Same-Day Registration and Absentee Voting

Project Vote v. Madison County Board of Elections
(James S. Gwin, N.D. Ohio 1:08-cv-2266)
and Ohio Republican Party v. Brunner
(George C. Smith, S.D. Ohio 2:08-cv-913)

At dispute in this litigation is whether Ohio citizens could both register to vote and vote absentee from September 30 to October 6, 2008.[1] For the 2008 general election, absentee voting in Ohio was to begin on September 30, which was 35 days before the election.[2] Voters must be registered at least 30 days before the election, but because that day fell on a Sunday voters had until October 6 to register.[3]

On Wednesday, September 24, three public interest organizations and two voters filed a federal challenge, in the Cleveland courthouse for the Northern District of Ohio, to a requirement of Ohio's Madison County that voters be registered for 30 days before they can receive an absentee ballot.[4] The plaintiffs sought a temporary restraining order.[5] The court assigned the case to Judge James S. Gwin, who set a hearing on the motion for Monday at 12:30 p.m.[6]

On Friday, the Ohio Republican Party and a voter filed an action, in the Columbus courthouse of the Southern District of Ohio, complaining that the secretary of state was permitting county boards of elections to issue absentee ballots to voters who had not yet been registered for 30 days.[7] The court assigned the case to Judge George C. Smith, who scheduled a hearing for Monday at 2:00 p.m.[8]

Among the papers that defendants filed over the weekend was a motion to dismiss or transfer the Northern District case because Madison County is in the

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1. Ohio Republican Party v. Brunner, 543 F.3d 357, 359 (6th Cir. 2008).

2. Ohio Rev. Code § 3509.01.

3. Ohio Rev. Code § 3503.06; Opinion at 4, Ohio Republican Party v. Brunner, No. 2:08-cv-913 (S.D. Ohio Sept. 26, 2008), D.E. 27, *available at* 2008 WL 4445193 [hereinafter Judge Smith's Temporary Restraining Order Opinion].

4. Complaint, Project Vote v. Madison Cnty. Bd. of Elections, No. 1:08-cv-2266 (N.D. Ohio Sept. 24, 2008), D.E. 1; *Ohio Republican Party*, 543 F.3d at 359–60; *see* Mark Niquette, *Lawsuit Backs "Same-Day" Voting*, Columbus Dispatch, Sept. 26, 2008, at 3B.

5. Temporary Restraining Order Motion, *Project Vote*, No. 1:08-cv-2266 (N.D. Ohio Sept. 26, 2008), D.E. 7.

6. Order, *id.* (Sept. 26, 2008), D.E. 8.

Tim Reagan interviewed Judge Gwin for this report by telephone on October 24, 2012.

7. Temporary Restraining Order Motion, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 26, 2008), D.E. 3; Complaint, *id.* (Sept. 26, 2008), D.E. 2; *Ohio Republican Party*, 543 F.3d at 360; Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 959 (S.D. Ohio 2008); *see* Mark Niquette, *GOP Sues in Federal Court Over Absentee Voting*, Columbus Dispatch, Sept. 27, 2008, at 3B; *see also* Richard L. Hasen, The Voting Wars 110 (2012) (reporting on the secretary's directive).

8. Docket Sheet, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 26, 2008).

Southern District[9] and a motion to transfer the Southern District case to the Northern District because it was related to the case that was filed there first.[10]

On Sunday, Judge Smith denied the motion to transfer the Southern District case to the Northern District, noting that the Northern District defendants were located in the Southern District and suggesting that the Northern District case was filed first to obtain a more favorable forum for the Northern District plaintiffs.[11]

Judge Smith also rescheduled Monday's hearing for 11:00 a.m.[12] The secretary of state, who was a defendant in both actions, asked Judge Gwin to move up the hearing in his case to 11:30 a.m., at which time she expected her attorney to arrive at the Cleveland courthouse.[13] Judge Gwin agreed to commence the hearing as soon as the parties arrived.[14]

On Monday, Judge Gwin determined that Madison County's violation of a directive by the secretary of state also violated both Ohio and federal law, and he issued a temporary restraining order.[15] His 22-page opinion was an effort to make a thorough record of his resolution of the motion while resolving the motion as quickly as possible.[16]

