NO. 08-4585

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

State of Ohio ex rel., Dana Skaggs, et al.,

Relators-Appellants,

v.

Jennifer L. Brunner, Secretary of the State of Ohio, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, Eastern Division

BRIEF OF AMICUS CURIAE OHIO DEMOCRATIC PARTY

In Support of Appellee Ohio Secretary of State Jennifer Brunner

Seeking Affirmance of the District Court

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF INTEREST OF AMICUS CURIAE OHIO DEMOCRATIC PARTY

Amicus Curiae Ohio Democratic Party is a state political party organized under Chapter 3517 of the Ohio Rev. Code. It is recognized by the State of Ohio as an official political party with the right to nominate candidates for election to public office at the primary election and to have its nominees designated by their political party on the general election ballot. The Party's interest in this case is in ensuring uniform, lawful and fair criteria with respect to the determination of the eligibility of provisional ballots to be counted. The Party represents hundreds of thousands of electors throughout the State of Ohio, including many who have cast provisional ballots and whose ballots will be affected by a ruling in this case. The Ohio Democratic Party has filed a Motion for leave to file an *amicus* brief pursuant to F.R.A.P. 29.

ARGUMENT

I. OHIO LAW, AS ENACTED BY THE OHIO GENERAL ASSEMBLY, CLEARLY DOES NOT IN ALL CASES REQUIRE A PROVISIONAL VOTER TO SIGN THE AFFIRMATION STATEMENT IN ORDER FOR THE PROVISIONAL BALLOT TO BE COUNTED

The present case challenges as erroneous the advice of the Ohio Secretary of State that a provisional ballot that has the voter's signature, but not the voter's name written on the provisional voter affirmation, may be counted and her advice that a provisional ballot that has the voter's name, but not the voter's signature on

the provisional voter affirmation may be counted. The provisional voter affirmation form at issue is set forth in R.C. §3505.182 and is not to be confused with a second affirmation require by R.C. §3505.18(A)(4), required of provisional voters who have (own) no identification acceptable for voting or a social security number.

Much has been said about what a provisional voter is required to do to cast a provisional ballot and about the duties of polling place officials in the process of the casting of provisional ballots under R.C. §§3505.18, 3505.181 and 3505.182. However, Amicus Curiae respectfully submits that the District Court's decision may be affirmed in the first instance by a consideration of R.C. §3505.183(B)(1), which provides:

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

The above governs the counting of all provisional ballots cast under R.C. §3505.181(B)(2), which lists all of the circumstances that entitle a person to cast a provisional ballot. It is clear from the above that the law provides for provisional ballots to be counted both when the voter has "executed" the affirmation and when the voter has "declined" to execute the affirmation. Indeed, the above paragraph deals first with counting provisional ballots where the voter has declined to execute the affirmation and then after the word "otherwise" deals with counting provisional ballots where the individual has not declined to execute the affirmation.

It is important to observe that the Ohio law does not limit the reasons that a provisional voter may have for declining to execute the affirmation. There are none specified in the law and the law does not even require a provisional voter to offer a reason.[1] The voter who declines to execute the affirmation is also not required to sign a written declination or even check mark a box to so indicate. The law is completely silent as to how a voter declines to execute the affirmation or what constitutes declining to execute. Thus, the Ohio law neither requires these provisional voters to sign the affirmation, nor a declination statement. As a result, the statute, as written by the Ohio General Assembly, has a built in administrative

[1] Thus, the discussion at the TRO hearing regarding declining to execute the affirmation due to religious objections is not relevant.

problem for boards of elections: What constitutes declining to execute the affirmation and how to distinguish between provisional voters who have declined to execute the affirmation and those who neglected to execute all or part of the affirmation.

The statute provides that when a voter declines to execute the affirmation, the voter's name is to be written in the affirmation by either the voter or the polling place official. So it seems reasonable to conclude that if there is an affirmation with a provisional ballot that contains the name of the voter, but is not signed, that this falls into the category of provisional ballots where the voter declined to execute the affirmation. The presumption must be in favor of counting the ballot. Otherwise, election officials would be requiring more than he law requires given that the law does not require any specific indication of declination. The fact that other parts of the affirmation may be completed, such as the voter's address or the last four digits of the voter's social security number is still a non-execution of the affirmation and does resolve whether the voter chose to decline to fully execute the affirmation by not signing or neglected to do so.

It is true that there may be a difference between declining to complete the affirmation and neglecting to complete it, but the Ohio law provides no means for distinguishing between the two categories of provisional voters. The one element in common for both groups of voters is that they did not sign the affirmation, *i.e.*,

they did not execute or fully execute the affirmation. With no way of distinguishing between the two groups, it is not even possible for a board to separate the ballots into different groups.[2] Therefore, the only logical thing to do is to treat them the same based on their common characteristic, the absence of the voter's signature. The question then is whether to count all of them or not count all of them. NEOCH and ODP submit that the benefit of the doubt as to whether to count the ballots on the basis that the voters declined in some fashion to execute or fully execute the affirmation must be resolved in favor of counting the ballots. Otherwise, the result is that ballots where the voter in fact declined to execute the affirmation will not be counted in direct violation of R.C. §3505.183.

