

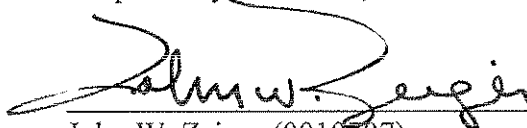
IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. :
DANA SKAGGS, et al., :
 :
Relators, :
 :
vs. : Case No. 08-2206
 :
JENNIFER L. BRUNNER : ORIGINAL ACTION IN
SECRETARY OF THE STATE OF : MANDAMUS
OHIO, et al., :
 :
Respondents. :

RELATORS' APPENDIX OF EVIDENCE

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| Affidavit of Timothy Ward | 2 |
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Respectfully submitted,



John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900

Counsel for Relators
Dana Skaggs and Kyle Fannin

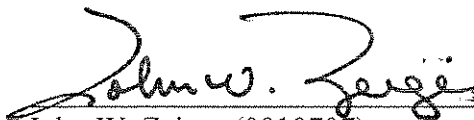
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served this 1st day of December, 2008, via hand delivery and email, upon the following:

Richard A. Coglianese
Damien W. Sikora
Pearl M. Chin
Assistant Attorneys General State of Ohio
State Office Tower
30 E. Broad Street, 16th Floor
Columbus, OH 43215-3428
Counsel for Respondent Brunner

Patrick J. Piccininni
Anthony E. Palmer
Assistant Prosecuting Attorneys
373 South High Street, 13th Floor
Columbus, OH 43215
Counsel for Respondent Franklin County Board of Elections

Donald J. McTigue
Mark A. McGinnis
McTigue Law Group
550 East Walnut Street
Columbus, OH 43215
Counsel for Proposed Intervenor
Ohio Democratic Party



John W. Zeiger (0010707)

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| Respondents. | : | |

**CONSOLIDATED AFFIDAVIT
OF MATTHEW M. DAMSCHRODER**

John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900
zeiger@litohio.com

COUNSEL FOR RELATORS
DANA SKAGGS AND KYLE FANNIN

EXHIBIT

1

in the election for the 15th Congressional District seat; Democrat Nancy Garland leads Republican Jim McGregor by 783 votes in the 20th House District race; and, Democrat Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19th House District (the “Undecided Races”). The outcome of each of these three elections may be determined by the provisional ballots the Board of Elections is now reviewing for eligibility but which have not yet been counted.

3. Over 27,000 provisional ballots were cast in Franklin County in the Election. A voter may cast a provisional ballot if the voter’s name does not appear in the poll list; the voter fails to provide required identification at the polling place on the day of the Election; the voter previously requested an absentee ballot; and for other reasons specified in R.C. 3505.181.

4. If a voter seeks to cast a provisional ballot, the voter is provided a Provisional Ballot Application prepared by the Board of Elections and a ballot. A true and accurate original of the Provisional Ballot Application used by the Board of Elections in the Election is attached as Exhibit A. The Provisional Ballot Application specifically requires that the voter provide her name, signature, and verifying identification information or, alternatively, requires her to sign the identification verification affirmation required by R.C. 3505.18(A)(4). The Provisional Ballot Application is printed on an envelope into which the voter inserts her provisional ballot, which is then sealed by the voter.

5. The Board of Elections, upon receipt of the Provisional Ballot Application, is mandated to use the information required of the voter on the Application to determine the eligibility of the voter to cast a provisional ballot. The voter-provided

information is cross-checked against the information of the Board of Elections, and of other county Boards of Elections, to determine the eligibility of the provisional ballot voter.

6. Upon completion of the review of a Provisional Ballot Application, if the provisional ballot voter is determined by the Board of Elections to be eligible to vote, the envelope on which the Provisional Ballot Application is printed is opened and the ballot is removed. To assure the secrecy of the provisional voter's ballot choices, the Provisional Ballot Application envelope is then separated from the ballot it contains and the ballot is then commingled with all other provisional ballots cast in the Election. As a consequence, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of any particular provisional voter, making an after-the-fact assessment of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional ballot voter impossible. Thus, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from the Application envelopes.

7. R.C. 3505.183(D) provides that all provisional ballots must be counted simultaneously:

No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election.

Thus, the Board of Elections cannot open and count any provisional ballot until the eligibility of each and every Provisional Ballot Application has been reviewed and resolved.

8. Initial processing suggests that the majority of the Provisional Ballot Applications have been submitted by voters who are eligible under Ohio statutes. As such, their Applications will be opened and their ballots will be counted if this initial processing is confirmed by the Board of Elections. Initial processing also suggests that a number of the Provisional Ballot Applications are fatally flawed because the voter who tendered the provisional ballot is either not properly registered to vote or voted in an incorrect precinct. If this initial processing is confirmed by the Board of Elections, these Applications will not be opened or counted.

9. While the determination of eligibility of a high percentage of provisional ballot voters is clear, dispute has arisen regarding the eligibility under Ohio statutes of Provisional Ballot Applications on which the provisional ballot voter failed to provide her name and/or her signature on the required provisional voter affirmation, or included them on the provisional ballot envelope but at locations unrelated to completion of the provisional voter affirmation. The Provisional Ballot Application, attached as Exhibit A, clearly indicates that the provisional voter is *required* to provide both her name and her signature on the affirmation. The Application highlights this requirement in capital letters, underscored, and in bold type: the provisional ballot voter is directed to “CLEARLY PRINT NAME-**(REQUIRED)**” and provide the “VOTER’S SIGNATURE-**(REQUIRED)**.” Nonetheless, approximately 3-4% of the Provisional Ballot Applications lack either the name or signature or both that is specifically required by the Application.

10. On March 31, 2008, Brian Shinn, Assistant General Counsel, Secretary of State of Ohio, responded to a series of questions from the Board of Elections regarding

procedures for counting provisional ballots. In response to a question regarding a voter's failure to provide both her name and signature on a provisional ballot application, Mr. Shinn, as Assistant General Counsel for the Secretary of State, gave the following instruction:

- 5) Voter did not print his or her name on column 1 but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.

[Emphasis in original.]

A copy of Mr. Shinn's e-mail of March 31, 2008, which was sent directly to me by Mr. Shinn, is attached as Exhibit B.

11. Mr. Shinn's March 31, 2008 instruction that a voter's failure to provide both her "Name AND signature" was consistent with the Secretary of State's pre-Election reading of R.C. 3505.183(B)(1)(a) which states in pertinent part:

... the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

- (a) The individual's name and signature;

In Directive 2008-101 ("SOS Directive 2008-101"), the Secretary of State instructed that the failure of a provisional ballot voter to provide both her name and her signature on the Provisional Ballot Application precluded a Board of Election from treating the provisional ballot as eligible and required that the Provisional Ballot Application "shall neither [be] open[ed] nor count[ed]":

If ANY of the following apply, board staff responsible for processing provisional ballots shall recommend to the board that a

provisional ballot **not** be counted, and a board of elections **shall neither open nor count** the provisional ballot;

* * *

c) The individual did not provide the following:

(1) His or her *name and signature* as the person who cast the provisional ballot;

* * *

[Bold emphasis in original;
bold italics emphasis added.]

SOS Directive 2008-101 is attached as Exhibit C and may be accessed at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-101.pdf>.

12. Consistent with the direction of the Secretary of State in SOS Directive 2008-101 and Mr. Shinn's e-mail instruction of March 31, 2008, the Prosecuting Attorney of Franklin County, Ohio has advised the Board of Elections that Ohio statutes require that the provisional ballot voter must provide both her name and her signature to be eligible to have her Provisional Ballot Application opened and her ballot counted. A true and accurate copy of the correspondence of the Prosecuting Attorney of Franklin County, Ohio is attached as part of the e-mail chain attached as Exhibit D.

13. The Board of Elections was prepared to follow the pre-Election instructions of the Secretary of State and disqualify as fatally flawed all provisional ballots that did not comply with Mr. Shinn's conclusion that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ."

14. However, on Monday, November 10, after the Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve

Stivers by nearly 400 votes for the 15th Congressional District seat, Bob DeRose, a lawyer for the Kilroy Committee, challenged the determination of the Secretary of State that R.C. 3505.181(B)(1)(a) requires that the Provisional Ballot Application, to be eligible to be counted, must contain both the name and the signature of the provisional ballot voter. Mr. DeRose went so far as to assert that a provisional ballot must be counted even if it lacks both the printed name and the signature of the provisional ballot voter. Mr. DeRose's e-mail of 10:29 a.m., November 10, 2008, addressed to the Board of Elections is attached as part of the e-mail chain attached as Exhibit D.

15. Mr. DeRose sent electronic copies of his e-mail of November 10, 2008 to a number of people, including Mr. Shinn, Assistant General Counsel, Ohio Secretary of State. Mr. DeRose's e-mail was sent at 10:29 a.m. At 6:04 p.m. the same day, Mr. Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a)" Rather, in response to the DeRose request, Mr. Shinn directed that the Board of Elections deem eligible those Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." Mr. Shinn went so far as to indicate that if a voter's signature is found on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e.; it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." A true and accurate copy of Mr. Shinn's e-

mail of Monday evening, November 10, 2008 is attached as part of the e-mail chain attached as Exhibit D.

16. On Wednesday, November 12, 2008 at 6:19 p.m., Mr. Shinn confirmed that Secretary of State Brunner concurred with, and had adopted, his November 10 directions to count provisional ballots on which the affirmation does not bear both the name and the signature of the provisional voter. A true and accurate copy of Mr. Shinn's November 12 e-mail is attached as part of the e-mail chain attached as Exhibit D.

17. As a result of Mr. Shinn's reversal of the instruction that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . .," and the direction of the Secretary of State and Mr. Shinn that the disputed ballots were eligible to be opened in spite of the direct mandate of R.C. 3505.183(B)(1)(a) and (4)(a)(iii) to the contrary, the Board of Elections, at its meeting on Thursday, November 13, 2008, after receiving the advice of the Prosecuting Attorney, its statutory counsel, regarding the requirements of these provisions, tied 2-2 on each of three motions relating to whether the provisional ballots that are facially deficient because of lack of name and/or signature on the affirmation, were eligible to be opened and counted.

18. Under Ohio law, the Secretary of State breaks ties of the Board of Elections. R.C. 3501.11(X). She did so by letter dated November 20, 2008, a true and accurate copy of which is attached as Exhibit E. In her November 20, 2008 letter, Secretary Brunner directed that all three categories of disputed provisional ballots on which the name, signature or both are missing, or not located in the appropriate spaces on the provisional voter affirmation, were eligible to be counted, and directed them to be

counted, irrespective of their failure to comply with R.C. 3505.183(B)(1)(a) and (4)(a)(iii).

19. As such, in the absence of judicial intervention, approximately 1,000 provisional ballots that do not facially comply with the explicit requirements of R.C. 3505.183(B)(1)(a) and (4)(a)(iii) will be counted and included in the official results of the Franklin County election.

The Provisional Ballot Envelope

20. Issues have been raised regarding the Provisional Ballot Envelope used by the Board of Elections for the November 4, 2008 election. In the November 4, 2008 election, the Board of Elections used the form of Provisional Ballot Application attached as Exhibit A. The Board of Elections first used this form in the 2006 General Election and has used it in each subsequent election held since that date. Neither the Secretary of State nor any representative of her office has ever advised the Board of Elections that it should not use this form nor have they otherwise objected to it, or its content, prior to the commencement of this litigation.

21. Although the Secretary of State has issued an alternative form of Provisional Ballot Application, SOS Form 12-B, she has never issued a directive requiring use of Form 12-B rather than the Provisional Ballot Application used by the Board of Elections. Indeed, although the Cuyahoga County Board of Elections was until recently subject to the administrative oversight of the Secretary of State, and thus under the direct control of her office, Cuyahoga County did not use the Secretary of State's Form 12-B in the November 2008 General Election but, as it has done in the past, used its own form of Provisional Ballot Application.

22. In short, the Board of Elections has never been directed to, and has never understood that it is required to use, Form 12-B rather than the Provisional Ballot Application attached as Exhibit A.

Poll Worker Training Materials

23. The Franklin County Board of Elections used its Precinct Election Official's Training Manual, prepared specifically for the November 2008 election, to train precinct poll workers for the November 4, 2008 election. True and accurate copies of the cover page of the Training Manual and the pages instructing poll workers how to complete provisional ballot envelopes (pages 159-166) are attached as Exhibit F.