Also on Monday, Ohio's supreme court determined that Ohio law required a newly registered voter to be registered for 30 days before the date of the election, not for 30 days before receiving an absentee ballot:

> [W]e hold that respondent, the secretary of state, correctly instructed boards of elections that an otherwise qualified citizen must be registered to vote for 30 days as of the date of the election at which the citizen offers to vote in order to be a qualified elector entitled to apply for and vote an absentee ballot at the election, and that the citizen need not be registered for 30 days before applying for, receiving, or completing an absentee ballot for the election.[17]

Judge Smith's Monday ruling had the benefit of Ohio's supreme court's ruling, to which he deferred.[18] There was another issue not resolved by Ohio's su-

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9. Motion, *Project Vote*, No. 1:08-cv-2266 (N.D. Ohio Sept. 28, 2008), D.E. 11.

10. Motion, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 27, 2008), D.E. 7; *Ohio Republican Party*, 543 F.3d at 360.

11. Order, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Sept. 28, 2008), D.E. 12, *available at* 2008 WL 4445192; Transcript at 4–6, *id.* (Sept. 29, 2008, filed Sept. 30, 2008), D.E. 31; *Ohio Republican Party*, 543 F.3d at 360.

12. Docket Sheet, *supra* note 8.

13. Motion, *Project Vote*, No. 1:08-cv-2266 (N.D. Ohio Sept. 29, 2008), D.E. 22.

14. Order, *id.* (Sept. 29, 2008), D.E. 24.

15. Opinion, *id.* (Sept. 29, 2008), D.E. 25, *available at* 2008 WL 4445176; Temporary Restraining Order, *id.* (Sept. 29, 2008), D.E. 26; *Ohio Republican Party*, 543 F.3d at 360; *see* Transcript, *supra* note 11, at 4–6; *see also* Peter Krouse, *Courts Back Brunner on 30 Days to Cast Their Absentee Ballots*, Cleveland Plain Dealer, Sept. 30, 2008, at B1; Mark Niquette & Tim Doulin, *Three Courts Rule on Absentee Issue*, Columbus Dispatch, Sept. 30, 2008, at 1B.

16. Interview with Hon. James S. Gwin, Oct. 24, 2012.

17. Ohio *ex rel.* Colvin v. Brunner, 896 N.E.2d 979, 982 (Ohio 2008); *see Ohio Republican Party*, 543 F.3d at 360; *see also* Hasen, *supra* note 7, at 110; Krouse, *supra* note 15; Niquette & Doulin, *supra* note 15.

18. Judge Smith's Temporary Restraining Order Opinion, *supra* note 3, at 6; *Ohio Republican Party*, 543 F.3d at 360; *see* Transcript, *supra* note 11, at 56–57; *see also* Krouse, *supra* note 15; Niquette & Doulin, *supra* note 15.

preme court, and Judge Smith enjoined the secretary of state's directive that county boards of elections are not required to allow election observers during the 35 days of absentee voting.[19] On Tuesday, over a dissent, the court of appeals stayed Judge Smith's order because "federal courts lack jurisdiction to enjoin state officials on the basis of state law"[20] and it was unlikely that the plaintiffs would succeed in proving a federal claim.[21]

On October 9, Judge Smith granted a renewed motion for a temporary restraining order on an issue that had not yet been addressed; he ordered the secretary of state to comply with the Help America Vote Act (HAVA)[22] by matching new voter registrations with information in the Ohio Bureau of Motor Vehicles and Social Security Administration databases so that possible voter fraud could be investigated.[23]

On the next day, by the same two-to-one vote as before, a panel of the court of appeals stayed Judge Smith's order.[24] Four days later, the full court of appeals vacated the panel's stay.[25] Three days after that, the Supreme Court overturned the court of appeals and vacated Judge Smith's order, determining that the plaintiffs would be unlikely to prevail on whether they had a private right of action to pursue their HAVA claim.[26]

On November 4, the secretary of state moved to consolidate Judge Smith's case with a case on voter identification that had been pending before Judge Al-

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19. Judge Smith's Temporary Restraining Order Opinion, *supra* note 3, at 8; Temporary Restraining Order, Ohio Republican Party v. Brunner, No. 2:08-cv-913 (S.D. Ohio Sept. 29, 2008), D.E. 29; Transcript, *supra* note 11, at 60; *Ohio Republican Party*, 543 F.3d at 360; Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 959 (S.D. Ohio 2008); *see* Krouse, *supra* note 15; Niquette & Doulin, *supra* note 15.

