No. 08A332

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER BRUNNER, OHIO SECRETARY OF STATE,

Applicant,

v.

OHIO REPUBLICAN PARTY AND LARRY WOLPERT,

Respondents.

OPPOSITION TO APPLICATION FOR STAY

To the Honorable John Paul Stevens, Circuit Justice for the Sixth Circuit:

Applicant's request for the "extraordinary" remedy of a stay from this Court, *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (Rehnquist, C.J., in chambers) (internal quotation omitted), is itself extraordinary because (1) the Sixth Circuit sat *en banc* on an emergency basis to deny such a stay below, *see Ohio Republican Party v. Brunner*, __ F.3d __, 2008 WL 4571959 (6th Cir. Oct. 14, 2008) (*ORP*), (2) applicant has not filed a petition for certiorari, and does not even pretend that the Sixth Circuit's *en banc* decision to deny a stay warrants this Court's review, and (3) there is no underlying merits decision here, only a temporary restraining order (TRO) that is by its very nature preliminary and discretionary. As the *en banc* Sixth Circuit took pains to point out, if applicant encounters legitimate difficulties in complying with her obligations under the TRO, she is free to return to the district court to seek modification of those obligations. *ORP*, 2008 WL 4571959, at *9. In a hierarchical judicial system, "we entrust the district court to deal fairly with future

implementation issues implicated by [its TRO]." *Id.* Rather than trying to resolve any problems in the district court, however, applicant now presents her grievances with the TRO to this Court, as if this Court were in the business of fine-tuning emergency TRO relief. This Court is not in that business, and should resist applicants' entreaties to become entangled in this dispute.

As a threshold matter, it is important to understand the nature of this dispute. Applicant—Ohio's elected Secretary of State—cannot and does not deny that the Help America Vote Act of 2002 (HAVA), 42 U.S.C. § 15301 *et seq.*, requires her to "match" the information in Ohio's computerized voter registration database with information in the database of Ohio's Bureau of Motor Vehicles "to verify the accuracy of the information provided on applications for voter registration." 42 U.S.C. § 15483. Rather, the Secretary takes the remarkable position that HAVA does not require her to *do anything* with the "mismatches" generated by such "matching," and in particular does not require her to share the "mismatch" information with county boards of elections in a manner that gives those boards a meaningful opportunity to investigate the mismatches (and hence weed out invalid voter registrations and prevent voter fraud) before counting votes.

If ever there were an unappealing argument presented to this Court by a party seeking emergency equitable relief, this is it. As the Sixth Circuit emphasized, no one is "arguing that a mismatch necessarily requires that a registered voter be removed from the rolls"; rather, "the identification of a mismatch allows a county board to investigate whether the mismatch has a legitimate

explanation." *ORP*, 2008 WL 4571959, at *5. Plaintiffs are thus seeking to vindicate the right to vote by preventing the votes of qualified voters from being diluted by the votes of unqualified or fraudulent voters. "'The right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the franchise.'" *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (*per curiam*) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). The Secretary's steadfast refusal to provide the HAVA "mismatch" data to the county boards of elections in a meaningful way that actually allows them to use that data—which is all that the TRO requires her to do—should be a cause for outrage, not a cause for extraordinary equitable relief.

ARGUMENT

It is telling that the Secretary's application for a stay does not even articulate the standards for obtaining such emergency relief from this Court. "The practice of the Justices has settled upon three conditions that must be met" before issuance of a stay. *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). "There must be [1] a reasonable probability that certiorari will be granted (or probable jurisdiction noted), [2] a significant possibility that the judgment below will be reversed, and [3] a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Id.* As explained below, none of these factors—much less all three of them—remotely justifies the extraordinary remedy of a stay in this case.

A. Reasonable Probability That Certiorari Will Be Granted

The Secretary apparently hopes to avoid the first factor in the stay analysis—"a reasonable probability that certiorari will be granted," *id.*—by simply declining to file a petition for certiorari. But surely it cannot be *easier* to obtain an emergency stay where, as here, a party does not file a petition for certiorari than where a party does file such a petition and seeks a stay pending disposition of the petition. If that were the case, then no one ever would file a petition before seeking emergency relief.