24. The Franklin County Board of Elections provided each poll worker with a copy of its Precinct Election Official's Training Manual as part of their training. Each poll worker received a training session of between two and four hours (depending on their assigned duties) conducted by the Franklin County Board of Elections in which each poll worker was familiarized with, and trained according to, the provisions of the Precinct Election Official's Training Manual.

25. The Poll Worker Quick Reference Guide for the November 2008 election prepared by the Secretary of State (SOS 0541-P (08/08)) was not used by Franklin County to train its poll workers for the November 4, 2008 election.

Franklin County Voting Records

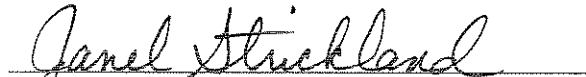
26. The official records of the Board of Elections disclose that Relators Dana Skaggs and Kyle Fannin are registered voters in Franklin County precincts within the Fifteenth Congressional District and that each voted in the General Election of November 4, 2008.

Further Affiant sayeth naught.



Matthew M. Damschroder

Sworn to before me and subscribed in my presence this 26th day of November,
2008.


Notary Public

859-001:189391



JANEL STRICKLAND
Notary Public, State of Ohio
My Commission Expires 07-24-13

**EXHIBIT
A**

**PROVISIONAL BALLOT APPLICATION • FRANKLIN COUNTY BOARD OF ELECTIONS
WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.**

STEP 1:

VOTER INFORMATION

Each blank must be completed by the Voter.

(CLEARLY PRINT NAME, REQUIRED): _____
I solemnly swear or affirm that I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in this election, for which I am casting this provisional ballot. I am casting this provisional ballot because my name should appear on the official precinct list, but does not, my address has changed, my name has changed, I requested an absentee ballot and/or I am listed in the official precinct list as having requested an absentee ballot or for another reason. I declare under penalty of election falsification I am a citizen of the United States, will have lived in this state for 30 days immediately preceding the next election, and I will be at least 18 years of age at the time of the general election.

CURRENT ADDRESS

HOUSE #/STREET _____ APT.# _____

CITY _____ ZIP CODE _____

FORMER ADDRESS: _____

STREET: _____

CITY: _____

COUNTY: _____

FORMER NAME (if applicable) _____

DATE OF BIRTH REQUIRED _____ (MM/DD/YYYY)

I understand that if the information I provide on this provisional ballot application is not fully complete and correct, and/or if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, and/or if the board of elections determines that I have already voted in this election, this provisional ballot will not be counted. I further declare that I understand the penalties for falsification of this information. I hereby declare under penalty of election falsification that the above statements are true and correct to the best of my knowledge and belief.

X

VOTER'S SIGNATURE (REQUIRED) _____ Date _____

STEP 2:

VOTER IDENTIFICATION

To be completed by the Voter.

You must provide one of the following forms of identification documentation

NOTE: If you are unable to provide proof of identity or if your right to vote was challenged and you were unable to provide the necessary documentation to satisfy the challenge, you may provide proof of identity at the Board of Elections within 10 days after the election.

The last four digits of my Social Security Number are: _____

My Ohio Driver's License Number OR State Identification Card Number is: _____

Other form of photo identification displaying name and current address: _____ (Specify kind of ID)

Other (copy of current utility bill, bank statement, government check, paycheck, or other government document that shows my name and current address) (Specify kind of ID)

No identification documentation and I have NO Social Security Number (complete Identification Affirmation below, if applicable)

IDENTIFICATION AFFIRMATION

ONLY FOR VOTERS WHO CHECKED "NO ID" ABOVE

RC 3505.16(A)(4)

(CLEARLY PRINT NAME) _____
I declare under penalty of election falsification that I cannot provide a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing my name and current address; nor the last four digits of my social security number because I have no social security number and further declare that I am the person named on this application and that I understand I may cast a provisional ballot.

X

VOTER'S SIGNATURE _____ Date _____

STEP 3:

POLL WORKER STATEMENT

To be completed by a Poll Worker

The preceding Provisional Ballot Application was subscribed and affirmed before me. The following is true concerning the reason necessary to issue a provisional ballot:

Voter's name is not in the Signature Poll Book

Voter has a LEGAL NAME CHANGE

Voter has an ADDRESS CHANGE

Number 2 is to the left of the signature box (undeliverable 60-day election notice)

Number 3 is to the left of the signature box (undeliverable registration acknowledgement notice)

Number 4 is to the left of the signature box (voter requested an ABSENTEE BALLOT)

"ATTORNEY IN FACT" is printed in signature box. Check here and also check the specific reason for a provisional ballot

The Voter is unable to provide valid identification

The Voter refuses to provide valid identification

Name or address on the Valid Non Photo Identification does NOT match the Signature Poll Book

Voter's name does not match the Signature Poll Book (Signature Poll Book has current legal name but ID does NOT have current legal name)

SPL, or MPL (and Precinct): _____ (Check Location Street Guide for information)

X

POLL WORKER'S SIGNATURE _____

STEP 4:

VOTE!

After completing this application in its entirety:

1. **POLL WORKER:** Using the Precinct Street Listing, find the provisional voter's current address and write the ballot style number for the voter's address here: _____

(Ballot Style Number)

2. **POLL WORKER:** Locate the provisional ballot pad(s) with the same ballot style number that you wrote above.

3. **POLL WORKER:** Give the provisional voter the provisional ballot and the Provisional Ballot Application envelope, and direct the provisional voter to a provisional voting booth (UNLESS THE VOTER IS DISABLED AND VOTING ON THE MACHINE) to mark the PAPER ballot.

4. **VOTER:** Carefully read all of the instructions. Once you have completed voting your provisional ballot, fold it in half and place it inside this envelope. Seal the envelope and deposit the envelope in the sealed ballot box.

THIS SPACE FOR OFFICE USE ONLY

RELATOR APP-13

Provisional Application Worksheet

(for office use only)

| Level | ID & Date | ID & Date | ID & Date | ID & Date | ID & Date |
|--------------------------------|-----------|-----------|-----------|-----------|-----------|
| 1 Initial Review | 1 | 1 | 1 | 1 | 1 |
| 2 Verification | 2 | 2 | 2 | 2 | 2 |
| 3 Voter Query Look-up | 3 | 3 | 3 | 3 | 3 |
| 4 SQL Look-up (restricted use) | 4 | 4 | 4 | 4 | 4 |
| 5 Bad Signature Review | 5 | 5 | 5 | 5 | 5 |
| 6 Rejection Review | 6 | 6 | 6 | 6 | 6 |
| 7 Check Old DWP for Voting | 7 | 7 | 7 | 7 | 7 |
| 8 Out of County Verification | 8 | 8 | 8 | 8 | 8 |
| 9 Legal Review | 9 | 9 | 9 | 9 | 9 |
| 10 Accepted | 10 | 10 | 10 | 10 | 10 |
| 11 Rejected | 11 | 11 | 11 | 11 | 11 |

DO NOT WRITE BELOW THIS LINE: FOR FINAL REVIEW ONLY

12 Approved: Y or N Code: 001
 13 Rejected: Y or N Code: 006 200 250 300 450 500 600 800 850

Signatures of Final Reviewers:

Date: _____

Comments:

| | |
|--|--|
| APR: APPLICATION AFR: APPROVED DOB: DATE OF BIRTH DWP: DISTRICT/WARD/PRECINCT FR: FOUND IN FRONTRUN CO RIG: FORA INCOMPLETE RE: PRECINCT SPLIT NOT ELIGIBLE NR: NOT REGISTERED HNC: NOT REGISTERED IN OTHER COUNTY NS: NO SIGNATURE | ORL: OHIO DRIVER'S LICENSE OS: OS SYSTEM PA: PROVISIONAL APPLICATION PW: PROVISIONAL WORKSHEET RAC: REGISTERED AFTER CUTOFF SPS: SIGNATURE POLY BOOK SSN: SOCIAL SECURITY NUMBER U: UNDERAGE VDC: VOTED IN OLD COUNTY VWP: VOTED IN WRONG PRECINCT * COUNT = BALLOT ACCEPTED NO COUNT = BALLOT REJECTED |
|--|--|

| | |
|--|--|
| 901 APPROVED 906 FORA INCOMPLETE 200 NOT REGISTERED 250 REGISTERED AFTER CUTOFF 300 NO SIGNATURE 450 VOTED ABSENT 500 SIGNATURE IDENT MISMATCH 600 VOTED IN WRONG PRECINCT 800 UNDERAGE 850 PRECINCT SPLIT NOT ELIGIBLE | 901 APPROVED 906 FORA INCOMPLETE 200 NOT REGISTERED 250 REGISTERED AFTER CUTOFF 300 NO SIGNATURE 450 VOTED ABSENT 500 SIGNATURE IDENT MISMATCH 600 VOTED IN WRONG PRECINCT 800 UNDERAGE 850 PRECINCT SPLIT NOT ELIGIBLE |
|--|--|

From: Shinn, Brian [mailto:bshinn@sos.state.oh.us]
Sent: Monday, March 31, 2008 1:00 PM
To: Damschroder, Matthew M.; Piccininni, Patrick J.
Cc: White, Dennis L.; Wedekind, Michael; Thomsen, Katherine
Subject: RE: Provisionals
Importance: High

Denny and Matt,

Todd and I have discussed most of the situations below. It is my understanding that your board would appreciate written responses.

Generally, most issues about provisional ballot affirmation statements are covered by Directive 2007-06 on pages 14-16, which explains the provisions of R.C. 3505.183 with regard to provisional ballot affirmation statements.

Under R.C. 3505.183(B)(1), the board is required to examine its records to determine whether the person who cast the provisional ballot is registered and eligible to vote. The only information that is REQUIRED TO BE INCLUDED IN THE AFFIRMATION FOR THE VOTE TO BE COUNTED IS: 1. [3505.183(B)(1)(a)] the voter's name and signature; 2. [3505.183(B)(1)(b)] a statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted; and 3. [3505.183(B)(1)(c)] a statement that the individual is eligible to vote in the election in which the provisional ballot is being voted. All other information is optional and is intended to aid the board in identifying whether the voter is registered in the jurisdiction. Contrary to Franklin County's provisional ballot envelope, date of birth is NOT REQUIRED. Even if the voter did not provide ID, the provisional ballot still may be counted under R.C. 3505.183(B)(4)(a)(vii) if the voter completed the affirmation statement under R.C. 3513.18(A) OR R.C. 3513.181(B).

Answers to your specific questions:

- 1) More than one ballot in the provisional ballot envelope – apparently some of your poll workers for whatever reason instructed voters to complete a party ballot or even both party ballots and an issues-only ballot. Unlike the absentee ballot statutes, there is no specific statute that says that a provisional ballot cannot be counted if there are multiple ballots in a provisional envelope. If your board determined that the voter was eligible to vote in the primary for a party, then that ballot should be counted only. If the person is only eligible to vote issues, then the issues-only ballot would be counted. If the person did not name a party on the envelope or on a form 10-W or 10-X, then the issues-only ballot is the one that would be counted. All other ballots should not be counted and should be voided. The poll workers in these precincts should be questioned and instructed NOT to issue multiple ballots in the future.
- 2) Poll worker did not sign affirmation statement – the ballot should still be counted if the voter provided the required information outlined above. No statute makes the poll worker signature necessary for the ballot to be counted.
- 3) Poll worker signed but did not check box for ID. As stated above, if the statutory requirements are met, then the ballot may be counted without ID being provided as

EXHIBIT

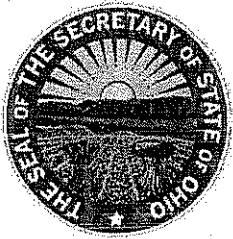
B

long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.

- 4) If only column one of Franklin County's provisional ballot envelope is completed then the ballot still may be counted for the reasons stated above (because column one contains all the information and statements required by statute) as long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.
- 5) Voter did not print his or her name on column one but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.
- 6) Voter was issued an absentee ballot, and the voter brought it to polling place on election day. Rather than instructing the voter to deliver the absentee ballot to the board of elections or issuing the voter a provisional ballot, the poll worker had the voter complete a provisional ballot envelope and placed the voted absentee ballot in it. The ballot can be counted IF the affirmation statement was properly completed as described above and IF the board can determine that no other absentee ballot was cast by the voter. The voter should not be disenfranchised due to the poll worker's error.