20. *Ohio Republican Party*, 543 F.3d at 360–61 (citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 124–25 (1984)).

21. *Id.* at 361–62.

22. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 42 U.S.C. §§ 15301–15545 (2010). *See generally* Brian Kim, *Help America Vote Act*, 40 Harv. J. on Legis. 579 (2003).

23. *Ohio Republican Party*, 582 F. Supp. at 966; Temporary Restraining Order, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Oct. 10, 2008), D.E. 55; *see* Transcript, *id.* (Oct. 9, 2008, filed Oct. 10, 2008), D.E. 57; *see also* Hasen, *supra* note 7, at 113; Darrel Rowland & Mark Niquette, *Brunner Loses Lawsuit to GOP*, Columbus Dispatch, Oct. 10, 2008, at 1B. *See generally* Richard L. Hasen, *What to Expect When You're Electing*, Fed. Law., June 2012, at 39 (summarizing litigation over the HAVA issue).

24. Opinion, Ohio Republican Party v. Brunner, No. 08-4322 (6th Cir. Oct. 10, 2008); *see* Hasen, *supra* note 7, at 113; Mark Niquette, *Brunner Won't Need to Change Voter Lists*, Columbus Dispatch, Oct. 11, 2008, at 1A.

25. Ohio Republican Party v. Brunner, 544 F.3d 711, 712 (6th Cir. 2008); *see* Hasen, *supra* note 7, at 114; Mark Niquette, *Court Nullifies Brunner Ruling*, Columbus Dispatch, Oct. 17, 2008, at 1B.

26. Brunner v. Ohio Republican Party, 555 U.S. 5 (2008); *see* Hasen, *supra* note 7, at 116; Adam Liptak & Ian Urbina, *Justices Block Effort to Challenge Ohio Voters*, N.Y. Times, Oct. 18, 2008, at A10; Mark Niquette, *Voter Suit Goes to Ohio Justices*, Columbus Dispatch, Oct. 18, 2008, at 1A.

genon L. Marbley since October 24.[27] On November 6, Judge Marbley granted the motion.[28] On November 24, the Ohio Republican Party stipulated to a dismissal of its action.[29] Ohio's legislature passed legislation on December 17 that would have reduced early voting from 35 days to 20 days,[30] but the governor vetoed the legislation as too partisan for lame-duck election legislation.[31]

On December 24, Judge Gwin granted to the plaintiffs in his case a voluntary dismissal without prejudice.[32]

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27. Consolidation Motion, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Nov. 4, 2008), D.E. 66; *see* NEOCH v. Brunner, 652 F. Supp. 2d 871, 876 (S.D. Ohio 2009) (case no. 2:06-cv-896).

28. Consolidation Order, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Nov. 6, 2008), D.E. 73; *see* Ohio *ex rel.* Skaggs v. Brunner, 588 F. Supp. 2d 819, 821–22 (S.D. Ohio 2008).

29. Stipulation, *id.* (Nov. 24, 2008), D.E. 78.

30. *See* Aaron Marshall, *House GOP Acts to Shorten Early Voting Period*, Cleveland Plain Dealer, Dec. 17, 2008, at B3; Jim Siegel, *House Oks Elections Bill*, Columbus Dispatch, Dec. 17, 2008, at 1A.

31. *See* Jon Craig, *Strickland Vetoes Three Bills Passed Last Year by GOP*, Cincinnati Enquirer, Jan. 7, 2009, at B2.

32. Order, Project Vote v. Madison Cnty. Bd. of Elections, No. 1:08-cv-2266 (N.D. Ohio Dec. 24, 2008), D.E. 43.