It is no accident that the Secretary has declined to file a petition, because she cannot credibly claim that the decision below warrants this Court's review. No court has yet decided the merits of this dispute. Rather, all that has happened is that the district court entered a TRO (which requires a balancing of several factors, including (1) the likelihood of success on the merits, (2) irreparable injury to the moving party, (3) injury to the nonmoving party, and (4) the public interest), *see Ohio Republican Party v. Brunner*, __ F. Supp. 2d __, 2008 WL 4560772, at *3 (S.D. Ohio Oct. 9, 2008), a divided panel of the Sixth Circuit granted the Secretary's motion to stay the TRO, and the *en banc* Sixth Circuit then denied the Secretary's motion to stay the TRO, *see ORP*, 2008 WL 4571959, at *6-9.

The issue presented here, in other words, is not the merits of plaintiffs' HAVA claim or even plaintiffs' right to bring such a claim under 42 U.S.C. § 1983. The lower courts will deal with those issues in due course. Rather, the issue presented here is whether there is any basis for this Court to review the *en banc* Sixth Circuit's conclusion that the district court did not abuse its discretion in

balancing all the relevant factors and entering a TRO. The Secretary's tacit admission that this issue does not warrant this Court's review should be a red flag highlighting the weakness of her request for emergency relief from this Court.

B. Significant Possibility That The Judgment Below Will Be Reversed

The Secretary fares no better under the second factor in the stay analysis, "a significant possibility that the judgment below will be reversed." *Barnes*, 501 U.S. at 1302. The Secretary contends, as she did below, that plaintiffs have no likelihood of success on the merits of their HAVA claims because they have no private right of action under § 1983 to enforce HAVA. *See* Stay App. 9-14. Tellingly, the Secretary does not argue, as she did below—presumably because that argument is so unappealing both legally and politically—that HAVA does not require her to provide county elections boards with meaningful access to the "mismatches" generated by HAVA matching. Although Congress provided that "[t]he specific choices on the *methods* of complying with the requirements of this subchapter shall be left to the discretion of the State," 42 U.S.C. § 15485 (emphasis added), that does not mean that *compliance* with the statute is left to the discretion of the State. Thus, a State need not implement any particular system to address HAVA mismatches, but it may not simply throw them in the trash. *See ORP*, 2008 WL 4571959, at *2. As the *en banc* Sixth Circuit noted, "[s]o far as the this record is concerned, the Secretary has given no tenable explanation why her current interpretation of [HAVA], as opposed to her office's prior implementation of the law [to give county boards of elections meaningful access to mismatches] remotely

furthers the anti-fraud objective of the law." *Id.* at *3; *see also id.* ("A mismatch that she does not allow the county boards of election meaningfully to track down is not a usable mismatch."); *id.* ("As far as we can tell, the problem with the current system is not that it is insufficiently user-friendly but that it is effectively useless."); *see also id.* at *12 (Kethledge, J., concurring).

On the § 1983 point, the *en banc* Sixth Circuit took pains to emphasize that the ultimate issue whether plaintiffs have a private right of action to enforce HAVA's "matching" provision is not presented here. *See ORP*, 2008 WL 4571959, at *7-8. That issue, the Sixth Circuit recognized, is "difficult," "close," and "deeply intricate." *Id.*; *see also id.* at *10 (Gibbons, J., concurring). The upshot of that point is that the district court did not remotely abuse its discretion in concluding, at the TRO stage, that plaintiffs had established a likelihood of success on the merits. The issue now presented to this Court, then, is not whether plaintiffs definitively may enforce HAVA rights under § 1983, but whether the § 1983 issue is so crystal clear that (contrary to the conclusion of the *en banc* Sixth Circuit) the district court abused its discretion in analyzing the likelihood-of-success-on-the-merits prong of the TRO analysis. The Secretary seems to recognize that heightened burden by arguing that "[t]he law is clear" on this score, Stay App. 9, and that the question "is not a close one," *id.* at 14, but of course even the Sixth Circuit panel that originally reviewed the TRO did not rely on the § 1983 point in staying the TRO. *See ORP*, 2008 WL 4581959, at *7 (making this point).

As a threshold matter, drawing the line between those federal statutes that may be enforced under § 1983 and those that may not has proven to be a difficult venture, and one that has repeatedly called for clarification by this Court. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Maine v. Thiboutot*, 448 U.S. 1 (1980). Certainly, it was reasonable for the district court and the *en banc* Sixth Circuit to conclude that the § 1983 issue in this case is not free from doubt.