Next are the provisional ballots that contain a voter's signature in the affirmation, but not separately the voter's name. Assuming that the signature is legible, it clearly is also the voter's name and this fulfills the statutory requirement. R.C. §3505.183(B)(1) does not specifically or necessarily require that a provisional voter print and sign his or her name. It would serve no additional purpose to

[2] Instructions for poll workers provided by the Secretary of State and boards of elections call for poll workers to note when a voter declines to execute the provisional ballot affirmation, but there is no specific place for making such notation on the affirmation statement or anywhere else. It is also not a statutory requirement. And there is the possibility that a poll worker may neglect to make the notation. Finally, as will be discussed herein, the counting of one group of ballots with a non-executed affirmation and not counting another group of ballots for the very same reason raises serious equal protection concerns.

require a voter to write his or her name a second time if the signature is legible so that the identity of the voter may be determined.

It should also be noted that R.C. §3505.183(B)(1) provides that the board of elections is to examine all of its records to determine if a provisional voter is eligible to vote. Thus, only those provisional voters who are determined to be duly registered and qualified as to age, residence and citizenship will have their ballots counted in the election.

II. Ohio Revised Code Sections 3505.181 & 3505.182 Require Poll Officials To Verify That A Provisional Voter Has Fully Executed The Written Affirmation On The PBA Before Permitting That Voter To Cast A Provisional Ballot Unless The Voter Has Declined To Execute The Affirmation

Read separately and together, Ohio Revised Code Sections 3505.181 and 3505.182 require poll workers to confirm and verify that the provisional voter has both executed and signed the written affirmation on the PBA. Only after the poll worker verifies that the voter has executed and signed the affirmation can he or she lawfully permit the voter to cast a provisional ballot.

Specifically, R.C. §3505.181(B)(2) provides that if a voter is eligible to cast a provisional ballot, that "individual ***shall be permitted*** to cast a provisional ballot at that polling place ***upon the execution of a written affirmation*** by the individual before an election official at the polling place . . .." (Emphasis added).

Moreover, the content of the written affirmation is prescribed by R.C. §3505.182, which provides that it "shall be ***substantially*** as follows" and has a space for the voter's printed name and signature. (Emphasis added). The affirmation must be completed by the voter and signed and witnessed by a polling place official. Id. Specifically, the poll worker must sign a statement that reads: "The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this . . . day of . . . (Month), . . . (Year)." Id.

As explained above, the district court's October 27 Order in the NEOCH Case requires Boards of Elections to count provisional ballots that are deficient because of poll worker error. That Order has not been challenged by the parties. Accordingly, if the Court finds that the Disputed Ballots are in dispute because of poll worker error, then it should affirm the district court's judgment.

After questions arose at the Franklin County Board of Elections regarding whether a provisional ballot affirmation that did not include both the name and the signature of the voter could be counted, the Secretary of State's office advised the Board that if it is otherwise possible from the Board's records to establish the identity and eligibility of the voter to vote in the election, then the absence on the provisional ballot affirmation of the voter's printed name or signature is not fatal.

This guidance is required by the Court's October 27th Order that provisional ballots may not be rejected for any reason attributable to poll worker error. Except

in the circumstance where the voter expressly declined to sign the affirmation statement—in which event the ballot must be counted (see below)—a missing printed name or signature is reasonably attributable to poll worker error. As stated above, R.C. §3505.181 requires the voter to execute the affirmation statement before a poll worker ***before being permitted*** to cast a provisional ballot. R.C. §3505.182 further requires the poll worker to sign a statement that the voter affirmation was signed and affirmed before the official. If the voter failed to print or sign his name, then he did not "execute" or "subscribe" the affirmation before a poll worker.

In such an instance, the poll worker may have made two errors. The first error was to sign the required statement that verified that "[t]he Provisional Ballot Affirmation printed above was ***subscribed*** and affirmed before me …." R.C. §3505.182 (emphasis added). ***The word "subscribed" means "to sign one's name to a document."*** Webster's II New Revised Dictionary (Rev. Ed.). If the poll worker verified that the voter had signed his name—and he did not—then the poll worker clearly erred by signing the verification statement. Based on this error alone, all ballots that lack a voter's signature must be counted, because the poll worker clearly erred by signing the verification statement.

The second error made by the poll worker was to give the voter a provisional ballot. The statute provides that voters are only permitted to cast a provisional

ballot if they have executed the affirmation statement. R.C. §3505.181(B)(2) ("The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place …."). If the voter did not execute the written affirmation—which requires both a printed name and signature—then he or she ***should not have been permitted*** to cast a provisional ballot. This error pertains to all ballots that lack a printed name, signature, or both, and requires that those ballots be counted.

III. Ohio Law Does Not Require The Voter To Include Both His Printed Name And His Signature On The Written Affirmation For That Ballot To Be Counted

Relators-Appellants insist that Ohio law requires both a printed name and a signature on a PBA. However, R.C. §3505.183 provides only that the written affirmation must contain "the individual's name and signature" to be counted. That is not the same as "the individual's ***printed*** name and signature."

