

In The Supreme Court Of Ohio

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

Relator,

v.

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

Respondent.

:
:
: Case No. 08-2206
:
:
: Original Action in Mandamus
:
:
: Expedited Election Matter
: Under S. Ct. Prac. R. X. § 9
:
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RESPONDENT OHIO SECRETARY OF STATE JENNIFER BRUNNER'S
SUBMISSION OF EVIDENCE

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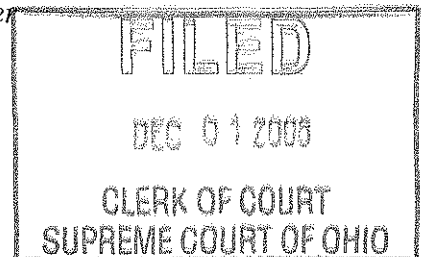
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SUBMISSION OF EVIDENCE

Pursuant to S. Ct. Prac. R. X, Section 7, Respondent Secretary of State Jennifer Brunner submits the following evidence:

- A. Affidavit of Patricia Wolfe
- B. Affidavit of Jacqueline J. Rothsuh
- C. Directive 2008-77
- D. Directive 2008-101
- E. District Court Order dated October 24, 2008
- F. District Court Order dated October 27, 2008
- G. Directive 2008-103
- H. Tie Vote Decision

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio




Richard N. Coglianese (0066830)
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Attorneys for Respondent

4. A requirement of my position is knowledge of how county boards of elections administer provisional voting.
5. Ohio's current provisional voting process in R.C. 3505.181, 3505.182 and 3505.183 was enacted in House Bill 3, effective May 2, 2006.
6. Chapter 35 of the Ohio Revised Code places numerous duties on election judges (often referred to as poll workers) in administering elections in precincts in Ohio.
7. The Ohio county boards of elections are required by R.C. 3501.27 and Directive 2008-77 to train election judges on administering elections, including provisional voting, at the precinct.
8. To aid Ohio's county boards of elections in training poll workers, the Secretary of State has developed pursuant to her statutory authority under R.C. 3501.05(C) and 3501.27(B) the Poll Worker Manual and Poll Worker Quick Reference Guide.
9. In Directive 2008-27, the Secretary of State required Ohio's county boards of elections to train poll workers using the Secretary of State's 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.
10. The Poll Worker Manual addresses provisional voting on pages 37 – 40 (attached hereto as Exhibit A). The Poll Worker Manual specifically requires poll workers to "check to make sure the voter's [provisional ballot affirmation] envelope is completed" and that "[t]he completed [provisional ballot affirmation] envelope should be double-checked by a second poll worker" on page 40, items 4 and 6.
11. The Poll Worker Quick Reference Guide also addresses provisional voting. The section addressing "Processing Provisional Ballots Voted" (attached hereto as Exhibit B) specifically requires poll workers to "check to make sure the voter's [provisional ballot affirmation] envelope is completed" and that "[t]he completed [provisional ballot affirmation] envelope should be double-checked by a second poll worker" in items 4 and 6.
12. Another requirement of my position is to draft forms prescribed in Chapter 35 of the Ohio Revised Code in consultation with the legal staff and pursuant to the Secretary of State's statutory authority under R.C. 3501.05(G).
13. I drafted Secretary of State Form 12-B (attached hereto as Exhibit C) to serve as the provisional ballot affirmation for use by persons voting provisionally as provided in R.C. 3505.182.

14. Secretary of State Form 12-B requires poll workers to review and witness the affirmation statement completed by a person voting provisionally before the poll worker completes the election official verification statement.
15. The Secretary of State's interpretation of the Revised Code requiring poll workers to review the provisional ballot affirmation completed by a voter prior to executing the election official verification statement has been consistent since the current provisional ballot voting process was enacted in 2006.

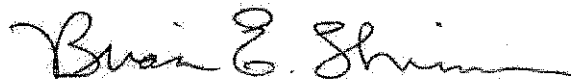
Further Affiant sayeth naught.


Patricia A. Wolfe, Elections Administrator

Sworn to before me, a notary public in and for said county and state, and subscribed in my presence, by the above-named Patricia A. Wolfe, who acknowledged that she did sign the foregoing instrument and that the same is hers and its free act and deed, this 18th day of November 2008, in the City of Columbus, County of Franklin, State of Ohio, in testimony whereof, I set my hand and official seal.



