

No. 04-4293

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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THE LEAGUE OF WOMAN VOTERS OF OHIO, ET. AL.,

*Plaintiffs-Appellees,*

v.

J. KENNETH BLACKWELL.

*Defendant-Appellant*

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On Appeal from the United States District Court for the  
Northern District of Ohio, Western Division  
Honorable James G. Carr

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**BRIEF OF PLAINTIFFS-APPELLANTS LEAGUE OF WOMAN VOTERS OF OHIO**

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October 26, 2004

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## I. INTRODUCTION

On October 5, 2004, the League of Women Voters of Ohio, the Ohio AFL-CIO, the Association of Community Organizations for Reform Now, People for the American Way Foundation, Ohio Counsel 8, American Federation of State, County, and Municipal Employees, OAPSE/AFSCME, the Coalition of Homelessness and Housing in Ohio, and Project Vote (the “League Plaintiffs”) filed their complaint and Motion for Preliminary Injunction against J. Kenneth Blackwell, in his capacity as Secretary of State of Ohio (“Blackwell”). The League Plaintiffs sought, *inter alia*, an injunction prohibiting Blackwell from enforcing Directives 2004-07 and 2004-33, which the League Plaintiffs contend violate the provisional ballot provisions of the Help America Vote Act of 2002, 42 U.S.C. § 15301, *et seq.* (“HAVA”). Prior to ruling on the League Plaintiffs’ motion, the district court issued an injunction in favor of the plaintiffs in the *Sandusky County Democratic Party v. Blackwell*, Case No. 3:04CV7582, 2004 WL 2308862 (N.D. Ohio Oct. 14, 2004); the *Sandusky* plaintiffs sought similar relief to that sought by the League Plaintiffs in their motion.

After issuing its order in *Sandusky*, the district court denied the League Plaintiffs’ motion for preliminary injunction, citing the pendency of proceedings in this Court in *Sandusky*. That left the League Plaintiffs with no means of enforcing the injunctive relief to which the district court clearly believed the League Plaintiffs otherwise would be entitled. This Court’s October 23, 2004 Order suggests that, except as to provisional ballots cast outside of a voter’s assigned precinct, this Court would agree that the League Plaintiffs are entitled to the relief to which the *Sandusky* plaintiffs are entitled.

In addition, HAVA requires election officials to count provisional ballots cast by those who are eligible under state law to vote. In its October 23, 2004 Order, this Court

does not address whether Ohio law that defines the eligibility of voters makes that eligibility turn on the precinct voting requirement advocated by Blackwell. If this Court believes there is any ambiguity in the applicable Ohio constitutional and statutory provisions, the Court should decline to resolve that ambiguity with respect to the interim injunctive relief at this time. Instead, this Court should either remand to the district court for a fuller briefing on the voter eligibility rules, or allow the Ohio courts to resolve such ambiguity in Ohio state law.

Accordingly, the League Plaintiffs request that this Court reverse the district court's denial of the League Plaintiffs' motion for preliminary injunction, and order that the district court grant a preliminary injunction in this case which comports with the preliminary injunctive relief this Court affirmed in *Sandusky*.

## **II. STATEMENT OF ISSUE PRESENTED**

(1) Whether the District Court erred in denying the League Plaintiffs' motion for preliminary injunction while granting the Sandusky Plaintiffs' motion for preliminary injunction, leaving the League Plaintiffs with no means of enforcing the relief to which the District Court and this Court of Appeal have held that the similarly situated Sandusky Plaintiffs are entitled?

(2) Whether this Court should defer to Ohio state courts to determine whether an individual is rendered ineligible to vote if he or she casts a provisional ballot outside of his or her assigned precinct, but in the county of his or her residence?

## **III. THE DISTRICT COURT'S DECISION TO DENY INJUNCTIVE RELIEF FOR THE LEAGUE PLAINTIFFS WAS CLEARLY ERRONEOUS**

The League Plaintiffs appeal from the district court's refusal to issue an injunction that applies to their claims, to the extent that the League Plaintiffs seek interim injunctive

relief to which this Court's October 23, 2004 Order holds that the *Sandusky* plaintiffs are entitled. For all of the reasons stated in the district court's Order in *Sandusky*, the League Plaintiffs are also entitled to injunctive relief. Specifically, the League Plaintiffs: (1) will suffer irreparable injury; (2) have established a likelihood of success on the merits as to whatever portions of the district court's order survives this Court's decision; and (3) no significant injury to others will result from a preliminary injunction in favor of the League Plaintiffs. Absent an Order from this Court reversing the district court's order that denied the League Plaintiffs' motion for preliminary injunction, the League Plaintiffs will have no ability to enforce their rights under the district court's order and this Court's October 23, 2004 Order. As non-partisan, member-based and voting rights groups, the League Plaintiffs clearly have a separate interest in enforcing the rights which this Court has concluded warrant a preliminary injunction in *Sandusky*, and should not be forced to rely solely upon the *Sandusky* plaintiffs. On the merits, as a result this Court's October 23, 2004 Order, there is no question that the League Plaintiffs have established standing, a right of action under 42 U.S.C. § 1983, that they will prevail on at least a portion of their claims that Directive 2004-33 violates HAVA. Accordingly, there was no basis for the district court to deny the injunction requested by the League plaintiffs.