You may contact me if you have any questions about these explanations.

Brian Shinn



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 EAST BROAD STREET, 16TH FLOOR
COLUMBUS, OHIO 43215 USA
TEL: 1-877-767-6446 FAX: 1-614-644-0649
WWW.SOS.STATE.OH.US

DIRECTIVE 2008-101

October 24, 2008

To: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS

Re : Guidelines for Determining the Validity of Provisional Ballots

This directive is issued as a means to settle ongoing litigation now pending in the United States District Court for the Southern District of Ohio, Case No. C2:06-0896 and captioned Northeast Ohio Coalition for the Homeless v. Brunner.

This directive provides guidelines for Ohio's boards of elections in processing and counting provisional ballots. This includes guidelines on determining the validity of provisional ballots under Ohio law and, generally, the timeframes during which boards may process provisional ballots to determine their eligibility for counting. This directive complements, but does not supersede, Directive 2008-81, Guidelines for Provisional Voting.

I. DEFINITIONS

A. For purposes of this directive, "members of the board" means a majority vote of at least a quorum of the members of the board of elections taken at a public meeting,

B. For purposes of this directive, "processing" provisional ballots means:

- handling provisional ballots in provisional ballot envelopes ("envelopes") as they are cast at a board of elections office or other designated site or as they are returned from precincts on election night;
- moving or storing provisional ballots at a board of elections office or other designated site;
- reviewing envelopes and affirmation statements to initially determine the presumptive eligibility of provisional ballots to be counted;
- sorting provisional ballots in their envelopes into categories of eligible, questionable, and ineligible, and if a board so states in its policy and procedures, into subcategories of ineligible; and
- the making by board of elections staff of a recommendation to the members of the board as to the eligibility and/or ineligibility of provisional ballots cast in the county for the election in question.

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C. For purposes of this directive, "counting" provisional ballots means:

- marking the envelope of provisional ballots that the members of the board have determined are not eligible to be counted;
- moving, and storing in their envelopes provisional ballots that the members of the board have determined are not eligible to be counted;
- opening the envelopes of provisional ballots that the members of the board have determined are eligible to be counted;
- removing provisional ballots from their envelopes that the members of the board have determined are eligible to be counted and separating them from their envelopes so as to sever the voter's identity from the ballot, thereby preserving the secrecy of the ballot;
- preparing provisional ballots to be counted for scanning by automatic tabulating equipment;
- scanning provisional ballots;
- tabulating votes cast by provisional ballots determined by the board to be eligible to be counted; and
- reporting numbers of provisional votes as part of the board's official canvass of the election.

II. TIMEFRAME FOR PROCESSING PROVISIONAL BALLOTS

Generally speaking, and except as otherwise provided in R.C. 3501.183(E)(2) and in this directive, boards of elections may begin processing provisional ballots beginning the day after an election. Boards may continue to process provisional ballots during the ten (10) days after an election, and may continue to do so after the tenth day, if necessary, until all provisional ballots have been processed. All provisional ballot processing must be completed by the end of the official canvass, which must be completed not later than the twenty-first day after the election.

III. DELEGATION OF PROCESSING TO BOARD STAFF

Ultimately, the four members of boards of elections must determine the validity of all votes cast in an election and must certify the results of all elections. However, nothing in Ohio law requires that the members of a board of elections must personally, physically complete all tasks associated with preparing for that certification. Thus, boards of elections may, under a policy adopted by the board, delegate the processing and some aspects of counting provisional ballots, as discussed throughout this directive, to board staff. Such processing must be done in bipartisan teams according to the instructions provided in this directive. To the extent consistent with Ohio law and this directive, boards may establish and follow additional policies and procedures for processing provisional ballots.

If a board delegates the processing of provisional ballots, it must first adopt a policy setting forth procedures for the processing of provisional ballots that includes the factors listed in I. above. Under a board's policy, board staff responsible for processing provisional ballots must make a recommendation to the board as to the eligibility of each provisional ballot cast in the county, either on an individual basis, or as to groups or categories of similarly situated provisional ballots.

IV. BOARD DETERMINES VALIDITY OF PROVISIONAL BALLOTS

Ultimately, the members of the board (see I.A. above) of each board of elections must determine the eligibility or ineligibility of all provisional ballots cast within the county in accord with Ohio law and this directive.. Boards may not delegate this task.

Each board of elections must then cause the ballots to be counted by board staff, and must include the tabulation of that count in its official canvass of the election results and, to the extent required, its certification of the election results to the Secretary of State.

V. GENERAL REMINDERS ON PROCESSING PROVISIONAL BALLOTS IN ENVELOPES

It is imperative that boards remember that R.C. 3505.183(D) provides that no provisional ballots may be counted in a particular county until the board of elections for that county determines the eligibility, pursuant to R.C. 3505.183 and this directive, of ALL provisional ballots cast in that county. This means that the board staff responsible for processing provisional ballots must completely process all provisional ballots and make a recommendation to the board to allow the board to vote on the eligibility of provisional ballots cast before the board or board staff may begin the procedures for counting provisional ballots.

It is also imperative that boards remember that provisional ballots, like all other ballots or other sensitive election materials, must be handled by bipartisan teams and must be stored in a secure location. This office has required boards to implement a system of storage using double lock and key – one key held by Democrats and one key held by Republicans – and provisional ballots must be stored in that environment.

It is also imperative that board members and staff remain cognizant at all times of the importance of maintaining the secrecy of the votes cast by a provisional voter, and act accordingly when opening and removing provisional ballots from their envelopes.

VI. GROUNDS FOR COUNTING OR INVALIDATING PROVISIONAL BALLOTS

Ohio Revised Code (“R.C.”) 3505.183 is the primary statutory lens through which boards of elections must view provisional ballots and affirmations in order to determine the eligibility of those provisional ballots for counting. It sets forth the steps through which a board or its staff must go to determine the eligibility of a provisional ballot for counting.

A. Step 1 – Additional Information Required from Voter in Some Cases

R.C. 3505.183(E)(2) provides that boards of elections may not examine the provisional ballot affirmation on the provisional ballot envelope of any provisional ballot for which an election official has indicated the provisional voter must provide additional information to the board of elections in order to ensure that the provisional ballot will count. Thus, checking for this statement by an election official must be the first step in determining a provisional ballot’s eligibility to be counted.

1. No additional information required

If no such statement by an election official appears on the provisional ballot envelope then the board staff responsible for processing provisional ballots may proceed to Step 2.

2. Additional information required

If such a statement by an election official appears on a provisional ballot envelope then the board staff responsible for processing provisional ballots must segregate that ballot and store it, still in its envelope, in accordance with this directive until the provisional voter provides the required additional information.

a) Additional information required during 10 days after election

Pursuant to R.C. 3505.181(B)(8), there are only four categories of provisional voters who are required to provide additional information to the board of elections during the ten days after the day of an election in order for their ballots to be counted:

(1) An individual who has but is unable to provide to precinct election officials any of the forms of identification required under R.C. 3505.18(A)(1), and who has a social security number but is unable to provide the last four digits of his or her social security number under R.C. 3505.18(A)(2);

(2) An individual who is challenged under R.C. 3505.20 and is determined to be ineligible to vote or whose eligibility to vote cannot be determined by election officials

(3) An individual who does not have any of the forms of identification required under R.C. 3505.18(A)(1), who cannot provide the last four digits of the individual's social security number under R.C. 3505.18(A)(2) because the person does not have a social security number, and who declines to execute an affirmation (SOS Form 10-T) under R.C. 3505.18(A)(4); and

(4) An individual who has, but declines to provide to precinct election officials, any of the forms of identification required under R.C. 3505.18(A)(1), and who has a social security number but declines to provide to the precinct election officials the last four digits of his or her social security number.

b) This section is specific to the aforesaid court action and its attempted settlement. Contacting voters to provide additional information during ten days

If a board of elections or board staff determine during the 10-day period that a provisional voter falls into one of the four categories listed above, the board must attempt once to contact the voter by telephone, if a telephone number is available, to remind the voter:

- (1) that he or she is required to provide additional information to the board by the tenth day after the election for the provisional ballot to count; and
- (2) what additional information is required.

If a board of elections does not have a telephone number for a particular voter, it need not conduct an exhaustive search to attempt to locate a telephone number for that voter, but should document any efforts undertaken to contact the voter.

During the first five days after the day of an election a board of elections may communicate the information listed in the list immediately above by postcard or letter rather than by telephone.

c) Additional information required at post-election challenge hearing

If a voter's registration is challenged by another Ohio voter under R.C. 3503.24 and the board of elections considering the challenge postpones the hearing until after the day of the election, the voter must vote provisionally at that election and must provide additional information to the board at the hearing, if so requested, in order to ensure that his or her provisional ballot will count.

Upon receipt of the required additional information under this step of this directive, the board staff responsible for processing provisional ballots may proceed to Step 2.

3. Failure to provide additional required information

A provisional ballot that is cast by any voter who is required by Ohio law or this directive to provide additional information to a board of elections cannot be counted unless and until that voter provides the required information, pursuant to R.C. 3505.181(A)(7). After the board of elections determines that the required information was not provided, the board staff responsible for processing provisional ballots shall proceed to Step 5.

B. Step 2 – Preliminary Analysis on Provisional Ballot Eligibility

R.C. 3505.183(B)(1) provides that the first step in determining the eligibility of provisional ballots to be counted is to determine the following:

- a) Whether the person who cast the provisional ballot is registered to vote;
- b) Whether the person who cast the provisional ballot is eligible to vote in the particular election in question; and
- c) Whether the person who cast the provisional ballot completed the affirmation on the provisional ballot envelope.

1. Not Registered or Not Eligible

If the person who cast the provisional ballot is either **not registered to vote or is not eligible to vote in the particular election** in question (e.g., wrong precinct), then **the board may not count that ballot**, and this is pursuant to R.C. 3505.183(B)(4)(a)(i) and (ii).

2. Registered, Eligible, and Affirmation Completed

If the person **is** properly registered to vote and is eligible to vote in the particular election in question, **and** the person who cast the provisional ballot completed the affirmation statement on the envelope, then the board staff responsible for processing provisional ballots must proceed to examine the affirmation statement executed by the person who cast the provisional ballot. Pursuant to R.C. 3505.183(B)(1)(a), (b), and (c), that affirmation must contain at least the following three items of information:

- a) The name and signature of the person who cast the provisional ballot;
- b) A statement that the person who cast the provisional ballot is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
- c) A statement that the person who cast the provisional ballot is eligible to vote in the particular election in which he or she cast the provisional ballot.

3. Registered, Eligible, but No Provisional Ballot Affirmation

If the person **is** properly registered to vote and is eligible to vote in the particular election in question, **but** he or she **did not** complete the affirmation statement on the envelope, the board staff responsible for processing provisional ballots must proceed, pursuant to R.C. 3505.183(B)(1), to determine whether the voter, or an election official at the direction of the voter, recorded the voter's name in a written affirmation. If neither the voter nor an election official, at the voter's direction, did so, then the provisional ballot cannot count, and the board staff responsible for processing provisional ballot shall proceed to step 5.

C. Step 3 – Additional Analysis on Provisional Ballot Eligibility

1. In addition to the information required in Step 1, above, and pursuant to R.C. 3505.183(B)(2), the board staff responsible for processing provisional ballots must, in determining the eligibility of any provisional ballot to be counted, also examine any information provided by the person who cast the provisional ballot:

- a) that appears in the affirmation on the provisional ballot envelope;
- b) that was made to an election official at the time he or she cast the provisional ballot pursuant to R.C. 3505.182; and
- c) that was made to the board of elections during the ten days after the day of the election.

2. Additional information often provided by provisional voters includes, but is not limited to, current and former addresses and date of birth. While this information, if provided, must be considered by boards of elections in determining the eligibility of provisional ballots for counting, nothing in Ohio law requires provisional voters to provide this information. Thus, the absence of such information on a provisional ballot affirmation is not sufficient, on its own, to disqualify a provisional ballot.

D. Step 4 – Recommendation to Board on Provisional Ballot Eligibility

During this step, board staff responsible for processing provisional ballots must use the information discussed above, among other things, to determine their recommendation as to the eligibility of particular provisional ballots to be counted.

