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)

Absentee voting began in Ohio thirty-five days before the 2008 general election; state election law required voters to be registered at least thirty days before the election. Could new voters both register and vote on the same day if they did so after absentee voting began and before the deadline for new voter registrations? On a Wednesday, three public-interest organizations and two voters filed a federal complaint in the Northern District against a county in the Southern District that interpreted the law as requiring registration thirty days before voting instead of thirty days before the election. The district judge set the matter for hearing on Monday midday. On Friday, the Republican Party and a voter filed a federal action in the Southern District to force Ohio's secretary of state to require voters to be registered for thirty days before voting. Over the weekend, defendants in each case moved to transfer their case to the other district. Both judges denied these motions, and both judges moved up their Monday hearings. On Monday, the Northern District judge ruled that the statute required registration thirty days before the election, not thirty days before voting. That same day, Ohio's supreme court reached the same result. Later that day, the Southern District judge deferred to the state court on the issue. Other issues in the Southern District case received expedited review by another district judge, the court of appeals, and the Supreme Court.

Subject: Absentee and early voting. *Topics:* Absentee ballots; case assignment; Help America Vote Act (HAVA); registration procedures.

At dispute in this litigation was 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 thirty-five days before the election.[2] Voters had to be registered at least thirty 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

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

2. Ohio Rev. Code § 3509.01 (2008).

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

voters be registered for thirty 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 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 thirty 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 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

4. Complaint, Project Vote v. Madison Cty. 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) [hereinafter *Ohio Republican Party* Docket Sheet].

Judge Smith died on April 15, 2020. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

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, 2008 WL 4445192; Transcript at 4–6, *id.* (Sept. 29, 2008, filed Sept. 30, 2008), D.E. 31 [hereinafter Sept. 29, 2008, *Ohio Republican Party* Transcript]; *Ohio Republican Party*, 543 F.3d at 360.

12. *Ohio Republican Party* Docket Sheet, *supra* note 8.

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 twenty-two-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 thirty days before the date of the election, not for thirty 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 supreme 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 thirty-five days of absentee voting.[19] On Tuesday, over a dissent, the federal court of appeals stayed Judge Smith's order because "federal courts lack jurisdiction to enjoin state officials on the basis of state law"[20]

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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, 2008 WL 4445176; Temporary Restraining Order, *id.* (Sept. 29, 2008), D.E. 26; *Ohio Republican Party*, 543 F.3d at 360; *see* Sept. 29, 2008, *Ohio Republican Party* 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. *Ohio Republican Party* Temporary-Restraining-Order Opinion, *supra* note 3, at 6; *Ohio Republican Party*, 543 F.3d at 360; *see* Sept. 29, 2008, *Ohio Republican Party* Transcript, *supra* note 11, at 56–57; *see also* Krouse, *supra* note 15; Niquette & Doulin, *supra* note 15.

19. *Ohio Republican Party* 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; Sept. 29, 2008, *Ohio Republican Party* 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)).

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 Algenon L. Marbley since October 24.[27] On November 6, Judge Marbley granted the motion.[28] On November 24, the Ohio Republican Party stipulated dismissal of its action.[29] Ohio's legislature passed legislation on

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21. *Id.* at 361–62.

22. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, The Help America Vote Act (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

23. *Ohio Republican Party*, 582 F. Supp. 2d 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* Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 210 (2013). *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; *see* Tokaji, *supra* note 23, at 210.

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; *see* Tokaji, *supra* note 23, at 210; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 118, 152–54 (2010).

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; *see also* Tokaji, *supra* note 23, at 210–13.

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, *Ohio Republican Party*, No. 2:08-cv-913 (S.D. Ohio Nov. 24, 2008), D.E.

December 17 that would have reduced early voting from thirty-five days to twenty 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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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 Cty. Bd. of Elections, No. 1:08-cv-2266 (N.D. Ohio Dec. 24, 2008), D.E. 43.