BRIAN E. SHINN
ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.



Brian E. Shinn, Attorney at Law
Notary Public - State of Ohio
My commission has no expiration. R.C.147.03.

POLL WORKER MANUAL

Exhibit A



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

PROVISIONAL BALLOTS

Provisional ballots are paper ballots that are used by voters whose identities cannot be vouched for by required identification (see Voter ID Requirements section) or in situations where there may be a question about a voter's eligibility to vote on Election Day in your precinct. The law provides specific situations where a provisional ballot should be issued. If you determine a voter is in the wrong precinct but the voter insists on voting in your precinct, you may still allow the voter to cast a provisional ballot, which will not be verified for eligibility until after Election Day.

Reasons under Ohio Law for Issuing a Provisional Ballot

- If the voter's name does not appear in the Signature Poll Book or the Supplemental Voter List, and the voter is in the right precinct, he or she **MUST** vote a provisional ballot.
- If the voter's name does not appear in the Signature Poll Book or the Supplemental Voter List, and the voter is in the wrong precinct and demands to vote, he or she **MUST** vote a provisional ballot.
- If the voter has **changed his or her name** and did not update his or her registration by the deadline for that Election Day, the voter **MUST** vote a provisional ballot.
- If the voter has **moved into your precinct** and did not update his or her registration with the board of elections, he or she **MUST** vote a provisional ballot. You must verify this by locating the voter's new address in your Voting Location Guide. The voter's current address will not be in the Signature Poll Book or the Supplemental Voter List. The voter should fill out a change of address form at the polling location which you will submit to the board of elections with all materials after the close of the polls.
- If a **message stating** the voter requested an absentee ballot or voted an earlier provisional ballot **appears** in the Signature Poll Book, he or she

MUST vote a provisional ballot, unless you are otherwise directed by the board of elections.

- If the Signature Poll Book shows that the Notice of Election card that was sent to the voter by the board of elections 60 days before the election was **returned as undeliverable**, a message will appear in the voter's signature box in the Signature Poll Book. If the voter **does not show** a valid proof of identity, the voter **MUST** vote a provisional ballot.
- If the voter is **NOT ABLE** to provide a valid ID at the check-in table, the voter **MUST** vote a provisional ballot.
- If the voter **REFUSES** to provide a valid ID at the check-in table, the voter **MUST** vote a provisional ballot.
- If the voter's signature, in the opinion of the poll worker, **does not match** the signature in the Signature Poll Book, the voter **MUST** vote a provisional ballot.
- If the voter's **eligibility** to cast a ballot has been **challenged (see challenging voter section)** by the poll workers and the voter refuses to make the required statement (Form 10-U), the voter **MUST** vote a **provisional ballot**.
- **Before providing a voter with a provisional ballot, make sure that the voter's address is in your precinct. If not, please direct the voter to the correct precinct, providing information on location and a telephone number the voter can call for help. There should be available cards, from the Secretary of State, with a number for the voter to call for help if needed on Election Day. If no cards are available, please have them call the following phone number: (877) 868-3874.**

Provisional Ballot Requirements Relating to Last 4 Digits of a Voter's Social Security Number When No Acceptable ID is Provided

If a voter does not have one of the seven forms of acceptable voter ID, you must ask him or her for the last four digits of his or her Social Security number. The voter does not have to show the poll worker her or her actual Social Security card.

- **ASKING FOR LAST FOUR DIGITS OF SSN:** Election officials must ask a provisional voter for the last four digits of his or her Social Security number.

- **VOTER HAS NO SSN:** A voter who does not have a Social Security number must cast a provisional ballot after completing a Form 10-T stating that he or she does not have a Social Security number or any type of identification. The poll worker must give the voter a written notice that the ballot will not be counted unless the voter appears at the county board of elections within 10 days of the election and provides the required identification.
- **VOTER HAS SSN BUT CANNOT OR WILL NOT PROVIDE:** If the voter cannot or will not provide the last four digits of his or her Social Security number, the election officials must ask the voter if they have a Social Security number. The poll worker must give the voter a written notice that the ballot will not be counted unless the voter appears at the county board of elections within 10 days of the election and provides the required identification.
- **VOTER HAS SSN AND PROVIDES LAST FOUR DIGITS:** A voter who has a Social Security number and provides the last four digits, he or she may vote a provisional ballot. The voter may appear at the board of elections within 10 days after the election to provide a valid form of identification but is not required to for the ballot to count.
- **VOTER REFUSES TO COMPLETE ANY FORMS:** Even if a voter refuses to complete the appropriate Affirmation Statement and Form 10-T noted above, he or she may cast a provisional ballot. However, the poll worker must record the voter's name and shall include that information with the ballot when transmitting it to the county board of election. The poll worker must give the voter a written notice that the ballot will not be counted unless the voter appears at the county board of elections within 10 days of the election and provides the required identification.