1. Ballots Eligible to be Counted

Where **ALL** of the following apply, board staff responsible for processing provisional ballots must recommend to the board that a provisional ballot shall count, and a board of elections shall count the provisional ballot:

- a) The individual named on the affirmation is properly registered to vote;
 - b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;
 - c) The individual provided the following:
 - (1) His or her name and signature as the person who cast the provisional ballot;
 - (2) A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
 - (3) A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;
- or
- (4) His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by an election official;
- or
- (5) A completed affirmation under R.C. 3505.18(B)(4) (SOS Form 10-T).
- d) If applicable, the individual has provided additional information to the board of elections as may be required, i.e. because he or she falls into

one of the four categories of provisional voters who **must** provide additional information to the board of elections during the ten days after the day of an election, and discussed in more detail below; and

e) If applicable, the individual has been afforded a hearing conducted under R.C. 3503.24, which has resulted in the inclusion of the provisional voter's name in the official registration list.

2. Ballots Not Eligible to be Counted

If **ANY** of the following apply, board staff responsible for processing provisional ballots shall recommend to the board that a provisional ballot **not** be counted, and a board of elections **shall neither open nor count** the provisional ballot:

- a) The individual named on the affirmation is not properly registered to vote;
- b) The individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot;
- c) The individual did not provide the following:

- (1) His or her name and signature as the person who cast the provisional ballot;
- (2) A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
- (3) A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;

or

- (4) His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by an election official;

- d) The individual has already cast a ballot, including an absentee ballot, for the election in which he or she cast the provisional ballot;
- e) If applicable, the individual has not provided additional information to the board of elections as may be required, i.e. because he or she falls into one of the four categories of provisional voters who **must** provide additional information to the board of elections during the ten days after the day of an election, and discussed in more detail below; and
- f) If applicable, the individual has been afforded a hearing conducted under R.C. 3503.24, which has resulted in the exclusion of the provisional voter's name in the official registration list.
- g) The individual failed to provide or execute any of the following:
 - (1) a current and valid photo identification;
 - (2) a military identification;
 - (3) an original or a copy of any of the following bearing the voter's name and current address:

- (a) utility bill;
- (b) bank statement;
- (c) government check;
- (d) paycheck; or
- (e) other government document¹;

- (4) the last four digits of the individual's social security number;
or
- (5) an affirmation under R.C. 3501.18(A)(4) (SOS Form 10-T), or one of the two affirmations already discussed in this directive, above.

E. Step 5 – Disqualification of Provisional Ballots and Retention

If a board of elections finally determines that a provisional ballot cannot be counted for any of the reasons identified in Ohio or this directive, then the board, pursuant to R.C. 3505.183(C)(1), shall record:

1. the name of the provisional voter who cast the ballot;
2. the identification number of the provisional ballot envelope, if applicable;
3. the names of the election officials who determined the validity of that ballot;
4. the date and time that the determination was made; and
5. the reason that the ballot was not counted.

The board shall maintain this record for the duration of the retention period that applies to the provisional ballot itself.

Further, if a board of elections finally determines that a provisional ballot cannot be counted for any of the reasons identified in Ohio law or in this directive, that provisional ballot envelope may never be opened, and the board shall not count the votes contained on such provisional ballot. Rather, pursuant to R.C. 3505.183(C)(2), the board shall store that ballot, unopened, for the duration of the retention period applicable to that type of ballot, and shall then destroy that ballot in its envelope. Storage of such provisional ballots shall be made in accordance with the requirements for storage of provisional ballots, generally, as provided in this directive.

VII. ADDITIONAL REQUIREMENTS

R.C. 3505.183 does not expressly provide that a board of elections must attempt to match the signature of the person casting a provisional ballot to the signature on file for that voter, presumably because the statutory scheme contemplates at least one circumstance where a provisional voter does not have to provide a signature (i.e., Step 4, Ballots eligible to be counted, 3. d, above). However, signature matching has long been a hallmark of election security, is explicitly provided for with respect to other types of ballots under Ohio law, and is a basis for

¹ Ohio law provides that notices of election mailed by boards of elections pursuant to R.C. 3501.19, and voter registration notices mailed by boards of elections pursuant to R.C. 3503.19 are not valid "other government documents" for voter ID purposes.

election officials to challenge the right of a person to cast a ballot under Ohio law. As such, when a signature is provided by a provisional voter, boards of elections should, in verifying the identity of that provisional voter, attempt to match the signature with the signature on file for the voter in question.

Boards of election should bear in mind in doing so, though, that signatures do tend to change over time, that there are people who do not sign their name identically every time they sign their name, and that, pursuant to R.C. 3501.05(AA), voters have the right to update their signatures with boards of elections using SOS Form 260.

Very recently, the Supreme Court of Ohio provided, in *State ex rel. Myles v. Brunner*, that in the absence of any evidence of fraud, unduly technical interpretations that impede the public policy favoring free, competitive elections must be avoided. Thus, boards of elections should keep in mind the concerns raised in the immediately foregoing paragraph when matching signatures. Boards should ensure that their primary concern is achieving confidence in the identity of the voter casting the provisional ballot rather than ensuring that every loop and line in a signature precisely and exactly matches the signature on file for the voter.

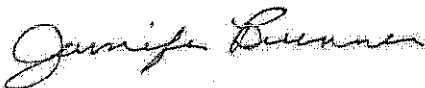
VIII. OBSERVERS

R.C. 3505.183(D) provides that observers, as appointed pursuant to R.C. 3505.21, may be present at all times that the board is determining the eligibility of provisional ballots to be counted and counting those provisional ballots determined to be eligible.

That statute further provides that no person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot. By its plain language, this prohibition applies both to election officials and observers, as well as others.

If you have any questions about this directive or its implementation please contact the elections attorney in this office assigned to assist your county board of elections.

Sincerely,



Jennifer Brunner

From: Shinn, Brian [mailto:bshinn@sos.state.oh.us]
Sent: Wed 11/12/2008 6:19 PM
To: Shinn, Brian; Piccininni, Patrick J.; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: O'Brien, Ron J.; Soulas, Nick A.; Wilson, Antoinette; Dora Rose; Bob DeRose
Subject: RE: Provisional Ballots with Signatures Issues

Michael and Matt,

I met with Secretary Brunner and our legal staff this afternoon. We discussed the provisional ballot issues raised in Mr. DeRose's email (below) that I responded to on Monday.

- 1) Secretary Brunner agrees with my earlier advice that a provisional ballot that contains the signature of a voter but not the written name **MUST BE COUNTED** if the person is a registered elector, the person voted in the correct precinct, and the person was not required to provide additional information to the board but failed to do so. R.C. 3505.182 prescribes the form of the provisional ballot affirmation but is only a substantial compliance statute. Directive 2008-81 (page 6) states that the voter must execute the affirmation and lists the required statements that must be included. "Execute" means sign. Franklin County uses a provisional ballot affirmation that is different from the SOS prescribed form (Form 12-B) in several regards. On our prescribed form, the poll worker is instructed to print the voter's name in the "Election Official Verification Statement." In contrast, Franklin County's form does not require the poll worker to print the person's name in step 3 or step 4. Thus, the Franklin County form omits a safeguard for the voter. While poll workers are trained to review the voter's affirmation statement before completing the poll worker statement, even the best trained poll workers make mistakes. It is not reasonable to assume that a person would sign a provisional ballot affirmation **BUT** refuse to write his or her name in. Directive 2008-101 must be read in conjunction with Directive 2008-103. Consequently, failure to write a voter's name on a provisional ballot affirmation is poll worker error that cannot be held against the voter under Directive 2008-103. Finally, we are all reminded by *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22: "we 'must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections.'" *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3, 598 N.E.2d 1149; cf. *Stern v. Cuyahoga Cty. Bd. of Elections* (1968), 14 Ohio St.2d 175, 180, 43 O.O.2d 286, 237 N.E.2d 313.
- 2) I will provide more information regarding our interpretation of the voter name but no signature issue tomorrow.
- 3) We stand by our requirement in Directive 2008-109 that a voter with an error or omission on his or her absentee ballot envelope must come to the board office to correct it. The board is not required to send out two staff members for a voter who cannot come to the board office. However, I know at least one board of elections that has decided to do so.
- 4) While the deadline for a voter who is required to provide additional information to the board for a provisional ballot to be counted is the tenth day, boards of elections have until the official canvass to resolve all issues regarding provisional ballots, such as

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confirming voters who moved from one Ohio county to another but failed to update their address. See Directive 2008-101 (Page 2, section II).

Brian Shinn

From: Shinn, Brian
Sent: Wednesday, November 12, 2008 9:42 AM
To: 'Piccininni, Patrick J.'; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: O'Brien, Ron J.; Soulas, Nick A.; Wilson, Antoinette
Subject: RE: Provisional Ballots with Signatures issues
Importance: High

Michael and Matt,

I respectfully disagree with Patrick on number 1. I believe that Judge Sargus' order regarding poll worker error and Directive 2008-103 should be read liberally and in favor of counting provisional ballots rather than rejecting them solely based upon technicalities.

The form of the provisional ballot affirmation under R.C. 3505.182 is a substantial compliance statute. While Franklin County's form has the voter complete his or her name in column one, your poll workers are trained to review the provisional ballot affirmation before completing the poll worker portion. Your poll worker should have noticed that the voter did not put his or her name in column one and instructed the voter to do so. The voter actually signed the provisional ballot affirmation, so the voter was cooperating and wanting his or her ballot to be counted. That is why I conclude that the omission of a name is poll worker error.

If you can determine based upon the address and signature that the person is a registered elector, voted in the correct precinct, and was not required to provide additional information, why would you not want to count the ballot? Otherwise, you are disenfranchising the person.

We will discuss this issue with Secretary Brunner this afternoon as well as the issue of no signature but name was printed on the affirmation and get back to you.

Brian Shinn

From: Piccininni, Patrick J. [mailto:pjpiccin@franklincountyohio.gov]
Sent: Wednesday, November 12, 2008 7:11 AM
To: Stinziano, Michael P.; Damschroder, Matthew M.
Cc: Shinn, Brian; O'Brien, Ron J.; Soulas, Nick A.
Subject: Provisional Ballots with Signatures issues
Importance: High

Gentleman: After our discussion of Brian Shinn's email, Directives 2008-101, 2008-103 and the provisional voter envelope we are in agreement that:

1) While Directive 2008-103, provides that a provisional ballot may not be rejected for reasons that **are attributable** to poll worker error neither the directive nor the court order transformed all

voter errors into poll worker errors. Under Directive 2008-101 many responsibilities remain the voters. Specifically, Directive 2008-101, §VI(D)(2)(c)(1) provides that the Board of Elections shall not open nor count a provisional ballot shall if the voter failed to provide their **name and signature** as the person who cast the ballot. The directive adopted by the Court states that both are required. The voter shall complete the information. Nothing in Directive 2008-101, 2008-103 nor the various court orders altered that requirement. R.C. §3505.181 puts the obligation on the voter to complete the application any omission of required information is voter error not poll worker error. Thus, the failure of the voter to put their name on the ballot is not poll worker error requiring the ballot be counted. The ballot should not be opened and not counted.

2) As to the situation where the voter completed the entire application but failed to sign the affirmation is voter error that will invalidate the provisional ballot. The statute is clear that the **voter must complete** the written affirmation before a poll worker. RC §3501.011 provides that the signature is that of the voter. The duty mandated in R.C. §3505.181 is on the voter not the poll worker. Failure to do so is a fatal defect.

Patrick J. Piccininni
Assistant Prosecuting Attorney, Civil Division
Franklin County Prosecutor's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215
ppiccin@franklincountyohio.gov
614-462-3520
614-462-6012 (fax)

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Thank you.

From: Shinn, Brian [mailto:bshinn@sos.state.oh.us]
Sent: Mon 11/10/2008 6:03 PM
To: Bob DeRose; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: Megan Kelley; Randy Borntrager; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Coie); Nickolas, Eric; Piccininni, Patrick J.
Subject: RE: Provisional Ballots with signature issues.

Michael and Matt,

I am writing to respond to some of the concerns raised by Mr. DeRose in his email. I have consulted with Directives 2008-101 and 2008-103 and R.C. 3505.181, 3505.182, and 3505.183. Michael also provided me with a copy of Franklin County's provisional ID envelope.