The Secretary insists, however, that Congress unmistakably shut "the courthouse door" on private parties seeking to enforce HAVA under § 1983. Stay App. 2. Her zeal on this point is misplaced. The Sixth Circuit has previously recognized that HAVA rights may be enforced under § 1983, *see Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (*per curiam*), and the Secretary did not challenge that point below (just as she does not challenge that point here, *see* Stay App. 11 & n.1). Nonetheless, the Secretary notes that *Sandusky* involved a different HAVA provision than is at issue here, and argues that "the en banc court ignored the stark textual differences between HAVA section 303, at issue here, and HAVA section 302, at issue in *Sandusky County*." Stay App. 11. But that is a distinction without a difference.

HAVA recognizes that the constitutionally protected right to vote can be abridged in two ways: either by denying qualified voters access to ballots, or by granting unqualified or fraudulent voters access to ballots and thereby diluting the votes of qualified voters. As the Eleventh Circuit recently explained, HAVA thus strikes "a balance between promoting voter access to ballots on the one hand and preventing voter impersonation on the other." *Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also ORP*, 2008 WL 4571959, at *1, 5. Just as § 302 of HAVA protects an individual's federal right to vote by creating a mechanism for provisional ballots, § 303 protects an individual's federal right to vote by preventing vote dilution through fraud. As Senator Bond explained in discussing the Conference Report on HAVA, "[t]his legislation recognizes that illegal votes dilute the value of legally cast votes—a kind of disenfranchisement no less serious than not being able to cast a ballot." 148 Cong. Rec. S10488 (2002). "If your vote is canceled by the vote of a dog or a dead person, it is as if you did not have a right to vote." *Id*. To allow only the rights conferred by § 302, and not the rights conferred by § 303, to be enforceable under § 1983 would destroy the very "balance" that HAVA established.

The Secretary's argument that nowhere does § 303 of HAVA mention a privately enforceable right, *see* Stay App. 11-12, thus misses the point: nothing in § 1983 requires Congress to use "magic words" to create a federally enforceable right. To the contrary, as this Court has recognized, "'[t]he state's burden is to demonstrate that Congress shut the door to private enforcement either expressly,

through specific evidence from the statute itself, or impliedly through a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Gonzaga*, 536 U.S. at 285 n.4. Here, as the *en banc* Sixth Circuit recognized, the district court did not remotely abuse its discretion by concluding that the Secretary had failed to carry that burden.

C. Likelihood Of Irreparable Injury

Nor is there any merit to the Secretary's argument that she will face irreparable harm if the TRO is not stayed. *See* Stay App. 19-22; *see generally Bagley v. Byrd*, 534 U.S. 1301, 1302 (2001) (Stevens, J., in chambers) (denying request for stay where applicant failed to demonstrate irreparable injury). Here, as in the Sixth Circuit, the Secretary offers no more than a speculative "parade of horribles" to justify her challenge to the TRO. And here, as in the Sixth Circuit, the short answer to the Secretary's grievances is that the door to the district court remains open to the Secretary to seek to modify the TRO if she produces evidence that such modification is warranted.

If anything, however, the Secretary only continues to ramp up her hyperbole. Although as recently as yesterday the Secretary's spokesman was reassuring the media that "[t]hings already are in motion to comply" with the TRO, and "[t]he computer work actually began last week," Terry Kinney, *Ohio Elections Chief Says She'll Comply With Court*, Associated Press (10/15/08), the Secretary now tells this Court that emergency intervention is required to "restore order to Ohio's election, which was destabilized" by the TRO, Stay App. 1. The problem for the Secretary, as

the *en banc* Sixth Circuit noted, is that she has failed to introduce a shred of *evidence* to support her claims of gloom and doom.

Although the Secretary complains that the district court "denied the Secretary's request to call *witnesses*" at a full-blown evidentiary hearing, Stay App. 1 (emphasis added)—there was no time to hold a such hearing—it is important to note that the district court in no way limited the Secretary's ability to present as much *documentary evidence* as she wanted. And indeed the Secretary availed herself of this opportunity, filing a "Notice of Filing of Evidence" in support of her memorandum in opposition to the TRO attaching several affidavits and voluminous supporting materials. It is simply not true, then, that the Secretary "had no opportunity," Stay App. 19, to present evidence on the practical difficulties associated with providing the county boards of elections with meaningful access to the HAVA "mismatches" in a way that would allow them to verify voter registration information before counting votes.

