

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

THE NORTHEAST OHIO COALITION FOR
THE HOMELESS, *et al.*,

Plaintiffs,

OHIO DEMOCRATIC PARTY,

Intervenor-Plaintiff

v.

JENNIFER BRUNNER, OHIO SECRETARY
OF STATE

Defendant.

Case No. C2-06-896

Judge Algenon L. Marbley

CONSOLIDATED

OHIO REPUBLICAN PARTY, *et al.*,

Plaintiffs,

v.

JENNIFER BRUNNER, OHIO SECRETARY
OF STATE

Defendant.

Case No. C2-08-913

Judge Algenon L. Marbley

STATE EX REL. SKAGGS *et al.*,

Plaintiffs,

Case No. C2-08-1077

Judge Algenon L. Marbley

v.

JENNIFER BRUNNER, OHIO SECRETARY
OF STATE, *et al.*

Defendants.

**MEMORANDUM OF OHIO DEMOCRATIC PARTY
IN OPPOSITION TO PLAINTIFFS' (RELATORS')
MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

The Ohio Democratic Party (ODP) hereby joins in and adopts the Memorandum of Defendant Jennifer Brunner, Ohio Secretary of State, in Opposition to Plaintiffs' Motion for Temporary Restraining Order (Doc. 13). ODP also submits the following additional argument for the Court's consideration.

NO STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

The starting point for evaluating whether Plaintiffs have shown a likelihood of success on the merits as a condition for issuing a temporary restraining order is to look to the relief requested in their Complaint and then consider whether the law supports it. Plaintiffs' prayer for relief asks for orders from the Court

A. . . . compelling Respondent Secretary of State to correct her erroneous interpretation of R. C. 3501.183(B)(1)(a) and compelling her to advise the county Boards of Elections that any provisional ballot must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted.

B. . . . compelling Respondent Secretary of State to correct her erroneous interpretation of R. C. 3501.181 and compelling her to advise the county Boards of Elections that any provisional voter must provide the identification verification information mandated by R. C. 3501.181 on the

Provisional Ballot Application or, alternatively complete the identification affirmation provided in R. C. 3501.18(A)(4), and if the voter fails to do so, her provisional ballot is not eligible to be counted.

So what are these “erroneous interpretations”?

NAME AND SIGNATURE ISSUE

On October 27, 2008, prior to the November 4, 2008 election, the Court issued an Order in *Northeast Ohio Coalition for the Homeless, et al v. Jennifer Brunner*, Case No. C2-06-896 (Doc. 143), in which the Court stated, “In addition, no provisional ballot cast by an eligible elector should be rejected because of a poll worker’s failure to comply with duties mandated by R. C. 3505.181, which governs the procedure for casting a provisional ballot.” In the Order, the Court ordered the Secretary of State to instruct the County boards of Elections that “provisional ballots may not be rejected for reasons that are attributable to a poll worker’s error, including a poll worker’s failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R. C. 3505.181.” In compliance with the Court’s Order, the Secretary issued Directive 2008-103 the following day, which was also before the election.¹

R. C. 3505.181(B) provides that “An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows: . . . (2) The individual 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 . . .**” (Emphasis added). The exact content of the affirmation is set forth in R. C. 3505.182.

That section begins by providing that “Each individual who casts a provisional ballot under

¹ Plaintiffs repeatedly comment, no doubt in order to imply political considerations by the Secretary of State, that the position of the Secretary before the election changed after the election. However, they are able to make this assertion only because they have chosen to ignore the Court’s October 27, 2008 Order and Directive 2008-103 and the effect that these have upon the issues presented in their case.

section 3505.181 of the Revised Code shall execute a written affirmation. The form of the written affirmation shall be printed upon the face of the provisional ballot envelope and shall be **substantially** as follows.” (Emphasis added). After setting forth the information to be provided by the voter, information to be completed by the polling place official, including “The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this . . . day of . . . (Month), . . . (Year).”

Following the election, questions arose at the Franklin County Board of Elections regarding whether a provisional ballot affirmation that did not include the name and signature of the voter could be counted. The Secretary of State’s office concluded that if it is otherwise possible from the board’s records to establish the identity and eligibility of the voter to vote in the election, then the absence on the provisional ballot affirmation of the written name or of the signature of the voter is not fatal. This advice is entirely consistent with the Court’s October 27th Order that provisional ballots may not be rejected for any reason attributable to poll worker error. The missing name or signature of the voter may reasonably be attributable at least in part to poll worker error. R. C. 3505.181 requires the affirmation statement to be completed before a polling place official and R. C. 3505.182 requires the polling place official to sign a statement that the voter affirmation was subscribed and affirmed before the official. These duties can not be completely fulfilled if the voter has not written his name on and signed the affirmation. The advice is also supported by the Ohio election law rule of substantial compliance and is in accord with the recent affirmation by the Ohio Supreme Court in *State ex rel Myles v. Brunner*, 2008 Ohio 5097 (October 2, 2008) that “Absolute compliance with every technicality should not be required in order to constitute substantial compliance, unless such complete and absolute

conformance to each technical requirement of the printed form serves a public interest and a public purpose.”

There is a second statutory basis for counting a provisional ballot where the voter did not sign the affirmation statement. The last sentence of R. C. 3505.182 provides that “If 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. That division provides that the official shall record the fact that the voter declined to execute the affirmation and include that information with the transmission of the ballot under division (B)(3), which in turn provides for transmitting the ballot to the appropriate election official for verification under division (B)(4), which provides that “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.” In accord is R.C. 3505.183(B)(1), which provides:

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.

It is clear from the above that the law does not require a signature on an affirmation in order to be able to count the ballot if the voter has declined to so sign. The difference between

declining to complete the affirmation and forgetting to complete it can be debated, but it would indeed be unacceptable from an equal protection stand point to hold that ballots without signatures for one group of voters are eligible to be counted, but not for the other group of voters. The fact that the law allows for provisional ballots be to be counted if the voter declines to execute the affidavit, but not be counted when the voter has not specifically declined would be an absurd result. The non-requirement of a signature by those who decline also demonstrates that there is no overriding public purpose or interest served by the signature.

VOTER ID ISSUE

The other issue raised by Plaintiffs alleges that there will be a tie vote of the Board of Elections to count provisional ballots where voters have not provided one of the forms of ID or the last four digits of their social security numbers. Apparently, the feared tie vote did not materialize and so there is no basis for this claim. It also should be noted there was in fact no evidence presented with the Motion for Temporary Restraining Order for a basis as to how the Secretary of State would break the tie if one had actually materialized.

CONCLUSION

For all of the above reasons, Plaintiff Ohio Democratic Party, requests that the Motion for a Temporary Restraining Order be denied.

Respectfully submitted,

s/ Donald J. McTigue

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 16th day of November, 2008.

/s Mark A. McGinnis

Mark A. McGinnis (OH 0076275)

Attorney at Law