As a preliminary matter, your board should be using Directives 2008-101 and 2008-103 to determine the validity of provisional ballots rather than any old emails that I sent you after the primary election.

There are three situations regarding provisional ballots described in the email below. Here are my suggestions for handling these:

- 1) The voter provided a **signature** in the affirmation statement, but neither the voter nor the poll worker wrote the **voter's name** anywhere on the provisional ballot envelope – if your board can determine from the information provided by checking the address and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name was not recorded falls under the category of poll worker error described in Directive 2008-103.
- 2) The voter's name was written on the provisional ballot ID envelope but no signature – we will consult with Secretary Brunner and get back to you on Wednesday. There is an ambiguity that we need resolved before I can advise you on this situation.
- 3) The voter's name and signature are on the provisional ballot envelope but not necessarily in the correct places. If your board can determine from the information provided that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name and signature were in the wrong place falls under the category of poll worker error described in Directive 2008-103.

The other issue raised by Mr. DeRose's email is whether the board must contact provisional voters who failed to sign the provisional ballot envelope. The only provisional voters whom the board must contact under Directive 2008-101 (section VI.A.2.b on page 4) are provisional voters who are required to provide additional information to the board of elections. Unlike absentee voters under Directive 2008-109, the board is not required to contact provisional voters with errors on their provisional ballot envelope except for those specified in the previous sentence.

Finally, I caution anyone from releasing information about the number of provisional ballots based upon observer information. Observers were sworn not to disclose information that might compromise the secrecy of the ballot.

Let me know if you have any questions.

Brian Shinn
Assistant General Counsel
Ohio Secretary of State Jennifer Brunner

From: Bob DeRose [mailto:bderose@bnhmlaw.com]
Sent: Monday, November 10, 2008 10:29 AM
To: Stinziano, Michael P.; mmdamsch@vote.franklincountyohio.gov
Cc: Shinn, Brian; Megan Kelley; Randy Borntreger; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Coie)
Subject: Provisional Ballots with signature issues.
Importance: High

Michael and Matt,

I am writing concerning the 800 individuals who were made to cast a provisional ballot and who have signature issues determined by you to be "fatally flawed." As the Kilroy for Congress campaign understands the situation, provisional ballots that either lack a printed name but have a signature in the affirmation or have a printed name but lack a signature in the affirmation, will not be counted and the Board of Elections does not intend to notify the voter to come to the Board to cure the defect. It is the position of the Kilroy for Congress campaign that the Board's position is incorrect because it does not follow the Ohio Revised Code nor the directives of the Ohio Secretary of State.

A review of R.C. §3505.181 provides at Section (B) (2):

The individual [voter] shall be permitted to cast a provisional ballot at that polling place upon the **execution of a written affirmation by the individual before an election official at the polling place** stating that the individual is both of the following: (a) A registered voter in the jurisdiction in which the individual desires to vote; (b) Eligible to vote in that election. (*emphasis added*)

Section (B) (2) uses the term "before" as a preposition meaning, "in the presence of an election official." R.C. §3505.181 confers upon the poll worker the duty to have the voter complete the provisional ballot envelope in their presence. The use of the word "before" as a preposition is supported by R.C. §3505.182 where in the Revised Code mandates that a poll worker attest to the voter's completion of the affirmation. In relevant part, R.C. §3505.182 requires the following language to be used on provisional ballots and same is used by the Franklin County Board of Elections; "The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this day of (Month), (Year)." Finally, R.C. §3505.182 requires that the poll worker sign their name to the provisional ballot envelope to attest to the voter's completion of the provisional ballot envelope's affirmation section. Further, in the event an individual declines to sign the affirmation, R.C. §3505.182 directs the poll worker to follow procedures set out in R.C. §3505.181 (B)(6).

R.C. §3505.181 (B)(6) requires that "at the time an individual casts a provisional ballot, ... the appropriate election official shall record...the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section."

Read together, R.C. §3505.181 and R.C. §3505.182 confer upon the poll worker a duty to make sure that the affirmation section of the provisional ballot envelope is completed correctly by the voter. This duty was codified in SOS Directive 2008-81. The poll worker's duty would include making certain that the voter placed their printed name in the correct section and signed the affirmation. Permitting a provisional ballot to be cast without the necessary information in the voter affirmation section is contrary to the poll

worker's statutory duty, especially since a poll worker is required by statute to record the affirmation or the declination of a voter to affirm. It stands to reason that the poll worker would check each provisional ballot for the information necessary to discharge their statutory duties and when the information is incomplete they would inquire of the voter if they intended not to sign or place their printed name in the affirmation section. The lack of a signature or a printed name on a provisional ballot envelope's affirmation section is the result of a poll worker's error in not checking the provisional ballot before it was cast. Pursuant to SOS Directive 2008-103, "provisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker's ... failure to comply with any duty mandated by R.C. 3505.181." As such, any provisional ballot that lacks a printed name but has a signature, or that has a printed name but lacks a signature, or lacks a printed name and has no signature was cast on November 4, 2008 as a result of poll worker error. It is our understanding that approximately 620 of the 800 provisional ballots contain a signature but lacks a printed name. As to these 620 provisional ballots that were cast by an otherwise eligible voter, meaning that there is sufficient information to confirm the identity of the voter, these should be reviewed for registration, their signature compared to the registration and counted as a vote. It is our understanding that approximately 30 provisional ballots have a printed name but lack a signature. As to these 30 provisional ballots, because you have a name and the precinct where the provisional ballot was cast, the Board of Elections should immediately notify these voters of the defect and have them come into the Board to sign the affirmation. As to the remaining provisional ballots that lack a printed name and lack a signature; to the extent that the Board can determine the voter's identity from other sources, the ID provided by the voter, the Board should notify the voter of the defect and have them come into the Board to cure.

This issue is of extremely high importance and needs to be addressed immediately since time is running out for these individuals to cure their defects. Because of the time sensitive nature of this issue, I have copied Brian Shinn on this email. Also, can you confirm the numbers I cited for each of the signature issue? Thank you.

Bob DeRose
Barkan Neff Handelman Meizlish, LLP
360 S. Grant Avenue
P.O. Box 1989
Columbus, Ohio 43216-1989
614-221-4221
614-744-2300 (Fax)
bderose@bnhmlaw.com
www.bnhmlaw.com



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 EAST BROAD STREET, 16TH FLOOR
COLUMBUS, OHIO 43215 USA
TEL: 1-877-767-6446 FAX: 1-614-644-0649
WWW.SOS.STATE.OH.US

November 20, 2008

Michael Stinziano, Director
Franklin County Board of Elections
280 East Broad Street, Room 100
Columbus, Ohio 43215

RE: Tie votes of November 14, 2008 concerning four categories of provisional ballots

Dear Director Stinziano:

The Franklin County Board of Elections met on November 14, 2008. During this special board meeting the board voted on several motions concerning categories of provisional ballots with irregularities on the provisional ballot affirmation form. Four of these motions resulted in a tie vote of the board. In accordance with R.C. 3501.11(X), and with the procedures outlined in the Ohio Election Official Manual, the Franklin County Board of Elections submitted the tie votes, including position statements of the board members and a transcript of the meeting, to me on November 18, 2008. After a full review of these materials, and for the reasons outlined below, I vote with Board Members Anthony and Marinello in favor of all four motions to deem valid and process the four categories of provisional ballots described below. Accordingly, the votes contained on the provisional ballots at issue must be included as valid votes in the official canvass of the November 4, 2008 election. My analysis and decision follow.

Background

The 2008 General Election was held on November 4, 2008. There were over 27,000 provisional ballots cast in Franklin County during the 2008 General Election. Board staff began reviewing provisional ballot affirmations after Election Day to determine whether the provisional ballots should be counted. On November 14, 2008, the board held a special meeting to consider whether provisional ballots that had similar irregularities would be counted in the official canvass.

The board reached tie votes on the following motions:

- 1) Board Member William A. Anthony, Jr., made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains the signature of the voter but not the written name of the voter if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Kimberly E. Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Douglas F. Preisse and Board Member Michael F. Colley voted against the motion, resulting in a tie vote. (Tr. 11, 15).¹

¹ References to the transcript of the November 14, 2008 special board meeting are referred to by the abbreviation "Tr." and the page number.

- 2) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains the printed name of the voter but not the signature of the voter if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Preisse and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 17, 21).
- 3) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains both the printed name of the voter and the signature of the voter but not in the place designated for the name and signature in column one of Franklin County's provisional ballot affirmation form if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Preisse and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 22, 23).
- 4) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains both the printed name of the voter and the signature of the voter but no verification that the voter provided identification in column two of Franklin County's provisional ballot affirmation form if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Preisse and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 31, 33-34).

Discussion

The tie votes of the Franklin County Board of Elections concern whether certain provisional ballots cast in the 2008 General Election with similar irregularities on the provisional ballot affirmation form should be counted in the official canvass. Prior to Election Day, and pursuant R.C. 3501.05(B), I issued two directives to the Ohio county boards of elections providing instructions for the processing and counting of provisional ballots. These directives were the result of settlement negotiations in the federal court case captioned *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-CV896 (S.D. Ohio). Directive 2008-101 interprets R.C. 3505.181, 3505.182 and 3505.183 and outlines the process by which boards of elections must process and count provisional ballots, while Directive 2008-103 specifically addresses the issue of poll worker error in processing provisional ballots. The U.S. District Court for the Southern District of Ohio adopted Directives 2008-101 and 2008-103 as orders of the court.

Ohio's current provisional voting process provided in R.C. 3505.181, 3505.182 and 3505.183 was enacted by House Bill 3, effective May 2, 2006. In order to vote a provisional ballot in Ohio, R.C. 3505.181(B)(2) requires a voter to execute a written affirmation "before an election official at the polling place." The voter is also required to provide identification to the election official, who records the type of identification provided by a voter, or if the voter does not have

identification, to execute an affirmation as provided in R.C. 3505.181(B)(6). If a voter declines to execute an affirmation, the election official must record the voter's name and note on the provisional ballot envelope that the voter declined to execute an affirmation. The election official must then transmit the provisional ballot back to the board of elections under R.C. 3505.181(B)(3) and (6). Thus, R.C. 3505.181(B) places a duty on poll workers to interact with voters and to oversee the completion and execution of the provisional ballot affirmation.

The form of the provisional ballot affirmation is provided in R.C. 3505.182. Pursuant to R.C. 3501.05(G), and consistent with R.C. 3505.182, this office adopted Secretary of State Form 12-B ("SOS Form 12-B") as the official Provisional Ballot Affirmation form. Pursuant to R.C. 3501.05(C) and 3501.27(B), and to aid Ohio's county boards of elections in training poll workers regarding the proper administration of elections, this office developed the Poll Worker Manual and Poll Worker Quick Reference Guide. Directive 2008-27 requires Ohio's county boards of elections to train poll workers using the Poll Worker Manual and Poll Worker Quick Reference Guide. Additionally, the directive requires boards of elections to provide a copy of these documents to all poll workers and to provide three copies of the Poll Worker Quick Reference Guide to each precinct for use on Election Day.

Clear direction is provided in SOS Form 12-B, the Poll Worker Manual (on page 40) and the Poll Worker Quick Reference Guide (in the "Processing Provisional Ballots Voted" section) that poll workers must review provisional ballot affirmation forms to ensure that the affirmation is properly completed by voters before the poll worker executes the election official verification section of SOS Form 12-B. This requirement is consistent with the express authority of poll workers to administer elections at precincts (R.C. 3501.33 and 3501.22), the statutory mandate that poll workers be trained regarding election laws and procedures (R.C. 3501.27), and the duty of poll workers to interact with voters and to oversee the completion of the provisional ballot affirmation (R.C. 3505.181(B)).

Unfortunately, the Franklin County Board of Elections does not use SOS Form 12-B as its provisional ballot affirmation form. Instead, the board has adopted a form that is inconsistent with SOS Form 12-B. It is unclear whether the Franklin County Board of Elections instructed its poll workers using the Poll Worker Manual and Poll Worker Quick Reference Guide as required by Directive 2008-27. However, Franklin County's poll workers still must comply with Ohio election law and the directives, advisories, rules and instructions for the conduct of elections promulgated by the Secretary of State. Moreover, the failure of a poll worker to do so constitutes poll worker error. Under Directive 2008-103 and the October 27, 2008 federal court order no provisional ballot may be rejected by a board of elections for reasons that are attributable to poll worker error.

