UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DRAMETRA BROWN, for herself and on behalf of other similarly situated,

Plaintiff,

v.

TODD ROKITA, in his Official Capacity as Indiana Secretary of State; J. BRADLEY KING AND KRISTI ROBERTSON, each in their official capacities as co-directors of the Indiana Elections Division; MARION COUNTY BOARD OF VOTER REGISTRATION; MARION COUNTY BOARD OF ELECTIONS;

Defendant.

Cause No.

COMPLAINT—CLASS ACTION

1:08-cv-1484 RLY-TAB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR DECLARATORY RELIEF

INTRODUCTION

Plaintiffs bring this case to obtain immediate relief for an ongoing violation of voting rights protected by federal statutes and the United States Constitution. They respectfully seek an order that would prevent Defendants from disenfranchising Plaintiffs, qualified electors of the State of Indiana, for reasons that have nothing to do with Plaintiffs eligibility or with the administration of registration rolls. In short, Defendants have disenfranchised Plaintiffs and similarly situated Indiana citizens who submitted complete and accurate voter registration applications on an older registration form than that currently in used. For that reason, and for no other, Plaintiffs will be denied the right

to cure any purely administrative, formalistic pre-requisites to voting on or before Election Day, November 4, 2008.

As a result of Defendants' interpretation of Indiana and federal laws, Plaintiffs will be irreparably harmed in the form of a denial of their most fundamental right of voting, unless a temporary restraining order shall issue, requiring Defendants to allow Plaintiffs to fill out any new registration application required by Defendants, with the identical information provided in their original registration applications, and to grant Plaintiffs access to the ballot box, along with all other qualified and registered Indiana citizens. Unless enjoined, Defendants will engage in a triumph of form over substance, in the insertion of meaningless administrative hurdles between qualified citizens of the United States and Indiana citizens and the ballot box. Once the election of November 4, 2008 has passed, Plaintiffs, who are qualified Indiana voters, will have irretrievably lost their most fundamental constitutional right...the right to cast a ballot for the candidates of their choice.

FACTS

Plaintiff Brown is a four-year resident of Indiana and resides in Indianapolis. She has resided in her precinct since May 2008 and she is over 18 years of age. She does not meet any criteria related to any status that would cause her to be disenfranchised under Indiana Law. Plaintiff Brown is a certified nursing assistant. While working at a nursing facility for elderly and infirm residents, at which she was and is employed, Plaintiff Brown received a voter registration form from a staff member who was conducting a program to register residents and other staff members to vote in the November 4 general election. Plaintiff Brown, a first time voter, was delighted at the opportunity to register and looked forward to voting. She completed a registration form issued by the state of Indiana, which gave no indication that it was defunct or otherwise unacceptable.

Plaintiff Brown legibly printed all necessary information on the form, signed the affirmation and entered the date, September 30, 2008 -- about one week before the Indiana registration deadline. No required blanks were left empty, all blanks applicable to Plaintiff Brown were fully completed. The form was timely submitted to the office of the Marion County Board of Elections. The declaration of Drametra Brown is attached hereto and incorporated herein as Exhibit A.

Plaintiff Brown did not receive notice from the office of the Marion County Board of Elections that her application was deficient in any manner. On or about September 27, she was contacted by an election advocate who was attempting to assist eligible but "rejected" applicants to get on the registration rolls so they could exercise their right to vote in the November 4 election. She was informed that she was one of many applicants whose registration application was rejected because it had been submitted on an "old form." Plaintiff Brown took immediate action and went to the board of elections in person, but she was advised that she could not "cure" the deficiency of having used an "old form," she would not be permitted to vote on November 4. Although other deficiencies in voter registration applications can be cured after the close of registration, Plaintiff Brown was informed that her problem, the problem of using an old form, could not be corrected. Her right to vote would be denied in this important election.