Processing Provisional Ballots Voted

1. The poll worker must indicate on the Provisional Ballot Envelope (Form 12-B) why the voter is casting a provisional ballot and include all of the following that apply:
 - The type of ID provided, if any;
 - **The last four digits of that voter's Social Security number, if provided;**
 - The fact that the Affirmation Statement (Form 10-T) was executed, if applicable; or

- That the voter refused to execute the Affirmation Statement (Form 10-T).
- 2. The envelope and Provisional Voter Hotline Notice must be given to the voter;
- 3. The voter should be asked to complete the statement on the envelope;
- 4. The poll worker must check to make sure the voter's envelope is completed;
- 5. The poll worker must completely fill out the back of the envelope and sign the front of the envelope;
- 6. The completed envelope should be double-checked by a second poll worker; and
- 7. Poll workers must provide to every provisional voter a copy of the Provisional Voter Hotline Notice at the time the voter casts his or her provisional ballot.

Recording Provisional Ballots Voted (Provisional Voting Summary)

1. The "Provisional Voters Only" section in the back of Poll Book must be completed and signed;
2. The poll worker must record the stub number(s) when the ballot is given to the voter;
3. The voter must complete the ballot and seal the ballot in the envelope; and
4. The voted provisional ballot in the sealed envelope must be placed by the voter or presiding judge in the provisional voting bag or box.

Exhibit B

FOR USE AT PRECINCT POLLING LOCATIONS

Poll Worker *Quick* Reference Guide

For November 2008



OHIO SECRETARY OF STATE

(Place County Information Sticker Here)

The information in this guide is the basic information all poll workers need to know about Ohio law and voting. Your board of elections may provide you with more instructions that are specific to your county. The Ohio Secretary of State's office has provided to boards a more detailed Poll Worker Training Manual that should help answer questions you may have after reading this Quick Reference Guide. You may also contact your local board of elections office with questions.

SOS 0541-P (09/08)

PRESIDING JUDGE DUTIES

POLL WORKER DUTIES AND CONDUCT

ARRANGING THE
POLLING LOCATION

SECURITY

OBSERVERS

ELECTIONEERING

MEDIA & POLLSTERS

PROCESSING VOTERS

CHALLENGING VOTERS

BALLOT ERRORS

WRITE-IN CANDIDATES

TIME LIMITS

PROVISIONAL BALLOTS

VOTER IDENTIFICATION REQUIREMENTS

CLOSING POLLS

TRANSPORTATION OF BALLOTS

If a voter does not have one of the seven forms of acceptable voter ID, you must ask him or her for the last four digits of his or her Social Security number. The voter does not have to show the poll worker her or her actual Social Security card.

- **ASKING FOR LAST FOUR DIGITS OF SSN:** Election officials must ask a provisional voter for the last four digits of his or her Social Security number.
- **VOTER HAS NO SSN:** A voter who does not have a Social Security number must cast a provisional ballot after completing a Form 10-T stating that he or she does not have a Social Security number or any type of identification. The poll worker must give the voter a written notice that the ballot will not be counted unless the voter appears at the county board of elections within ten days of the election and provides the required identification.
- **VOTER HAS SSN BUT CANNOT OR WILL NOT PROVIDE:** If the voter cannot or will not provide the last four digits of his or her Social Security number, the election officials must ask the voter if they have a Social Security number. The poll worker must give the voter a written notice that the ballot will not be counted unless the voter appears at the county board of elections within ten days of the election and provides the required identification.
- **VOTER HAS SSN AND PROVIDES LAST FOUR DIGITS:** A voter who has a Social Security number and provides the last four digits, he or she may vote a provisional ballot. The voter may appear at the board of elections within ten days after the election to provide a valid form of identification but is not required to for the ballot to count.
- **VOTER REFUSES TO COMPLETE ANY FORMS:** Even if a voter refuses to complete the appropriate Affirmation Statement and Form 10-T noted above, he or she may cast a provisional ballot. However, the poll worker must record the voter's name and shall include that information with the ballot when transmitting it to the county board of election. The poll worker must give the voter a written notice that the ballot will not be counted unless the voter appears at the county board of elections within ten days of the election and provides the required identification.