Directive 2008-101, which interprets R.C. 3505.181, 3505.182 and 3505.183, provides the steps that boards of elections must follow in reviewing and processing provisional ballots. Section VI.D.1. of the directive provides the necessary information for a provisional ballot to be counted:

Ballots Eligible to be Counted

Where **ALL** of the following apply, board staff responsible for processing provisional ballots must recommend to the board that a provisional ballot shall count, and a board of elections shall count the provisional ballot:

- a) The individual named on the affirmation is properly registered to vote;
- b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;
- c) The individual provided the following:
 - (1) His or her name and signature as the person who cast the provisional ballot;
 - (2) A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
 - (3) A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;or
 - (4) His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by an election official;or
 - (5) A completed affirmation under R.C. 3505.18(B)(4) (SOS Form 10-T).
- d) If applicable, the individual has provided additional information to the board of elections as may be required, i.e. because he or she falls into one of the four categories of provisional voters who **must** provide additional information to the board of elections during the ten days after the day of an election, and discussed in more detail below; and
- e) If applicable, the individual has been afforded a hearing conducted under R.C. 3503.24, which has resulted in the inclusion of the provisional voter's name in the official registration list.

Finally, the determination of the validity of provisional ballots must also be viewed in the context of the Supreme Court of Ohio's reminders in *State ex rel. Myles v. Brunner*, 2008-Ohio-

5097, ¶ 22, that election officials “must avoid unduly technical interpretations [of election law] that impede the public policy favoring free, competitive elections,” and in *State ex rel. Colvin v. Brunner*, 2008-Ohio-5041, ¶ 62, that election laws are to be “liberally construed in favor of the right to vote according to one’s belief or free choice, for that right is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state.”

1. Provisional ballot affirmations containing the voter’s signature but not the printed name

The first category of provisional ballots with affirmation form irregularities includes ballots that contain the signature of the voter but not the printed name of the voter. The motion provides that these provisional ballots may be counted if the board’s staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.1 or 4. (above), the provisional ballot must be counted if the voter’s name and signature were recorded by the voter or if the printed name was recorded by the voter or a poll worker. If the voter did not provide his or her written name, the poll worker was required to review the form and to instruct the voter to record it. Moreover, if the board had used SOS Form 12-B, the poll worker would have been required to print the voter’s name in the election official verification. Thus, the failure to record the name of the voter was poll worker error, and poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a signature in the affirmation form but not a printed name must be counted.

2. Provisional ballot affirmations containing the voter’s printed name but no signature

The second category of provisional ballots with affirmation form irregularities includes ballots that contain the printed name of the voter but not the signature of the voter. The motion provides that these provisional ballots may be counted if the board’s staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.4. (above), the provisional ballot must be counted if the voter’s name was recorded by the voter or by a poll worker. Section VII of Directive 2008-101 specifically states that “the statutory scheme contemplates at least one circumstance where a provisional voter does not have to provide a signature” for the provisional ballot to be counted.

There is specific statutory authority for this conclusion in Directive 2008-101. The last sentence of R.C. 3505.182 provides that “[i]f the individual declines to execute the affirmation, an appropriate local election official shall comply with division (B)(6) of section 3505.181 of the Revised Code.” Under R.C. 3505.181(B)(6):

If, at the time that an individual casts a provisional ballot, the individual *** declines to execute such an affirmation *** the appropriate local election official shall record *** the fact that the individual declined to execute such an

affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section.

R.C. 3505.181(B)(3) provides

An election official at the polling place shall transmit the ballot cast by the individual, the voter information contained in the written affirmation executed by the individual under division (B)(2) of this section, or the individual's name if the individual declines to execute such an affirmation to an appropriate local election official for verification under division (B)(4) of this section.

R.C. 3505.181(B)(4) states "If the appropriate local election official to whom the ballot or voter or address information is transmitted under division (B)(3) of this section **determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election.**"

Finally, R.C. 3505.183 specifically provides:

(B)(1) To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. **If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; otherwise,** the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

- (a) The individual's name and signature;
- (b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted;
- (c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

Thus, even in the absence of poll worker error, there is clear statutory authority for counting the provisional ballot of a voter that includes the printed name of the voter on the provisional ballot

affirmation but no signature. Moreover, poll workers are required by R.C. 3505.181(B)(6) to record that a voter has declined to execute an affirmation and the failure of a poll worker to do so constitutes poll worker error. Poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing the printed name of a voter in the affirmation form but no signature must be counted.

3. Provisional ballot affirmations containing the voter's printed name and signature but not in the spaces designated on Franklin County's provisional ballot affirmation form

The third category of provisional ballots with affirmation form irregularities includes ballots that contain both the printed name and signature of the voter but not in the place designated for the name and signature in column one of Franklin County's provisional ballot affirmation form. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day, if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.1 or 4. (above), the provisional ballot must be counted if the voter's name and signature were recorded by the voter in the affirmation. As stated above, poll workers are required to review the affirmation to ensure that it is properly completed before completing the election official verification. If the poll workers had complied with this duty the voter would have been instructed by the poll workers to complete the affirmation properly and would likely have corrected their envelope by placing their name and signature on the appropriate lines, since these voters had already once provided their name and signature. Thus, the failure of poll workers to review the provisional ballot affirmation and instruct the voter to complete the form properly clearly was poll worker error, and poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a name and signature in the affirmation form but not in the spaces designated on the form for name and signature must be counted.

4. Provisional ballot affirmations containing the voter's printed name and signature but no verification of identification on the provisional ballot affirmation form

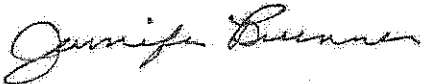
The fourth category of provisional ballots with affirmation form irregularities includes ballots that contain both the printed name and signature of the voter but lack verification on the face of the affirmation that the voter provided identification to the poll worker. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.2.g. and R.C. 3505.183(B)(4)(a)(vii), a provisional ballot may not be counted if the voter did not provide identification, the last four digits of the voter's social security number or execute an affirmation stating that the person does not have identification or a social security number.

Under SOS Form 12-B and Franklin County's provisional ballot affirmation form, the poll worker was required to mark whether the voter failed or refused to provide identification. The absence of the designation whether the voter failed or refused to provide identification is poll worker error, and consistent with my duty to interpret the election laws liberally in favor of upholding the right to vote, it is appropriate to assume that the voter provided identification. Poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a name and signature in the affirmation form but no verification on the face of the affirmation that the voter provided identification to the poll worker must be counted.

Decision

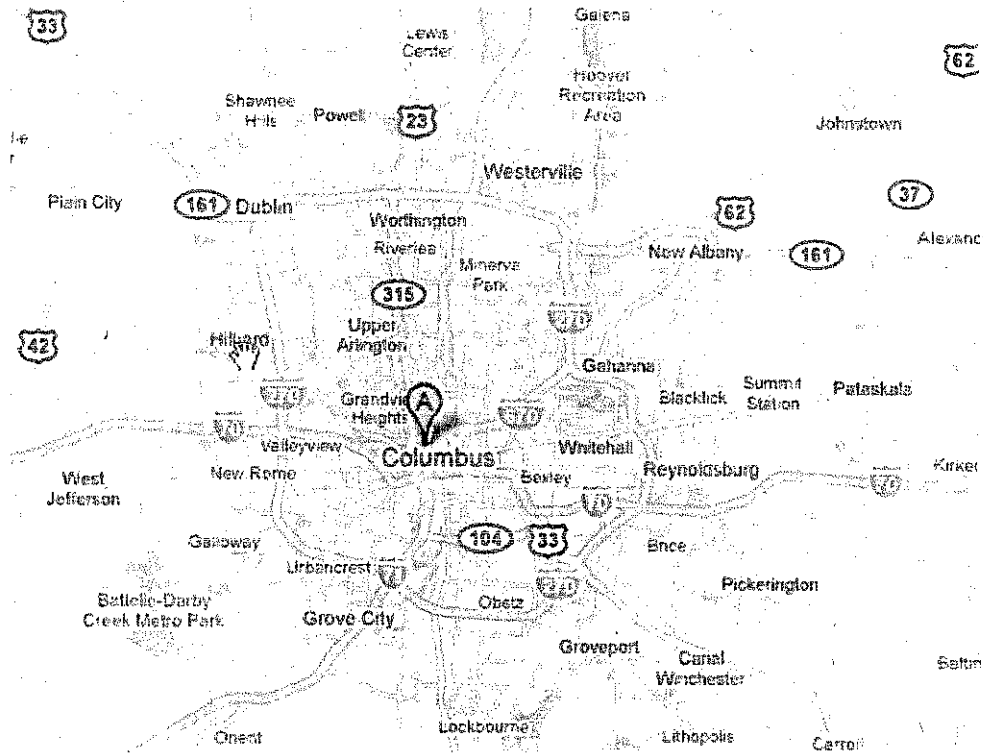
For the foregoing reasons, I vote with Board Members Anthony and Marinello **in favor** of all four motions to deem valid and process the four categories of provisional ballots described above. Accordingly, those motions pass. The Franklin County Board of Elections is hereby instructed to begin processing provisional ballots in accordance with this tie vote decision unless there is an order in the federal case of *State ex rel. Skaggs v. Brunner*, Case No. 2:08 cv 1077 (S.D. Ohio) to the contrary.

Sincerely,

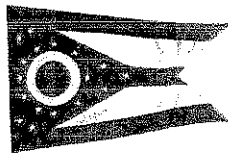


Jennifer Brunner

Precinct Election Officials Training Manual



Franklin County
Board of Elections
November 2008



280 East Broad Street
Columbus, OH 43215-4572
614/462-3100

<http://vote.franklincountyohio.gov>

EXHIBIT

F

RELATOR APP-40

Provisional Voters

COMPLETING THE PROVISIONAL BALLOT APPLICATION ENVELOPE

All required information **MUST** be completed for the Provisional Ballot to count

STEP 1: VOTER INFORMATION

1. VOTER prints his/her name (required)

2. VOTER prints **CURRENT (required)** and **FORMER** Addresses, including Apartment #, if applicable, and Zip Code.

3. VOTER prints **FORMER NAME** (if applicable) if the former registration is under another name.

4. VOTER prints **DATE OF BIRTH (required)**

5. VOTER signs and provides date (required)

**STEP 1:
VOTER INFORMATION**

Each blank must be completed by the Voter.

I, _____,

(CLEARLY PRINT NAME-REQUIRED)

solemnly swear or affirm that I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in this election, for which I am casting this provisional ballot. I am casting this provisional ballot because my name should appear on the official precinct list, but does not, my address has changed, my name has changed, I requested an absentee ballot and/or I am listed in the official precinct list as having requested an absentee ballot or for another reason. I declare under penalty of election falsification I am a citizen of the United States, will have lived in this state for 30 days immediately preceding the next election, and I will be at least 18 years of age at the time of the general election.

CURRENT ADDRESS

HOUSE #/STREET _____ APT # _____

CITY _____ ZIP CODE: _____

FORMER ADDRESS:

STREET: _____

CITY: _____

COUNTY: _____

FORMER NAME (if applicable)

DATE OF BIRTH REQUIRED

_____/_____/_____ (MM/DD/YYYY)

I understand that if the information I provide on this provisional ballot application is not fully complete and correct, and/or if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, and/or if the board of elections determines that I have already voted in this election, this provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution. I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief.

X _____ Date _____

VOTER'S SIGNATURE (REQUIRED)

STEP 2: VOTER IDENTIFICATION

STEP 2:
VOTER IDENTIFICATION

To be completed by the Voter.

You must provide **one** of the following forms of identification documentation

NOTE: If you are unable to provide proof of identity or if your right to vote was challenged and you were unable to provide the necessary documentation to satisfy the challenge, you may provide proof of identity at the Board of Elections within 10 days after the election.

The last four digits of my Social Security Number are: _____

My Ohio Driver's License Number OR State Identification Card Number is: _____

Other form of photo identification displaying name and current address:
(specify kind of ID) _____

Other (copy of current utility bill, bank statement; government check, paycheck, or other government document that shows my name and current address)
(specify kind of ID) _____

I have no identification documentation and I have NO Social Security Number (complete Identification Affirmation below if applicable)

IDENTIFICATION AFFIRMATION
ONLY FOR VOTERS WHO CHECKED "NO ID" ABOVE
RC 3505.18(A)(4)

I, _____
(CLEARLY PRINT NAME)

declare under penalty of election falsification that I cannot provide a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing my name and current address, nor the last four digits of my social security number because I have no social security number and further declare that I am the person named on this application and that I understand I may cast a provisional ballot.