To the extent the facts have changed, or further facts have been developed, the Secretary can present those facts to the district court in the first instance. As the Court of Appeals explained, if compliance with the TRO would be

> exceedingly difficult for the Secretary, or worse if [such compliance] would create a meaningful risk of harm to other parts of the [statewide voter registration] database at this stage in the year, she needs to explain why rather than allowing her attorneys to speculate why. The record on all of this is ear-splittingly silent—all the more conspicuously so given that it is the key risk of harm identified on the Secretary's side of the case and it is the one risk that must be balanced against the risk ... of allowing potentially fraudulent votes to be forever counted.

ORP, 2008 WL 4571959, at *6; *see also id.* at *5 (the Secretary's assertions regarding the difficulty of compliance with the TRO are "never explained, much less supported by affidavits from the Secretary or her office"); *id.* at *6 ("[The Secretary's] argument raises more questions than it answers because she again never explains why [the TRO could create other problems for the election], much less supports her position with affidavits from someone who would know."); *id.* at *9 ("[O]ne of the key obstacles to the Secretary's request for relief is the lack of any affidavit or other factual support for her arguments that altering the relevant computer programs will be difficult or will create material risks to other aspects of the election process."). Notwithstanding the Sixth Circuit's invitation, the Secretary has not returned to the district court to seek modification of the TRO. Rather, the Secretary spent the day yesterday not only filing her application for stay in this Court, but also participating in a panel discussion at the National Press Club in Washington, D.C. *See* Catherine Candisky, *200,000 Voting Registrations In Doubt*, Columbus Dispatch (10/16/08). If the Secretary were really "undertaking her best efforts to comply with the TRO," Stay App. 2, it is unclear why she would want or expect emergency relief from this Court. *See, e.g.*, *McGraw-Hill Cos. v. Procter & Gamble Co.*, 515 U.S. 1309, 1311 (1995) (Stevens, J., in chambers) (denying application for stay where applicant did not seek appropriate relief from the district court).

Nor has the Secretary provided any justification for her public-relations position that "[i]f the Sixth Circuit's decision is allowed to stand, an untold number

of legitimate voters in Ohio will be forced to reestablish the bona fides of their vote before the county boards of elections, or they will stay at home out of frustration and confusion." Stay App. 23. This is very similar to the argument, recently rejected in *Crawford v. Marion County Elec. Bd.*, 128 S. Ct. 1610, 1620-24 (2008), that any effort to verify the accuracy of voter registration, and hence prevent voter fraud and unlawful vote dilution, will have the effect of chilling and disenfranchising legitimate voters. Nothing in the district court's TRO remotely purports to require "an untold number of legitimate voters ... to reestablish the bona fides of their vote," Stay App. 23; rather, the TRO simply requires the Secretary to provide the HAVA "mismatches" to the county boards of elections in a format they can use to verify voter registration before counting ballots. And to the extent the Secretary believes the TRO is too broad or creates a burden on voters, she is free to ask the district court to modify it accordingly, which she has not done.

Finally, the Secretary cannot justify emergency relief from this Court by conjuring up the spectacle of "a flood of lawsuits across the Nation [alleging] vague claims concerning state officials' administrative actions." Stay App. 2; *see also id.* ("Those [hypothesized future] lawsuits will interfere with other state officials' efforts to administer smoothly the election."); *id.* at 4 ("[I]t is difficult to predict what additional lawsuits might follow."); *id.* at 22 (predicting "litigation by voters and voter groups claiming that they have been improperly disenfranchised on the eve of an election."). Such speculation provides no basis for staying the TRO, and there is nothing "vague" about plaintiffs' claims here. To the contrary, as the

district court explained, the Secretary "*admitted* that the county boards of elections had no way to search or identify the mismatches" generated by HAVA matching, 2008 WL 4560772, at *6 (emphasis added), and acknowledged that she could rectify the situation in a few days, *id.* at *5. The Secretary's vague assurance that she is "taking numerous steps to verify the accuracy of the voter registration lists, to confirm voters' eligibility, and to prevent various forms of fraud in the election," Stay App. 2, provides no explanation for her refusal to share the HAVA "mismatches" apparently within her possession with county boards of elections in a way that will allow them to use that information. An order forcing the Secretary to do her job in compliance with federal law does not impose "irreparable injury."