Although Relators-Appellants contend that the name and signature must be separately written, that requirement does not appear in the statute. The simple fact is that a person's signature is a written representation of his name. While it is true that some signatures are more legible than others, that does not prevent a person's signature from being his name. Moreover, although R.C. §3505.182 contemplates

that the voter will print and sign his name, that statute requires only that the affirmation completed by the voter be "substantially" the same as the statute.

For these reasons, Ohio law does not require that a provisional voter include both his printed name and his signature on the affirmation form for his or her vote to be counted, where he or she is otherwise determined to be registered and eligible to vote.

IV. Relators-Appellants' Claims Are Fatally Defective For Other Reasons That Provide Additional Grounds For The District Court's Decision

A. Standard of Review.

Relators-Appellants' claims are fatally flawed in at least three other ways, any one of which could have formed the basis of the District Court's decision. *See Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.").

B. The Ohio Law As Written Violates The First Amendment And Equal Protection Rights Of Provisional Voters

As shown in Section 1 of this brief, the Ohio law does not require that the PBA affirmation be executed if a voter chooses not to do so for any reason or no reason. The law then divides provisional voters into two groups. One group's votes will be counted and the other's will not. The state's stated reason for treating the two groups differently with respect to the most fundamental right of all is that one

group declined to execute the affirmation and the other group did not decline. Other than this, the two groups are identically situated. There is no constitutional legitimacy to the distinction drawn by the state.

By providing that any provisional voter without limitation may decline to execute the affirmation and still have their ballot counted, the state has forfeited any argument that the requirement of an executed affirmation by persons who neglected or forgot to execute it is necessary to protect the integrity of the election. There is no state interest in treating persons who neglected to execute the affirmation differently than those who neglected or forgot to do so. Penalizing voters for sake of penalizing them or because they were not knowledgeable about the process to actually decline to execute the affirmation are not valid state interests.

An option to decline to execute the affirmation may be proper if rewritten by the state legislature to serve some specific purpose, but currently there is no limitation in statute or rule. Maybe it was legislative oversight and maybe it was not. In either case, it is not the Court's role to rewrite the statute.

C. The Claimed Deficiencies Result From A Form Used Only In Franklin County

The district court also could have ruled the same way on the grounds that because the FCBE uses a different form than the form used in other counties—and

because a key difference in those forms likely led to the claimed deficiencies—a refusal to count these challenged ballots would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Defendant-Appellee Brunner has prescribed a provisional ballot affirmation form that is used by many counties. [Rec. Entry 38-3, Form 12-B.] On the second page of the Secretary of State's prescribed form, the poll worker is required to print the name of the voter. ***No such requirement is imposed by Franklin County's form***. [Rec. Entry 38-2.]

That omission in the Franklin County form eliminates a protection for voters who do not themselves print their name on the form. If that voter had cast his vote in a county that used the Secretary of State's Form 12-B, then the poll worker would have printed his name and that issue would have been eliminated. As a result, provisional voters in Franklin County are subjected to different and unequal standards—and are more likely to have their vote be discarded—then voters in other counties. The Equal Protection Clause, therefore, also requires that the Disputed Ballots be counted.

D. The District Court Could Have Reached The Same Result By Relying On The Voting Rights Act of 1964, 42 U.S.C. Section 1971

The Voting Rights Act of 1964, 42 U.S.C. § 1971(a), provides

(2) No person acting under color of law shall –
(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different

from the standards, practices, or procedures applied under such law or laws to other individuals in the same county, parish, or similar political subdivision who have been found by state officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election;

Given what has been set forth in the record and in the briefs in this case, it is abundantly clear that the different treatment of the two groups of provisional voters who did not execute an affirmation on the PBA violates paragraph (A) above of the Voting Rights Act of 1964. Further, the fact that the Ohio law allows any provisional voter to decline to execute the affirmation, demonstrates that the omission to do so by voters who did not *per se* decline to execute it is not a material omission. Thus, not counting the provisional ballots on this basis would violate paragraph (B) above of the Act.

E. The District Court Could Have Reached The Same Result By Relying On The Help America Act of 2002, 42 U.S.C. Section 15482(a)(2) and (4)

Similar to the Ohio statute, the Help America Vote Act of 2002 ("HAVA"), 42 U.S. C. Section 15482(a)(2) provides that an "individual shall be permitted to cast a provisional ballot . . . upon the execution of a written affirmation by the individual before an election official at the polling place . . ." Subsection (4) then provides that the ballot shall be counted if "that individual is eligible under State law to vote."

In interpreting Ohio's statute, the District Court was also effectively interpreting how HAVA's mandate to count a provisional ballot would apply where a polling place official permitted an individual to cast a provisional ballot without fully executing the affirmation "before an election official at the polling place." In other words, the same situation as in the instant case.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

Respectfully submitted,

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November 23, 2008

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I hereby certify that on November 23, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this matter.

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