**IV. IN REVERSING A PORTION OF THE INJUNCTION ENTERED IN SANDUSKY, THIS COURT SHOULD DEFER TO OHIO COURTS TO RESOLVE ANY AMBIGUITY WHICH THIS COURT FINDS IN OHIO LAW REGARDING VOTER ELIGIBILITY**

**A. HAVA's Provisional Ballot Requirements**

Section 302(a) of HAVA provides that an individual "must be permitted to cast a provisional ballot" if the voter declares that he or she is (i) "a registered voter in the jurisdiction in which the individual desires to vote" and (ii) "eligible to vote in an

election for Federal office.” 42 U.S.C. § 15482(a). Once a voter casts a provisional ballot, HAVA requires election officials to “transmit” the ballot or the voter information contained in the accompanying written affirmation “to an appropriate State or local election official for prompt verification.” *Id.* § 15482(a)(3). If the election official determines that “the individual is eligible under State law to vote,” HAVA provides that the individual’s provisional ballot “shall be counted as a vote in that election in accordance with state law.” *Id.* § 15482(a)(4).

**B. In Ohio, A Voter Is Registered “In The Jurisdiction” If The Voter Is Registered in The Relevant County.**

In *Sandusky*, this Court affirmed the district court’s injunction that individuals who appear in the incorrect precinct must be permitted to cast a provisional ballot. In doing so, this Court necessarily agreed with the League Plaintiffs that the relevant “*jurisdiction* in which the individual desires to vote” for purposes of Section 302(a) of HAVA is not the precinct or particular polling place, but the relevant county. But because at earlier stages Blackwell has questioned that interpretation, we explain briefly why that is correct.

Although HAVA does not define “jurisdiction,” Congress directed that HAVA be construed in harmony with the National Voter Registration Act of 1993 (“NVRA”), which does define the term. *See* 42 U.S.C. § 15545(a)(4); 148 Cong. Rec. S2532 (daily ed. Apr. 11, 2002) (statement of Sen. Dodd) (“It is our intent that the word ‘jurisdiction,’ for the purposes of determining whether the provisional ballot is to be counted, has the same meaning as the term ‘registrar’s jurisdiction’ in section 8(j) of the National Voter Registration Act.”). NVRA uses the term “registrar’s jurisdiction” to refer to the geographic scope of the unit of government that maintains the voter-registration rolls.

*See* 42 U.S.C. § 1973gg-6(j). Under this definition, in Ohio, where voter registration is maintained by each county, *see* Ohio. Rev. Code Ann. § 3501.11 (describing duties of county boards of elections in establishing and maintaining voter registration lists), and where elector eligibility is determined on the basis of residence in the state, *see infra*, “jurisdiction” necessarily refers to a geographic unit at least on the level of a county.

This plain reading of “jurisdiction” is confirmed by the way Congress used the term in other provisions of HAVA. Section 255 of HAVA, for example, provides that in developing a plan for complying with HAVA, a state must create a “committee of appropriate individuals, including the chief election officials of the two most populous jurisdictions within the State.” 42 U.S.C. § 15405. Plainly, Congress used the term “jurisdictions” to refer to local units of governments, such as counties, not precincts. Similarly, Section 401 of HAVA authorizes the Attorney General to bring a suit against “any State or jurisdiction.” 42 U.S.C. § 15551; *see also id.* § 15404(c) (authorizing “a State or other jurisdiction” to be criminally prosecuted based on the content of a state plan). Congress did not intend the Attorney General to sue a precinct (which generally is not a separate juridical entity, and certainly is not in Ohio), but to sue local units of government, such as counties, cities, villages, and townships, that refused to comply with HAVA. *Cf.* Complaint in *United States v. San Benito County*, Civ. Action No. 04-02056 (N.D. Cal.), available at [http://www.usdoj.gov/crt/voting/hava/SanBenito\\_Comp.pdf](http://www.usdoj.gov/crt/voting/hava/SanBenito_Comp.pdf) (suit by United States brought against county alleging violations of HAVA).

**B. HAVA Requires Election Officials to Count Provisional Ballots Cast by Those Eligible Under Ohio Law to Vote**

As noted above, once a voter casts a provisional ballot, Section 302(a) of HAVA requires election officials to “transmit” the ballot or the voter information contained in

the accompanying written affirmation “to an appropriate State or local election official for prompt verification.” 42 U.S.C. § 15482(a)(3). If the election official determines that “the individual is eligible under State law to vote,” HAVA provides that the provisional ballot “shall be counted as a vote in that election in accordance with state law.” *Id.* § 15482(a)(4). While HAVA incorporates state laws governing who is “eligible . . . to vote” and leaves it to the states to determine the methods of counting, HAVA does not afford states any discretion to refuse to count provisional ballots cast by registered voters who *are* eligible under state law to vote. As the district court in *Sandusky* correctly explained, the language of HAVA “preserves the state’s [] ability to determine how ballots are counted, while federal law, under HAVA, prescribes whether they are to be counted, after the voter has been found to the ‘eligible under State law’ to vote in the first instance.” *Sandusky*, 2004 WL 2308862, at \*16.