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 - The type of ID provided, if any;
 - **The last four digits of that voter's Social Security number, if provided;**
 - The fact that the Affirmation Statement (Form 10-T) was executed, if applicable or
 - That the voter refused to execute the Affirmation Statement (Form 10-T).
2. The envelope and Provisional Voter Hotline Notice must be given to the voter;
3. The voter should be asked to complete the statement on the envelope;
4. The poll worker must check to make sure the voter's envelope is completed;
5. The poll worker must completely fill out the back of the envelope and sign the front of the envelope;
6. The completed envelope should be double-checked by a second poll worker; and
7. Poll workers must provide to every provisional voter a copy of the Provisional Vote Hotline Notice at the time the voter casts his or her provisional ballot.

Recording Provisional Ballots Voted (Provisional Voting Summary)

1. The "Provisional Voters Only" section in the back of Poll Book must be completed and signed;
2. The poll worker must record the stub number(s) when the ballot is given to the voter;
3. The voter must complete the ballot and seals the ballot in the envelope; and
4. The voted provisional ballot in the sealed envelope must be placed by the voter or presiding judge in the provisional voting bag or box.

PROVISIONAL BALLOTS

VOTER IDENTIFICATION REQUIREMENTS

**IDENTIFICATION ENVELOPE
PROVISIONAL BALLOT AFFIRMATION**

Exhibit C

R.C. 3503.16, 3505.181, 3505.182

I, _____, solemnly swear or affirm that I am a citizen of the
(Printed name of voter)

United States, I will be at least 18 years of age at the time of the general election, I have lived in this state for 30 days immediately preceding this election, I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot.

Current Address

Former Address (if applicable)

Street Address

Street Address

City/Zip

City/Zip

County

County

Mailing Address if other than above

If name change, please complete line below:

Birthdate: _____

Former Name _____

Former Signature: _____

Voluntary information: To assist the board of elections in contacting you in a timely manner, if necessary:

Your daytime phone number _____

Your email address _____

Form of identification provided:

- Ohio drivers license (provide #): _____
(located left hand side, middle of card beginning with two letters)
- Other valid photo identification (specify): _____
- Last four digits of my social security number are: _____
- Other _____
- None _____

Reason for voting provisional ballot:

- My name does not appear on the official precinct list
- Change of address
- Change of name
- Requested, but did not receive absent voter's ballot
- Other _____

I declare, if the election is a primary election, by requesting a partisan ballot of the _____ Party, I hereby state that I desire to be affiliated with and support that party.

I understand that, if the above provided information is not fully completed and correct, 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, or if the board of elections determines that I have already voted in this election, my 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 _____
Signature of Voter

Date

X _____
Signature of Witnessing Election Official

Date

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE
THE ELECTION OFFICIAL VERIFICATION STATEMENT MUST BE COMPLETED ON BACK.

ELECTION OFFICIAL VERIFICATION STATEMENT

The Provisional Ballot Affirmation of _____ was subscribed
(Print Voter's Name)

and affirmed before me this _____ day of _____
(Month) (Year)

1. If applicable, the election official must check the following true statement concerning additional information needed to determine the eligibility of the provisional voter:

- The provisional voter is required to provide additional information to the board of elections
- An application or challenge hearing regarding this voter has been postponed until after the election

2. The election official must check the following true statement concerning identification provided by the provisional voter, if any.

- Current and valid photo identification, or military identification.
- Current valid photo identification other than a driver's license or state ID card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.
- Copy of current utility bill, bank statement, government check, or other government document with the voter's name and current address.
- Last four digits of social security number.
- Unable to provide any of the above acceptable ID but does have one of these items. Voter must provide one of the acceptable ID to the board of elections within ten days after the election.
- Unable to provide any of the above acceptable ID but does have one of these items and cannot provide the last four digits of the voter's social security number. Voter must provide one of the acceptable ID to the board of elections within ten days after the election.
- Does not have any acceptable ID, but has completed Form 10-T *Affirmation of Voter Unable to Provide Identification*.
- Does not have any acceptable ID and has declined to execute an affirmation. (Form 10-T)
- Voter declined to provide any acceptable ID, but does have one of those forms of ID. Voter must provide one of the acceptable ID to the board of elections within ten days after the election.