X _____ Date _____
VOTER'S SIGNATURE

1. VOTER checks which form of Identification he/she is providing to the Paper Ballot Judge. (required, unless no form of ID)

2. Only if a voter does not have any form of valid ID and does not have a Social Security number, will that voter will sign and date the Identification Affirmation.

If the voter refuses to complete the Identification Affirmation Statement, continue on to Step 3 of the application.

STEP 3: POLL WORKER STATEMENT

The POLL WORKER records the type of identification presented by the voter.

Use the form the Roster Judge filled out at the Roster table and sent with the voter so you know if the voter is a **PROVISIONAL VOTER OR IS VOTING A PAPER BALLOT BY CHOICE.**

PROVISIONAL = YELLOW

DISABLED PROVISIONAL VOTING ON MACHINE = BLUE

- 2. PAPER BALLOT JUDGE fills in Voting Precinct and signs

**STEP 3:
POLL WORKER STATEMENT**

To be completed by a Poll Worker

The preceding Provisional Ballot Application was subscribed and affirmed before me. The following is true concerning the reason necessary to issue a provisional ballot:

- Voter's name is not in the Signature Poll Book
- Voter has a LEGAL NAME CHANGE
- Voter has an ADDRESS CHANGE
- Number '2' is to the left of the signature box (undeliverable 60-day election notice)
- Number '3' is to the left of the signature box (undeliverable registration acknowledgement notice)
- Number '4' is to the left of the signature box (voter requested an ABSENTEE BALLOT)
- " ATTORNEY IN FACT" is printed in signature box. Check here and also check the specific reason for a provisional ballot
- The Voter is unable to provide valid identification
- The Voter refuses to provide valid identification
- Name or address on the Valid Non Photo identification does NOT match the Signature Poll Book
- Voter's name does not match the Signature Poll Book (Signature Poll Book has current legal name but ID does NOT have current legal name)

Precinct/MPL: _____

(Check Location Street Guide for this)

X _____
POLL WORKER'S SIGNATURE

STEP 4: VOTE!

- 2) PAPER BALLOT JUDGE records the **BALLOT STYLE** for the voter (**From the Precinct Street/Road Guide**)
- 3) PAPER BALLOT JUDGE locates all pages of the correct paper ballot with the voter's correct ballot style.
- 4) A 5-digit, red number should be **PREPRINTED** on ALL **YELLOW** and **BLUE** Provisional Application envelopes.
- 5) PAPER BALLOT JUDGE gives the voter the completed **YELLOW** application envelope and the **PAPER** ballot.

Voter goes to privacy booth to vote paper ballot. Voter puts all pages of ballot in the application envelope and deposits it into the slot of the Paper Ballot Station Transport Box.

- 6) Paper Ballot Judge gives Provisional voter the two Provisional handouts (Judge Carr notice and Provisional Voter Rights).

NOTE: A disabled provisional voter can vote provisionally ON THE VOTING MACHINE (BLUE envelope, two handouts, but NO paper ballot)

DISABLED VOTER completes the **BLUE** Provisional Ballot Application Envelope. The voter takes the envelope to the machine judge and votes on the machine.

NOTE: A disabled provisional voter seals the Provisional Application Envelope and deposits it in the sealed ballot box, after voting on the voting machine.

- 7) ALL Paper Ballot Envelopes with voted paper ballots in them (Yellow and TAN) remain in the sealed ballot box ALL DAY. The Blue Envelopes for disabled voters also remain in the sealed ballot box (remember, this voter votes on the machine so the envelope does NOT contain a voted ballot).

**STEP 4:
VOTE!**

After completing this application in its entirety:

1. POLL WORKER: Using the Precinct Street Listing, find the provisional voter's current address and write the ballot style number for the voter's address here:

(Ballot Style Number)
2. POLL WORKER: Locate a provisional ballot packet with the same ballot style number that you wrote above.

→ 58672
3. POLL WORKER; Give the provisional voter the provisional ballot packet and the Provisional Application envelope, and direct the provisional voter to a provisional booth (**UNLESS THE VOTER IS DISABLED AND VOTING ON THE MACHINE**) to mark the **PAPER** ballot.
4. VOTER: Open the provisional ballot packet and carefully read all of the instructions. Once you have completed voting your provisional ballot, fold it in half and place it inside this envelope. Seal the envelope and deposit the envelope in the sealed ballot box.

THIS SPACE FOR OFFICE USE ONLY

PROVISIONAL VOTER

I

VOTER DOES NOT SIGN SIGNATURE POLL BOOK; DO NOT ISSUE ATV SLIP

Driver's License
State ID

NAME DOES
NOT MATCH

Signature Poll Book
(Name is Different)

PROVISIONAL
Complete Steps 1-4
on application

Other Forms of
Valid Identification

NAME / ADDRESS
DOES NOT
MATCH

Signature Poll Book
(Name and Address)

PROVISIONAL
Complete Steps 1-4
on Application

Does Not Have
Identification

PROVISIONAL
Complete Steps 1-4
on Application
Voter signs affirmation

Declines to Show or
Does Not Bring ID

PROVISIONAL
Complete Steps 1-4
on Application
Can record last 4 digits
of SSN

Declines to Sign
Affirmation Statement

PROVISIONAL
Complete Steps 1-4
on Application

VOTER DOES NOT SIGN SIGNATURE POLL BOOK; DO NOT ISSUE ATV SLIP

ATTENTION PRESIDING JUDGES/VOTING LOCATION MANAGERS: YOU MUST POST THIS NOTICE AT BOTH THE MAIN ENTRANCE TO THE BUILDING WHERE YOUR VOTING LOCATION IS, AS WELL AS AT YOUR POLLING STATION WITH THE OTHER PUBLIC LEGAL NOTICES:

NOTICE

Your vote, including a vote cast by provisional ballot, will count **ONLY if you are voting in the precinct in which you reside.**

If you do not know whether your correct precinct is located at this polling place, please ask a poll worker now for assistance.

THIS NOTICE MUST BE PROVIDED TO EACH PROVISIONAL VOTER

NOTICE OF AVAILABILITY OF PROVISIONAL VOTER HOTLINE

To learn if your provisional ballot was counted in the November 4th election, please call the PROVISIONAL VOTER HOTLINE AT 866-OHIO-VOTE from December 19 to December 31.

You may also inquire whether you need to provide further proof of identity for your vote to count at the Franklin County Board of Elections.

You may provide additional proof of identity until Friday, November 14, 2008, to your county board of elections.

Hours to call you Board of elections:
from 8:00 a.m. – 5:00 p.m. Monday through Friday at 614-462-3100

PROVIDING PROOF OF IDENTITY WITHIN 10 DAYS AFTER THE ELECTION

If you cast a provisional ballot because: 1) you were unable or declined to provide proof of identity, or 2) your right to vote was challenged at the polling place, you may provide required proof of identity within 10 days after the election.

A provisional ballot needs additional verification before it can be counted. A board of elections makes that determination within 10 days after an election. Many times, a voter who has voted a provisional ballot may appear in person at the board of elections during the 10-day period after the election and complete certain steps that will allow his or her ballot to be counted. Here are different situations and what you can do:

1. **You have ID but didn't have it with you at the polls and couldn't supply the last 4 digits of your social security number. The board of elections needs ONE of these items below showing your name and address within 10 days after the election for your vote to count:**
 - a. Current and valid Ohio driver's license (address need not be current on this form of ID),
 - b. Photo identification card issued by the State of Ohio (address need not be current on this form of ID) or the United States government,
 - c. Military ID showing your name and current address,
 - d. Utility bill issued and dated within one year of the election,
 - e. Bank statement issued and dated within one year of the election,
 - f. Paycheck issued and dated within one year of the election,
 - g. Government check issued and dated within one year of the election,
 - h. Another government document dated within one year of the election (e.g. letters; bills for taxes; hunting, fishing and marine equipment operator's licenses; license renewal notices and other notices; court papers; grade reports, transcripts, etc.) "Government office" includes any local (including county, city, township and village governments), state or federal (United States) government office, branch, agency, commission, public college or university or public community college, whether or not in Ohio. The law specifically provides that you cannot use as a "government document" a notice mailed by a board of elections.

If you do not have or wish to provide any of the above forms of ID, you may supply the board of elections with the last four digits of your social security number.
2. **You had ID but didn't want to provide it and didn't want to provide the last 4 digits of your social security number AND you didn't want to execute an affirmation statement. The board of elections needs ONE of the items listed in 1. above showing your name and address. This item must be supplied in person to the board of elections within 10 days after the election for your vote to count.**
3. **You did not have any required form of ID and do not have a social security number AND didn't want to execute an affirmation statement. The board of elections needs ONE of the items listed in 1. above showing your name and address. This item must be supplied in person to the board of elections within 10 days after the election for your vote to count OR you will need to appear at the board of elections and execute the written affirmation statement.**
4. **You were challenged at the polling place by someone who claimed you were not eligible to vote. The board of elections will tell you what identification or other documentation you need to resolve the challenge. (See Revised Code section 3505.20.) You may call the board and supply the needed information in person within 10 days after the election.**

**FRANKLIN COUNTY BOARD OF ELECTIONS
GENERAL ELECTION, NOVEMBER 4, 2008**

Provisional Voter Transfer Form

1. Together, the Paper Ballot Judge and Voter use the County Street Guide to determine the correct voting location.
2. In the alphabetic list, first find the voter's street and then house number in the correct range (odd or even or ALL).
3. To the far right of the street row is the voter's precinct where he/she **should vote**.
4. Toward the end of the County Street Guide (green pages), in alphabetic order, find the voter's precinct identified in #3. Write the voter's correct polling place and address below on this form.
5. **Give the voter this form to take to the correct voting precinct.**

Correct Precinct and name of Voting Location where voter **should be** voting.

Address of the Voting Location where you are sending this voter.

By signing below, both the Paper Ballot Judge and Voter agree the information above is correct.

Voter Name (print)

Paper Ballot Judge Name (print)

Voter Signature

Paper Ballot Judge Signature

Voter Name (print)

Paper Ballot Judge Name (print)

Voter Signature

Paper Ballot Judge Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators.

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

Case No. 2:08 cv 1077

Judge Marbley

Magistrate Judge King

AFFIDAVIT OF TIMOTHY A. WARD

STATE OF OHIO)
) ss:
COUNTY OF MADISON)

Timothy A. Ward, being duly sworn, states from personal knowledge that:

1. I am Director of the Board of Elections of Madison County, Ohio. I have held this position since February 2007.

2. The Madison County Board of Elections met on Wednesday, November 19, 2008 to, among other items, review provisional ballots cast in the November 4, 2008 general election. Based upon Secretary of State Directive 2008-101, our Board rejected a provisional ballot on which the voter had failed to provide a signature on the affirmation even though the poll worker had signed the back of the provisional ballot envelope. As such, this provisional ballot will not be counted.

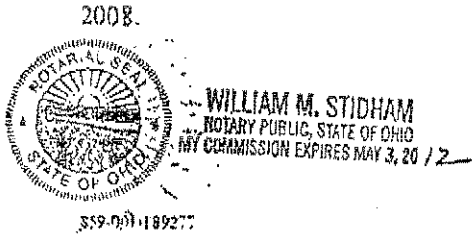
EXHIBIT

2

Further Affiant sayeth naught

Timothy A. Ward
Timothy A. Ward

Sworn to before me and subscribed in my presence this 20th day of November.



William M. Stidham
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel. :
DANA SKAGGS, et al., :
 : Case No. 2:08 cv 1077
Relators, :
 : Judge Marbley
vs. :
 : Magistrate Judge King
JENNIFER L. BRUNNER :
SECRETARY OF THE STATE OF :
OHIO, et al., :
 :
 :
Respondents. :

AFFIDAVIT OF ROBERT W. PARROTT

STATE OF OHIO)
) ss:
COUNTY OF UNION)

Robert W. Parrott, being duly sworn, states from personal knowledge that:

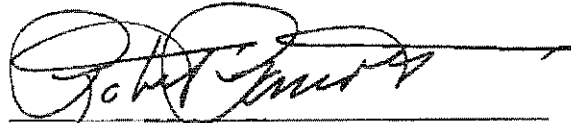
1. I am the Chairman of the Board of Elections of Union County, Ohio. I have held positions with the Board of Elections for approximately 19 years.