ARGUMENT

When ruling on a motion for preliminary injunctive relief, four factors are to be considered: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 431 (6th Cir. 2004); *Blue Cross & Blue Shield*

Mut. of Ohio v. Columbia/HCA Healthcare Corp., 110 F.3d 318, 322 (6th Cir. 1997). These factors are not meant to be "rigid and unbending requirements," but should instead be "balanced." *McPherson v. Michigan High School Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997)(en banc). In this case, as explained below, all the requirements counsel in favor of issuing a temporary restraining order.

I. PLAINTIFFS ARE HIGHLY LIKELY TO PREVAIL ON THE MERITS, BECAUSE DEFENDANTS' INTERPRETATION AND APPLICATION OF INDIANA LAW WILL IMPEDE VOTING RIGHTS PROTECTED BY FEDERAL STATUTES AND THE U.S. CONSTITUTION.

A. The National Voter Registration Act of 1993 at Section 9 Preempts Indiana Law

Under the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme law of the land." State laws must therefore be interpreted in such a way as to conform with federal laws, or they must give way. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("state law is naturally preempted to the extent of any conflict with a federal statute"). A state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This principle holds special importance when it comes to the conduct of congressional elections. The Elections Clause of the U.S. Constitution (Article I, Section IV), gives Congress broad power to "make or alter" the rules by which elections for U.S. Senators and Representatives or conducted. This provision specifically "grants Congress the authority to force states to alter their regulations regarding federal elections." *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 n. 2 (6th Cir. 1997) (power includes

the "manner" of such elections, including registration); *see also Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1414-15 (9th Cir. 1995).

At 42 U.S.C. § 1973gg-7(b)(1), the NVRA provides that "a state's mail-in application (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."

Defendants, in interpreting and enforcing Indiana's voter registration card statute, I.C. § 3-5-4-8(a) in such a manner as to deny qualified applicants the right to vote if they inadvertently and unknowingly use an "old" registration form, violate NVRA at 42 U.S.C. § 1973gg-7(b)(1). The information called for on the form utilized by Plaintiff Brown and others, attached as Exhibit B, is identical to the information called for in the current registration voter registration application used by election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process. The current application is attached as Exhibit C. Such a an interpretation elevates formalism over the clear and unambiguous substantive requirements of the NVRA.

More than 200 voter registration applications were rejected in Marion County, Indiana for having been submitted on old forms. Officials of the Marion County Board of Elections have indicated that the practice of rejected old voter registration forms is conducted statewide. A copy of the affidavit of Mark Levine, who investigated the rejected applications as part of a program to

assist registrants to correct their applications is attached as Exhibit D. An Excel sheet with the list of 200 registration applications that were rejected in Marion County is attached as Exhibit E.

B. Indiana Applies its Election Code in Contravention of the Materiality Provision of the Voting Rights Act

The Materiality Provision of the VRA prohibits any person "acting under color of law" from "deny[ing] the right of any individual to vote in any election because of an error or omission on any . . . application . . . if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election ." 42 U .S .C . § 1971(a)(2)(B) .

Defendants, acting under color of state law, have violated and continue to violate the Materiality Provision of the Voting Rights Act. To the extent that Defendants interpret and apply the Indiana Election Code to deny otherwise qualified citizens the fundamental right to vote simply because he or she used an "old" state registration form, Defendants are acting in violation of the Materiality Provision of the VRA and such actions are subject to a temporary injunction to prevent the irreparable harm that would inure to Plaintiffs should they be denied the fundamental right to vote in the upcoming general, federal election. To cut off the right to cure such an immaterial defect of Plaintiffs' registration forms on the date that registration closes also contravenes the Materiality Provision of the VRA. Plaintiff Brown and other affected voters have submitted forms that specifically and expressly contains each and every piece of information required to determine that voter's qualifications and administer the election. Defendants therefore are acting in contravention of the VRA and their actions must be enjoined.