Name of Precinct _____

X

Signature of Election Official

law and the Directives and Advisories of the Secretary of State, including training them regarding provisional voting.

6. When I was Director of the Guernsey County Board of Elections, I trained poll workers to review the provisional ballot affirmation (Secretary of State Form 12-B) executed by a voter who was voting a provisional ballot before the poll worker completed the election official verification statement.
7. In reviewing a provisional ballot affirmation statement completed by a voter, poll workers were trained to instruct a voter to complete any missing information or to correct any mistakes on the provisional ballot affirmation.
8. The Secretary of State's interpretation of the Revised Code requiring poll workers to review the provisional ballot affirmation completed by a voter prior to executing the election official verification statement has been consistent since the current provisional ballot voting process was enacted in 2006.

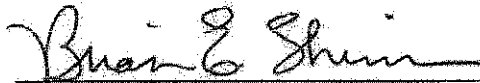
Further Affiant sayeth naught.


Jacqueline J. Rothschild, Assistant Elections Administrator

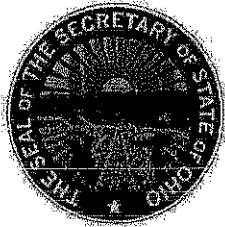
Sworn to before me, a notary public in and for said county and state, and subscribed in my presence, by the above-named Jacqueline J. Rothschild, who acknowledged that she did sign the foregoing instrument and that the same is hers and its free act and deed, this 18th day of November 2008, in the City of Columbus, County of Franklin, State of Ohio, in testimony whereof, I set my hand and official seal.



BRIAN E. SHINN
ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.



Brian E. Shinn, Attorney at Law
Notary Public - State of Ohio
My commission has no expiration. R.C.147.03.



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

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COLUMBUS, OHIO 43215 USA
TEL: 1-877-767-6446 FAX: 1-614-644-0649
WWW.SOS.STATE.OH.US

DIRECTIVE 2008-77

September 4, 2008

**TO: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS**

RE: Minimum requirements and best practices for poll worker training

Pursuant to R. C. 3501.27 (B), which provides that "[e]ach board shall establish a program as prescribed by the secretary of state for the instruction of election officers in the rules, procedures, and law relating to elections," the Secretary of State's office has prepared training materials and compiled best practices to assist boards of elections with their county poll worker training program.

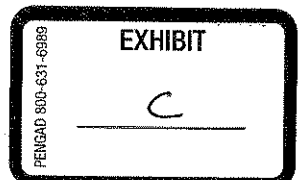
This directive is being issued to outline the minimum requirements and materials that are to be utilized by boards of elections in their poll worker training program. The boards of elections may use additional poll worker training materials prepared by or on behalf of the board to supplement these minimum requirements and best practices.

Training Requirements

Each county board of elections shall make a part of its poll worker training curriculum, at a minimum, the content of the materials or the materials themselves that have been specifically produced by the Ohio Secretary of State's office and that may currently be found on the Secretary of State's BOE Extranet, which include: the Poll Worker Manual of Instructions and Poll Worker Reminder Sheet. Also, at least one Poll Worker Quick Reference Guide (currently in printing, but available on the Secretary of State's BOE Extranet; hard copies will be furnished by the Secretary of State's office to boards of elections), must be given to each poll worker prior to Election Day, preferably during county poll worker training sessions. At least three Poll Worker Quick Reference Guides must be included in each precinct/polling place kit so that it is available to poll workers on Election Day in each precinct polling location. The purpose for this requirement is to make consistent the application of recent laws passed by the Ohio General Assembly and to minimize the probability of Election Day lawsuits contending disparate application of state laws by the various counties of the state.

In addition to the printed materials required to be utilized as part of a poll worker training program, the boards of elections have the option of using, at no charge to the boards, the Online Poll Worker Training Course that is located at ohioelectiontraining.com.