The case boils down, then, to a question of Ohio law regarding whether casting a ballot in the correct precinct is necessary to make an individual “eligible . . . to vote.”

Blackwell argues that the individual achieves eligibility only *after* arriving at his or her assigned polling place to cast a vote. But this argument disregards the Ohio Constitution’s guidance on who is eligible. The only conditions of voter eligibility under Ohio law are those authorized by Article V, Section 1 of the Ohio Constitution, which provides: “Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote in all elections.” That constitutional provision delegates to the Ohio legislature the authority to provide for durational residency requirements in “the state,

county, township, or ward,” but not in the precinct.

Under the authority of Article V, the Ohio legislature provided that a person must be a resident of *the state* for thirty days immediately preceding the election to be a qualified elector. Ohio Rev. Code Ann. § 3503.01. Ohio law has no durational residency requirement in a county, township, or ward for an individual to be eligible to vote. Thus, under Ohio law, an individual is eligible to vote in all statewide contests if he or she is a citizen of the United States, eighteen or more years old, a resident of the state for the thirty days prior to the election, and registered to vote anywhere in the state for the thirty days prior to the election.

These eligibility rules should not be confused with non-eligibility rules defining where and when a voter is supposed to appear to cast his or her ballot. Ohio has a body of Elections Code provisions, regulatory and administrative directives, including criminal penalty statutes, which together function to channel voters to their assigned precincts. The League Plaintiffs do not challenge any part of that scheme *except* Directive 2004-33, to the extent this directive conflicts with HAVA’s requirements: (1) that voters be allowed to cast provisional ballots upon affirmation that they are registered in the jurisdiction and eligible to vote in that election; and (2) that those provisional ballots be counted if the voter is later determined eligible under Ohio law. The League Plaintiffs submit that neither Ohio law nor HAVA allows Blackwell to abridge an eligible, registered voter’s clearly delineated rights under HAVA by refusing to issue a provisional ballot to eligible voters who is eligible to vote, or to count that provisional ballot.

Blackwell nonetheless argues that other provisions of Ohio’s statutes define voter eligibility in terms of the precinct. The League Plaintiffs maintain that the provisions

cited by Blackwell should not be understood as voter eligibility requirements, since the Ohio Constitution authorizes the legislature only to set durational residency requirements for voting eligibility, and Ohio has not established durational residency requirements in the precinct. (Indeed, it could not do so consistent with the NVRA). But if this Court finds that Ohio law is ambiguous with respect to voter eligibility, the League plaintiffs respectfully submit that this Court should allow the state courts of Ohio to resolve that ambiguity.

**C. If This Court Finds Any Ambiguity in the Voter Eligibility Requirements in Ohio Election Laws on the Record in This Case, the Court Should Either Remand to the District Court or Allow the Ohio Courts to Resolve That Ambiguity**

This Court's October 23, 2004 Order in *Sandusky* makes it clear that the Court has concluded that the interim injunctive relief sought in *Sandusky* and by the League Plaintiffs is not warranted by the record in the *Sandusky* case with respect to ballots cast in the wrong precincts. As set forth above, the League Plaintiffs believe that under Ohio law, voter eligibility does not turn on the precinct in which a voter casts his ballot. If this Court believes there is any ambiguity in the Ohio election laws that are applicable to the issues raised in *Sandusky*, it is appropriate that this Court decline to resolve those ambiguities on this record at this time. Instead, this Court should remand to the district court for a fuller briefing of the underlying state eligibility requirements that HAVA incorporates. Alternatively, since the Ohio courts have not had the opportunity to decide whether Ohio's precinct requirements are voter eligibility rules, this Court should defer to the Ohio courts to interpret Ohio law. *Cf. Israfil v. Russell*, 276 F.3d 768, 771-772 (6th Cir. 2001) (Because state courts are the final authority on state law, under principles of comity, federal courts must accept a state court's interpretation of its law.)

## V. CONCLUSION

For the reasons set forth above, the League Plaintiffs respectfully request that this Court (1) reverse the district court's denial of injunctive relief to the League Plaintiffs; and (2) decline to resolve any ambiguities in Ohio law regarding voter eligibility.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a).**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,523 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated October 26, 2004

**CERTIFICATE OF SERVICE**

I, Monica Youn, declare:

I am a citizen of the United States and employed in New York, New York. I am over the age of eighteen years and not a party to the within-entitled action. My business address 500 Fifth Avenue, New York, New York, 10010.

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NAACP Plaintiffs' Opposition Brief, by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 10:00 a.m.

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Executed on October 26, 2004, at New York, New York.

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Signature