C. The Help America Vote Act Does not Supersede the Materiality Provisions of the VRA or Section 9 of the NVRA.

From reports of election officials, it is argued that the old forms of the Indiana voter registration form do not have questions mandated by HAVA regarding the applicant's age and United States citizenship, and check boxes in which the applicant can indicate whether the applicant meets those criteria. The relevant provision is found at Section 303(b)(4)(A) and (B). Section 303(b)(4)(A) of HAVA states that the mail voter registration form developed under NVRA shall include a question asking whether the applicant is a United States Citizen, a question asking whether the applicant is at least 18 years of age, and boxes to indicate the answer. Section 303(b)(4)(B) of HAVA provides that "*if said information is omitted,* election officials shall *notify the applicant and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office. (emphasis added.)*"

This is a case of first impression in this district. In *Diaz v. Cobb,* 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006), the Florida district court ruled that under HAVA, the checkboxes and responses to the checkboxes were material. The court reasoned that because HAVA was the more recent statute and explicitly required check boxes, the HAVA provision superseded the Materiality provision of the VRA at Section 1971.

It should be noted, however, that the district court's decision has no precedential authority and, therefore, is not binding on this court. See, e.g., Howard v. Wal-Mart Stores, Inc., 160 F.3d 358, 359 (7th Cir.1998) ("a district court's decision does not have precedential authority"); Malabarba v. Chicago Tribune Co., 149 F.3d 690, 697 (7th Cir.1998) ("district court opinions are of little or no authoritative value"); Old Republic Ins. Co. v. Chuhak & Tecson, P.C., 84 F.3d 998,

1003 (7th Cir.1996) ("decisions by district judges do not have the force of precedent"); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority.)

Although the court is not bound by the decision of the court in *Diaz,* it is nevertheless important to point out that the voter registration form in *Diaz* was markedly different than the voter registration form used by Plaintiff Brown in the case at bar and the case is factually distinguishable. In that case there were checkboxes related to citizenship and other qualifications on the top of the registration form. Those checkboxes had not been checked. In this case, there were no checkboxes. The information was obtained by way of bullet points in the oath or affirmation box. Plaintiff Brown did not fail to complete this form in any respect, and her attestation as to citizenship and age was very clear. Instead of two separate boxes the questions are asked in the form of two bullet points, the first two bullet points, to which the applicant must attest in order to become registered in Indiana. Thus, instead of two boxes and two checkmarks, there is one box, bullet points for the critical questions, and an affirmation, under a plain-spoken penalty of perjury, that the affiant meets those qualifications.

Where the two federal Acts, the Materiality provision of the VRA and Section 303(b)(4)(A) and (B) of HAVA can be interpreted so as to be reconciled, it is a well-settled rule of statutory construction that they should be so reconciled. ("A) new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled." *Regional Rail Reorganization Act Cases , 419 U .S . 102, 134 (1974).* HAVA does not provide that a voter, otherwise qualified, shall be disenfranchised if he or she does not provide the required information in exactly the precise format prescribed by Section 303(b)(4) by the registration deadline. To interpret HAVA in that

manner needlessly places it in direct opposition to the Materiality Provision of the VRA. The provisions of HAVA may not be arbitrarily interpreted so as to interpose formalisitic, meaningless and duplicative administrative steps between a qualified American voter and the ballot box.

Section 303(b)(4)(B) of HAVA, 42 U.S.C. § 15483(*b*)(*4*)(B), provides that if the applicant "fails to answer the question" regarding United States citizenship, election officials shall notify the applicant and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office. This section does not say "fails to check the box," it says "fails to answer the question." HAVA provides that the election authority must provide the *missing information on citizenship* in a timely manner to allow for the completion of the form prior to the next election and only if the information is omitted.

To the extent that Defendants interpret the Indiana Election Code to require the information on age and citizenship to be in separate check boxes instead of or in addition to the single box and bullet point format provided in the voter registration form attached hereto as Exhibit A, Defendants are acting in a manner that violates the Materiality provision of the VRA and denies Plaintiffs the fundamental right to vote for "errors or omission" that are not even tangentially related to their qualifications.

Furthermore, by denying Plaintiffs the opportunity to cure or correct any alleged or perceived deficiency "old" registration form after the registration deadline (when the completed older application was timely submitted prior to the deadline) Plaintiffs are acting in violation of the Materiality Provision of the Voting Rights Act.