Also, all poll workers must be informed during a board of elections poll worker training program of the requirements outlined in the following directives, advisories and memoranda and any superseding or subsequently issued directives, advisories and memoranda, as they relate to poll workers and polling places:



- **Directive 2007-06** Voter Identification Requirements, Absentee Voting Requirements; Provisional Voting Requirements; and Verification of Parking at Polling Places for Persons with Disabilities (Handicapped Parking)
- **Directive 2007-35** Adoption of Secretary of State's Ethics Policy
- **Directive 2008-25** Polling Place Security and Voting Equipment, Supplies and/or Ballot Chain of Custody Form
- **Directive 2008-29** Rights and Limitations on election observers
- **Directive 2008-30** Ballot Shortages or Machine Failures
- **Directive 2008-59** Optical Scan Ballots for Voters in Counties Using DRE Voting Machines
- **Directive 2008-60** Procedures if a Court Order Causes Any Precinct Polling Place to Remain Open on Election Day Past 7:30 p.m.
- **Directive 2008-65** Precinct Polling Location Arrangement and Diagram for Counties Using DRES
- **Directive 2008-68** Voting Machine Delivery Requirements
- **Advisory 2008-03** Polling Place Conduct; Media Access to Polling Locations; and Exit Polling Within 100 Feet of a Polling Place
- **Advisory 2008-20** Bi-partisan transport of ballots
- **Memorandum dated 2/25/08** Clarification of utility bills as voter identification for college students
- **Memorandum dated 2/26/2008** Special Powers and Responsibilities of Sheriffs on Election Day – March 4, 2008

The Poll Worker Manual of Instructions covers many of these topics; however, boards of elections may wish to supplement what is contained in the manual to provide information more specific to a county or polling location.

In the event that the above-listed directives, advisories and/or memoranda are replaced, the board shall use the most current one in effect for its poll worker training program, plus any others it may deem appropriate to assist poll workers in understanding their responsibilities. A list of all current directives, advisories and memoranda is available on the Secretary of State's Web site at www.sos.state.oh.us/SOS/elections/Directives.aspx.

Contingency Planning

Boards of elections shall develop a contingency plan for poll workers and ensure poll workers are familiar with it prior to Election Day. The plan shall be in effect for all election precincts in the county and cover what to do in the event of:

- a voting machine failure
- a shortage of paper ballots
- the absence of a poll worker
- the early departure of a poll worker due to an emergency

Boards of elections must also develop a contingency plan for each polling location and train poll workers on what to do in the event of an emergency or disaster.

Contacting Poll Workers in the Event of Court Orders

Boards of elections must develop a method to contact poll workers at polling locations in case a court order is issued ordering polls to remain open after the 7:30 p.m. closing time, as outlined in **Directive 2008-60**. Poll workers must be trained in what to do if the polling location must remain open for extended voting. Information on this subject is contained in both the Poll

Worker Manual of Instructions and the Poll Worker Quick Reference Guide. Boards should review the instructions on this subject in both publications and determine if any additional information is needed in training their poll workers.

If you have any questions concerning this directive, please contact an elections administrator at 614-466-2585 or via e-mail.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Brunner".

Jennifer Brunner



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.

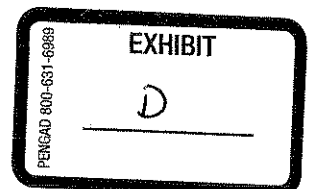
This directive provides guidelines for Ohio's boards of elections in processing and counting provisional ballots. This includes guidelines on determining the validity of provisional ballots under Ohio law and, generally, the timeframes during which boards may process provisional ballots to determine 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.



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 aforestated 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.

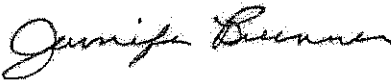
VIII. OBSERVERS

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

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

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

Plaintiffs,

vs.

Case No. C2-06-896
Judge Algenon L. Marbley
Magistrate Judge Terence P. Kemp

JENNIFER BRUNNER,
in her official capacity
as Secretary of State of Ohio,

Defendant.

ORDER

This matter is before the Court for consideration of Plaintiffs' Motion for Preliminary Injunction. During the pendency of this Motion, the Ohio Secretary of State issued Directive 2008-101. The Plaintiffs and the Secretary of State agree that the Directive resolves the issues in dispute as to Plaintiffs' Motion for Preliminary Injunction, except issues relating to (1) the effect of poll-worker error; and (2) the validity of addresses for person without permanent residence. By agreement of the Plaintiffs and the Secretary of State, the Court **ADOPTS** and annexes hereafter Directive 2008-101 as an Order of this Court.