2. The Union County Board of Elections met on Thursday, November 20, 2008 to, among other items, review provisional ballots cast in the November 4, 2008 general election. Based upon Secretary of State Directive 2008-101, our Board rejected a provisional ballot on which the voter failed to provide either their name or signature on the affirmation even though the poll worker had signed the back of the provisional ballot envelope. As such, this provisional ballot will not be counted.

EXHIBIT

3

Further Affiant sayeth naught.

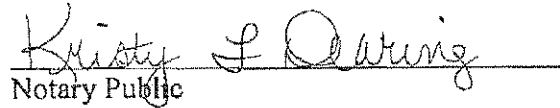


Robert W. Parrott

Sworn to before me and subscribed in my presence this 20th day of November,



KRISTY L. DEARING
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES SEPTEMBER 7, 2013


Notary Public

859-001:189276

AFFIDAVIT OF JANET BRENNEMAN

STATE OF OHIO,

COUNTY OF DELAWARE

Now comes the Affiant, Janet Brenneman, and after being duly cautioned and sworn does hereby state as follows:

I am the Director of the Delaware County, Ohio Board of Elections (BOE) and have been employed continuously with Delaware County BOE since 1989.

My present duties as Director, as identified under Ohio Revised Code §3501.13, and further specified by the Ohio Secretary of State under the authority of Revised Code §3501.05, include overseeing the proper methods of conducting elections in Delaware County.

In performing my duties I have become familiar with the procedures for casting (voting) a Provisional Ballot. Under the Help America Vote Act, ("HAVA"), a person is permitted to cast a provisional ballot if the person's name does not appear on the list of eligible voters for the polling place or if an election official asserts that the person is not eligible to vote. In Directive 2004-55, the Ohio Secretary of State instructed that a signed affirmation statement was necessary for a provisional ballot to be counted. My office has uniformly followed this directive.

Under the Secretary of State guidelines, there are additional requirements for casting a provisional ballot. These are stated in the Poll Worker Manual and Poll Worker Quick Reference Guide issued by the Secretary of State. These guidelines are also explained to poll workers in the Delaware County Poll Worker Manual, pp. 34-36

EXHIBIT

4

(Exhibit 1), which is given to every poll worker in Delaware County. Requirements are also printed on the Identification Envelope which is presented to individuals casting a Provisional Ballot.

Every poll worker in Delaware County completes a training class of three hours conducted by BOE staff, at which the poll worker manual is distributed.

Upon identifying a voter who must cast a Provisional Ballot, Poll Workers in Delaware County are trained to explain to the voter what a Provisional Ballot is and the requirements for casting a Provisional Ballot.

In the 2008 General Election, the poll workers were instructed that the provisional ID envelope is to be completed and signed by the voter. (see Exhibit 1) After the voter has completed and signed the ballot envelope, the poll worker also signs and dates the provisional ballot envelope on the front and back, and marks what form of identification was provided by the voter.

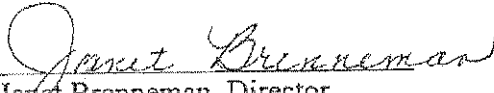
Provisional ballots without voter signatures received by the BOE have, in past elections been compiled into a list by BOE staff and presented to the board, which has voted not to count those ballots. Provisional ballots with incomplete information were treated in the same manner by both staff and the board.

In the 2008 general election, the BOE received 2,014 provisional ballot envelopes. The provisional ballots are still in the process of being tabulated, but they include both provisional ballot envelopes not signed by the voter, provisional ballot envelopes not completed by the voter, and provisional ballot envelopes that lack both

Affidavit of Janet Brenneman, Page three of three

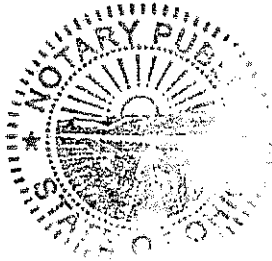
signature and complete information. These ballots will be tabulated and presented to the board as in past elections.

FURTHER AFFIANT SAYETH NAUGHT.


Janet Brenneman, Director
Delaware County Board of Elections

SWORN TO AND SUBSCRIBED IN MY PRESENCE ON THIS, THE
20th DAY OF NOVEMBER, 2008.


NOTARY PUBLIC



TERRI L. SCOTT
Notary Public, State of Ohio
My Commission Expires
2-09-2010

Ex 1

PROCEDURES FOR PROVISIONAL BALLOTS

All provisional voters vote a paper ballot, unless they meet the ADA requirements.

New Provisional Packet contains the following

- Provisional instruction page
- Registration Card
- Affirmation Statement
- 12-B Yellow Envelope

Note: **HOTLINE NOTICE** is now packed separately as a group on the top of the provisional packets in the black bag.

POSITION # 1

Check the precinct street list – make sure the provisional voter is in the correct precinct.

- If the voter's name is in the signature book but has moved within the precinct, they are a regular voter if they meet all other requirements. Have the voter complete a registration card to change the record at the Board office.
- If the voter's name is not in the signature book, you must determine if he/she is authorized to vote in the precinct. Pay attention to the details of the street list. If the address is listed on the precinct street list, and the voter's name does not appear in the signature book, vote a provisional ballot. You must provide the voter with an Authority to Vote slip to be handed to the person handling paper/provisional voters in your precinct.
- If the address is not in your precinct, check the county map to determine the correct polling location and precinct or call the Board of Elections to determine where to send the voter.

PROVISIONAL VOTER will complete

- the 12-B Yellow Envelope on the front
- White Registration Form
- Affirmation Statement if they have no ID or refuse to give ID

POLL WORKER

- Write the Ballot Stub Number and School District on the upper right hand corner of the provisional envelope
- Sign the front of the provisional envelope, turn over and complete top portion of the back
- Mark the form of ID shown
- Sign the back
- Check that the registration card has been completed and signed
- Affirmation Statement is completed (This is not needed if they show ID)

Give the voter the Optical Scan Ballot, leave Stub A on the ballot (Stub must still be attached to the ballot when placed in the Provisional envelope.)

- Write voter's name and address on the blank pages at the back of the Signature Book.
- Voter will sign the Signature Book provisional page (next to poll worker entry).

POSITION # 2

1. Log voter's name (last name first) and address on the Provisional pages of the poll list notebook
2. Enter Optical Scan Ballot Stub Number under the "Authority to Vote No." column
3. Place the provisional voter's completed voter registration card and affirmation form in the envelope provided in your black bag (not the yellow envelope). Be sure this envelope is returned to the Board of Elections office in the black canvas bag on Election Night.
4. Add the voter's name at the bottom of the posting list.

POLL WORKER

- **VOTER** is directed to the Votomatic voting booth.
- **VOTER** marks and folds the ballot, with the stub attached, and places it in the 12-B Provisional Envelope (Do not put completed forms in the yellow provisional envelope.)
- **VOTER** seals yellow envelope and returns it to the registration table. Yellow envelope is put into the metal ballot box.
- **GIVE THE VOTER THE PROVISIONAL HOTLINE FORM AND THE "I VOTED TODAY" STICKER**

Presiding Judge is responsible for returning used and unused provisional ballots and completed forms to the Board Office on election night.

SPECIAL PROVISIONAL VOTER CIRCUMSTANCES

MOVED FROM ANOTHER STATE/VOTER'S NAME DOES NOT APPEAR ON SIGNATURE LIST

- CHECK THE STREET LIST to make sure they are in the correct precinct.
- Have the voter complete a white registration card.
- They are not eligible to vote if they have not been registered to vote 30 days prior to Election Day in the State of Ohio. (October 6, 2008)
- If they give you a hassle, allow them to vote a Provisional ballot and we will check it out at the Board of Elections office.

ABSENTEE VOTER

- Anyone whose name is on the signature list and marked with "ABSENTEE" must also vote a **PROVISIONAL BALLOT** at the polls. If the voter brings the absentee ballot with them to the polls and they have not voted the ballot, **YOU STILL DO NOT TAKE THE BALLOT.**
- Have voter complete the Provisional Ballot Envelope.
- All blanks must be completed.

- Fill in name and address on the **blank lines** of the signature book and have them sign.
- Add name on the yellow pages in the Poll List Notebook.
- Have the voter move on to position 2 judge.

NO IDENTIFICATION

- A voter who cannot provide identification or refuses must complete 3 forms—the provisional form, the registration card and the **AFFIRMATION OF VOTER WHO CANNOT PROVIDE IDENTIFICATION** form (this does not need to be completed if the voter fills in their Driver's License number or the last 4 digits of their Social Security number).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|--|---|-----------------------|
| STATE <i>ex rel.</i> SKAGGS, <i>et al.</i> | : | |
| | : | Case No. C2:08CV-1077 |
| Relators, | : | |
| | : | |
| v. | : | Judge Marbley |
| | : | |
| JENNIFER L. BRUNNER | : | |
| SECRETARY OF STATE OF OHIO, | : | |
| <i>et al.</i> , | : | |
| | : | |
| Respondents. | : | |
| | : | |

| | | |
|-----------------------|---|----|
| State of Ohio | } | |
| | } | ss |
| Franklin County, Ohio | } | |

AFFIDAVIT

1. I, Ron O'Brien, being first duly sworn, depose and say that I am the duly elected Prosecuting Attorney for Franklin County, Ohio and in that capacity am statutory counsel to the Franklin County Board of Elections but also prosecute the voter fraud and other election law crimes that are primarily contained in Title 35, Ohio Revised Code.

2. During the 2008 general election cycle, numerous election fraud cases were investigated by my office. On November 14, 2008 the Board of Elections voted to refer six additional cases to this office. Such cases have ranged from registration and voting by non-residents, voting twice, voting by non-citizens, and multiple registrations that were forged, fictitious or fraudulent.

| |
|--------------------------------|
| <p>EXHIBIT</p> <p>5</p> |
|--------------------------------|

3. The Grand Jury returned a twenty-four count election fraud indictment on November 18, 2008 in one of those cases.


4. Ohio statutes require that a voter's signature be contained on a provisional ballot, and that requirement is necessary for two other election law reasons.

5. First, Board of Elections personnel must have a voter's signature to compare with the known signature of a voter that is already on file at the Board, either on registration forms, absentee ballot requests, or the poll book for another precinct. That comparison cannot be done when a signature does not appear on the provisional ballot.

6. Second, all important election documents provided for by Ohio law must be signed under penalty of election falsification, and statutes require a warning above or near the signature. Those laws are to deter election fraud, but more importantly are essential to the prosecution of a voter fraud case. Fraudulent provisional ballots will not be able to effectively be prosecuted if a signature of the purported voter does not exist. A poll worker likely will not be able to visually identify a provisional voter due to the numerous persons met and dealt with on election day. Absent other methods of identification and a confession, any provisional voter fraud cannot effectively be prosecuted.

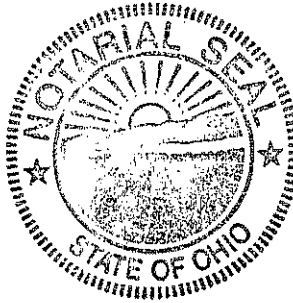
7. The indictment referred to above was possible only because of expert opinion by a handwriting expert that the offender signed the fraudulent registration and absentee ballot forms. Without a signature on a provisional ballot form the ability to prosecute fraudulent forms, voters, or schemes would be virtually impossible.

Further affiant says naught.

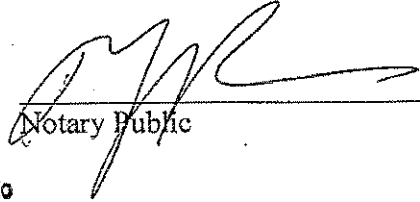

Ron O'Brien 18 Nov 08

Sworn to and subscribed before me in my presence this 10th day of November,

2008.



PATRICK J. PICCININNI
ATTORNEY AT LAW
Notary Public -State of Ohio
My Commission Does Not
Expire RC SEC. 147.03



Notary Public