II. PLAINTIFFS WILL BE IRREPARABLY INJURED UNLESS INJUNCTIVE RELIEF ISSUES ON OR BEFORE NOVEMBER 4, AND THE BALANCE OF HARDSHIPS TIPS DECISIVELY IN THEIR FAVOR

Plaintiffs' will suffer irreparable injury if injunctive relief is denied, in the form of harm to their federal voting rights. The Supreme Court has long held that voting is among the most fundamental rights granted to United States citizens. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. All other rights are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964). It is therefore elementary that the loss of the right to vote constitutes irreparable injury. *See Boustani v. Blackwell*, 460 F. Supp. 2d 822, 827 (N.D. Ohio 2006) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and granting injunction against enforcement of statute unduly burdensome to the right to vote); *Summit Co. Democratic Ctr. & Exec. Comm. v. Blackwell*, 2004 WL 5550698, at (N.D. Ohio Oct. 31, 2004) (enforcement of statutory provisions burdensome to right to vote would constitute irreparable harm). As such, the interference with the right to vote constitutes irreparable harm. *United States v. Berks County, Pennsylvania,* 277 F. Supp. 2d 570, 582 (E.D. Pa. 2003); *Coleman v. Board of Education of the City of Mount Vernon*, 990 F. Supp. 221, 226 (S.D.N.Y. 1997) ("The deprivation or dilution of voting rights constitutes irreparable harm."); *Puerto Rican Legal Defense and Education Fund v. City of New York*, 769 F. Supp. 74, 79 (E.D.N.Y. 1991) ("it is well-settled that the claimed deprivation of a constitutional right such as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm."); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984). The denial of the

fundamental right to vote cannot be compensated by an action at law for money damages. Further, any remedy that requires delay until the likely conclusion of this litigation will be inadequate.

In this case, the harm to Plaintiffs and others who unknowingly submitted and "old" form that called for the same substance, would be that they would irretrievable lose their fundamental right to a voice at the ballot box in the critical election of an American President. Additionally, "old form" registrants would be denied their fundamental right to vote despite having completed Indiana voter registration forms and turned them in to the proper election authorities before the registration deadline. The only difference between this set of voters, and the voters who may cure incomplete applications, as is done in Indiana, is that this particular set of registrants had the misfortune of inadvertently using an old form.

III. RISK OF HARM TO DEFENDANTS

There is, by contrast, no risk of harm to Defendants if the requested TRO is granted. There is no evidence that Plaintiff Brown and other similarly situated Indiana citizens are not qualified to vote or that they are ineligible on any basis other than the particular voter registration application that fell into their hands. They just were handed an old registration form, and filled it out per instructions. Thus, there is no risk of fraud on the part of Plaintiffs. Defendant shall suffer no harm, and will experience only the inconvenience of advising county boards of election to print out lists of voters to be kept at the polling place in order that any voters on that list may simply vote, and not be denied their franchise because of an distinction without a difference between the registration form they used when compared with the current form. By contrast, absent the relief requested, Plaintiffs would be denied the right to vote for reasons that have absolutely nothing to do with their

qualifications as Indiana voters, with the timely submission of a properly completed voter registration form, or with failing to provide each and every piece of information required to determine their eligibility.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the following relief:

(1) A temporary restraining order requiring Defendants to provide a print-out of the names of every otherwise eligible voter registration applicant whose application was rejected solely for having been submitted on an old form.

(2) A temporary restraining order requiring Defendants to distribute to each polling place a list of otherwise eligible voter registration applicants from that polling place who submitted old forms and instructions that said applicants may vote a regular ballot upon showing such voter identification as is required pursuant to Indiana law and upon stating under oath before a pollworker that they are United States citizens, at least 18 years of age.

(3) A temporary restraining order requiring Defendants to count provisional votes of those voters who, although otherwise eligible and qualified, were not registered voters due to the fact that they submitted their applications on an old form of the Indiana voter registration form.

(4) For such other relief as the court may deem appropriate in the circumstances.

Respectfully submitted,

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