D. Other Equitable Considerations

Even assuming that the Secretary could satisfy all three of the foregoing conditions, moreover, those conditions "are not necessarily sufficient" to warrant a stay, and "[e]ven when they all exist, sound equitable discretion will deny the stay when 'a decided balance of convenience,' does not support it." *Barnes*, 501 U.S. at 1304-05 (quoting *Magnum Import Co. v. Coty*, 262 U.S. 159, 164 (1923)). "It is ultimately necessary, in other words, to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (internal quotation omitted).

Here, the injury to the Secretary (if any) from the denial of a stay is substantially outweighed by the injury to respondents and to the public interest more generally from the grant of such a stay. The TRO protects plaintiffs from irreparable injury: the dilution of their votes as a result of the Secretary's refusal to

make HAVA "mismatches" available to county boards of elections for investigation before ballots are counted. There can be no question that this injury is irreparable: once the county boards of elections start opening the envelopes containing absentee ballots as early as October 25, it will be impossible to verify the registration of any absentee voter before his or her ballot is counted.

On her side of the equation, the Secretary tries to peddle a laches argument, arguing that plaintiffs brought this lawsuit too late. *See* Stay App. 1, 15. As the *en banc* Sixth Circuit noted, however, the record simply does not bear her out on this score. *See ORP*, 2008 WL 4571959, at *6. The Secretary suggests that plaintiffs should have sued as early as 2004, when her predecessor began to set up the database required by HAVA, or at least when the database was first used in the 2006 general election. *See* Stay App. 15. What the Secretary conveniently fails to mention, however, is that the Ohio voter registration database operated in precisely the way plaintiffs argue it should operate until the Secretary herself changed her policy "[f]or reasons that the record does not reveal and at a time the record does not reveal." *ORP*, 2008 WL 4571959, at *2; *see also id.* at *6. As the *en banc* Sixth Circuit explained, the record shows that the database was originally designed to share mismatch data with the county boards, and had in fact operated in this fashion until the Secretary affirmatively changed that practice at some later date. *See id.* Moreover, as the court below pointed out, the record is silent as to "when the Secretary told the public that she had changed the office's prior policy on implementing § 15483(a)(5)(B)(i) [of HAVA], when she told the public why she made

these changes and whether she has made additional changes to the policy since." *Id.* at *6. The Secretary's assertion that "in June 2006, [her predecessor] programmed the database so that it did not provide notification to counties of certain mismatches," Stay App. 5, has no support whatsoever in the record.

Contrary to the Secretary's assertion, this Court's *Purcell* decision does not create a presumption against granting relief in lawsuits filed close to an election. As an initial matter, any such presumption would be entirely divorced from reality: much election-related litigation necessarily occurs shortly before, or even (as in the case of suits to keep polls open) on, election day. *See ORP*, 2008 WL 4571959, at *6. In any event, such a presumption would turn *Purcell* on its head. At issue in *Purcell* was the constitutionality of a state law that sought to *protect* the right to vote from dilution by requiring voters to show identification. *See* 549 U.S. at 6; *see generally Crawford*, 128 S. Ct. at 1617-20 (noting that states have a legitimate interest in checking voter identification to prevent voter fraud). The *Purcell* Court stressed the importance of avoiding, where possible, issuing court orders close to election polling day, but it did so in the course of vacating the stay of a district court order entered, without any explanation, by a two-judge motions panel of the Ninth Circuit on the eve of an election. *See* 127 S. Ct. at 7. That decision has no bearing whatsoever on this Court's review of the *en banc* Sixth Circuit's reasoned decision to *deny* a motion to stay a district court order.

Finally, the overriding public interest here, which truly should be dispositive, is ensuring the integrity of the process of electing the President of the United

States, and promoting public confidence in that process. *See*, *e.g.*, *Purcell*, 549 U.S. at 7 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."). For the Secretary to assert that the TRO here creates "a substantial risk of undermining confidence in the electoral process," Stay App. 4, is positively Orwellian. What undermines confidence in the electoral process is the Secretary's steadfast refusal to provide the county boards of elections with meaningful access to the HAVA "mismatches" to allow them to verify registrations before counting votes. That is why the *en banc* Sixth Circuit had little difficulty concluding that "the risks of harm to each party and above all the risks of harm to the public support the TRO." *ORP*, 2008 WL 4571959, at *5.

Accordingly, this Court should deny the application for a stay.

Respectfully submitted,

/s/ _____

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