By further agreement of the parties, that portion of Plaintiffs' Motion for Preliminary Injunction related to questions as to the constitutionality of various Ohio statutes is withdrawn without prejudice to refileing.

IT IS SO ORDERED.

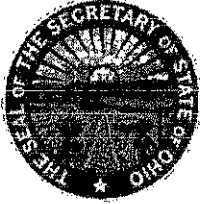
10-24-2008
DATED


EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

PENGAD 800-631-6889

EXHIBIT

E



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 EAST BROAD STREET, 16TH FLOOR
COLUMBUS, OHIO 43215 USA
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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

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- 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.

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

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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.

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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 aforestated 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.

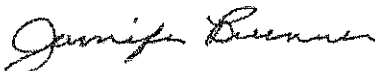
VIII. OBSERVERS

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

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

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

Plaintiffs,

**CASE NO. C2-06-896
JUDGE ALGENON L. MARBLEY
MAGISTRATE JUDGE TERENCE P. KEMP**

v.

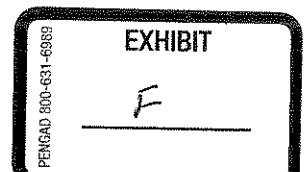
**JENNIFER BRUNNER,
in her official capacity as
Secretary of State of Ohio,**

Defendant.

ORDER

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction. The Court has carefully considered the parties' submissions in support of and opposing the preliminary injunction, the oral arguments by counsel, evidence presented by the parties, and the relevant statutory and case law.

On October 24, 2008, this Court issued an Order adopting the Secretary of State's Directive 2008-101. The Court's October 24, 2008 Order, however, did not resolve the parties' disputes regarding the effect of poll worker error and the validity of addresses for persons without permanent addresses. This Order is based upon the agreement of the Plaintiffs and the Secretary of State and addresses these two issues.



Poll worker Error

Consistent with this Court's October 24, 2008 Order and Directive 2008-101, an eligible voter casting a provisional ballot should not be disenfranchised because of poll worker error in processing a provisional ballot.

The expedited discovery taken by Plaintiffs has revealed that some county boards of elections do not currently count a provisional ballot if the poll worker, for unknown reasons, has not signed the provisional ballot. The failure of a poll worker to sign a provisional ballot, standing alone, does not constitute a valid reason to reject a provisional ballot.

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.

Accordingly, the Secretary of State is hereby **ORDERED** to instruct the County Boards of Election that provisional ballots may not be rejected for reasons that are attributable to poll worker 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.


Addresses for Persons Without Permanent Addresses

Similarly, some discovery in this case indicated that at least one county might reject provisional ballots if a person uses their actual residence location if that location is not a building. Pursuant to Advisory 2008-25 and R.C. 3503.02(I), if a person does not have a fixed place of habitation, the shelter or other place where the person intends to return shall be deemed his residence for purposes of voting.

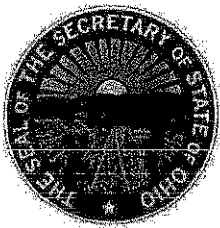
Accordingly, the Secretary of State is hereby **ORDERED** to instruct the County Boards of Elections that provisional ballots may not be rejected for failing to list a building address on the provisional ballot envelope if the voter resides at a location that does not have an address.

IT IS SO ORDERED.

10-27-2008
DATED



EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE



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
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DIRECTIVE 2008-103 Issued Pursuant to Court Order

October 28, 2008

To: All County Boards of Elections

Re: Directive Issued Pursuant to Court Order

On October 24, 2008, the United States District Court for the Southern District of Ohio issued an order in the case *The Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. C2-06-896. On October 27, 2008, the court issued a second order. Pursuant to these federal court orders, the boards of elections are hereby directed as follows:

October 24, 2008 Order:

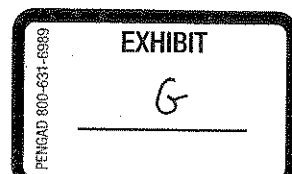
The federal court adopted and annexed as a court order Directive 2008-101, Guidelines for Determining the Validity of Provisional Ballots. This means that **the instructions governing the processing and counting of provisional ballots as described in Directive 2008-101 now carry the weight of a federal court order.**

October 27, 2008 Order:

1. **Poll worker error.** The court observed that "failure of a poll worker to sign a provisional ballot, standing alone, does not constitute a valid reason to reject a provisional ballot." The court further observed that "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."

Therefore, pursuant to the court order, I hereby instruct the boards of elections **that provisional ballots may not be rejected for reasons that are attributable to poll worker 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.

2. **Addresses for Persons Without Permanent Addresses.** The court observed that, pursuant to Advisory 2008-25 and R.C. 3503.02(I), if a person does not have a fixed place of habitation, the shelter or other place where the person intends to return shall be deemed his residence for purposes of voting. When voting provisionally such a person may state his or her actual residence location even if the actual residence location is not a building.




Therefore, pursuant to the court order, I hereby instruct the boards of elections that **provisional ballots may not be rejected for failing to list a building address on the provisional ballot envelope if the voter resides at a location that does not have an address.**

Copies of the two federal court orders are attached to this directive.

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



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 EAST BROAD STREET, 16TH FLOOR
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November 20, 2008

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

RE: The 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.

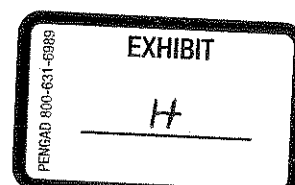
Background

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.

Franklin County Tie Votes on Provisional Ballots
November 20, 2008

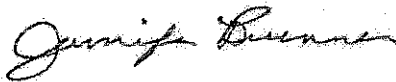
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Under SOS Form 12-B and Franklin County's provisional ballot affirmation form, the poll worker was required to mark whether the voter failed or refused to provide identification. The absence of the designation whether the voter failed or refused to 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

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

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

Plaintiffs,

CASE NO. C2-06-896

JUDGE ALGENON L. MARBLEY

MAGISTRATE JUDGE TERENCE P. KEMP

v.

**JENNIFER BRUNNER,
in her official capacity as
Secretary of State of Ohio,**

Defendant.

ORDER

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction. The Court has carefully considered the parties' submissions in support of and opposing the preliminary injunction, the oral arguments by counsel, evidence presented by the parties, and the relevant statutory and case law.

On October 24, 2008, this Court issued an Order adopting the Secretary of State's Directive 2008-101. The Court's October 24, 2008 Order, however, did not resolve the parties' disputes regarding the effect of poll worker error and the validity of addresses for persons without permanent addresses. This Order is based upon the agreement of the Plaintiffs and the Secretary of State and addresses these two issues.

Poll worker Error

Consistent with this Court's October 24, 2008 Order and Directive 2008-101, an eligible voter casting a provisional ballot should not be disenfranchised because of poll worker error in processing a provisional ballot.

The expedited discovery taken by Plaintiffs has revealed that some county boards of elections do not currently count a provisional ballot if the poll worker, for unknown reasons, has not signed the provisional ballot. The failure of a poll worker to sign a provisional ballot, standing alone, does not constitute a valid reason to reject a provisional ballot.

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.

Accordingly, the Secretary of State is hereby **ORDERED** to instruct the County Boards of Election that provisional ballots may not be rejected for reasons that are attributable to poll worker 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.


Addresses for Persons Without Permanent Addresses

Similarly, some discovery in this case indicated that at least one county might reject provisional ballots if a person uses their actual residence location if that location is not a building. Pursuant to Advisory 2008-25 and R.C. 3503.02(I), if a person does not have a fixed place of habitation, the shelter or other place where the person intends to return shall be deemed his residence for purposes of voting.

Accordingly, the Secretary of State is hereby **ORDERED** to instruct the County Boards of Elections that provisional ballots may not be rejected for failing to list a building address on the provisional ballot envelope if the voter resides at a location that does not have an address.

IT IS SO ORDERED.

10-27-2008
DATED

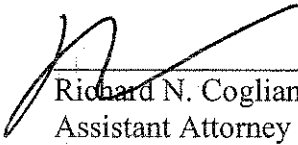


EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

Certificate of Service

This is to certify a copy of the foregoing was served upon the following by US Mail, postage prepaid, and by electronic mail on this 1st day of December, 2008

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