IN THE SUPREME COURT OF OHIO

State of Ohio ex rel., Dana Skaggs, et al.,	)	
Relators,	)	CASE NO. 08-2206
v.	)	Original Action in Mandamus
Jennifer L. Brunner, Secretary of the State of Ohio, et al.,	)	
Defendants.	)	

BRIEF OF AMICUS CURIAE THE ACLU VOTING RIGHTS PROJECT AND ACLU OF OHIO

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Statement of Interest of *Amici Curiae*

The ACLU of Ohio is one of the 53 affiliates of the American Civil Liberties Union Foundation, Inc. (ACLU), a nationwide, non-profit, nonpartisan organization with nearly 550,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU and its affiliates, including the ACLU of Ohio, have been active in defending the equal right of all citizens to participate in the electoral process. The ACLU has operated a Voting Rights Project since 1966. The ACLU of Ohio has nearly 30,000 supporters and members statewide. Through the Voting Rights Project, the ACLU of Ohio, and other ACLU offices nationwide, the ACLU has provided representation to plaintiffs in hundreds of voting cases involving electoral processes throughout the country, including Ohio. The attorneys for the Voting Rights Project of the ACLU have represented voters, candidates and political parties in courts within the areas covered by each of the Circuits of the United States Courts of Appeals. Together, the Voting Rights Project of the ACLU and the ACLU of Ohio have litigated several cases on behalf of Ohio voters, namely *Stewart v. Blackwell,* 5:02-cv-02028 (N.D. Ohio); *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006); *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio 2008); *Project Vote et al. v. Madison County Board of Elections*, 1:08-cv-02266 (N.D. Ohio 2008); and *ACLU v. Taft*. 02-00766 (S.D. Ohio). In addition, the Voting Rights Project of the ACLU and the ACLU of Ohio have filed *amicus curiae* briefs in several voting cases, including this Court's recent cases of *State ex rel. Colvin v. Brunner*, 2008-Ohio-5041, and *State ex rel Myles v. Brunner*, 2008-Ohio-5097.

Proposition of Law No.1: Discarding the votes of identifiable and eligible voters whose provisional ballots contained voters' signatures but not printed names and other immaterial errors violates Section 1971 of the Civil Rights Act of 1964.

Relators argue that roughly one thousand provisional ballots should not be counted because the voter's ballot lacked a printed name on the provisional ballot envelope or other envelope errors, even though the board of elections is able to verify the voter's identity and eligibility to cast a ballot (hereafter referred to as "affected provisional ballots"). There is no specific requirement in Ohio law requiring an individual voter to print his or her name on their provisional ballot envelope. *See* OHIO REV. CODE § 3505.181(B)(4) (in describing the procedure for handling provisional ballots, the code directs that "[i]f the appropriate local election official to whom the ballot or voter or address information is transmitted ...determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election.").

The Franklin County Board of Elections created its own envelope form for use in the 2008 general election even though a provisional ballot envelope format was prescribed by the Secretary of State. Franklin County's envelope-form states that a voter is required to print his or her own name on the form. Had the board used the Secretary's prescribed form, a poll worker would have filled out the form for the provisional voter and simply asked the voter to sign. Neighboring Madison and Union Counties used the Secretary's forms and procedures. Notably, these types of inter-county disparities in the treatment of provisional ballots formed the basis for a federal court lawsuit, *NEOCH v. Brunner*, Case No. 2:06cv896 (S.D. Ohio filed 2006). Among other claims in that case,[1] at issue in *NEOCH* were the need to establish clear standards for the acceptance or rejection of provisional ballots and the impact of poll worker error. The parties in

[1] The *NEOCH* Plaintiffs also asserted claims relating to voter identification and homeless voters, neither of which is relevant to the instant mandamus action.

that case settled the former by way of Secretary of State Directive 2008-101, which was adopted as an order of the federal court on October 24, 2008. *NEOCH v. Brunner*, No. 2:06cv896 (S.D. Ohio Oct. 24, 2008) (order adopting Directive 2008-101 and withdrawing without prejudice that portion of the Plaintiffs' Motion for Preliminary Injunction). Three days later, the federal court disposed of the latter issue, namely, the effect of poll worker error. By agreement of the parties, the *NEOCH* court ordered that "an eligible voter casting a provisional ballot should not be disenfranchised because of poll worker error in processing a provisional ballot." *NEOCH v. Brunner*, No. 2:06cv896 (S.D. Ohio Oct. 27, 2008) (ordering the Secretary of State to instruct county 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 properly complete a provisional ballot envelope).[2]

Amici assert that Franklin County election officials would violate Section 1971 of the Civil Rights Act, 42 U.S.C. § 1971(a)(2)(B), if they were allowed to discard ballots solely because the voter or election official failed to print the voter's name but the ballot otherwise contained the signature and/or other identifying information such that election officials could verify his identity. Section 1971 provides that:

> No person acting under color of law shall ... 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.

42 U.S.C. § 1971 (a)(2)(B).

Section 1971 was enacted as part of "a spurt of federal enforcement of voting rights after a long slumber ..." *Florida NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). "[O]ften

[2] A copy of the Oct. 27, 2008 decision in *NEOCH* is included as Attachment A.

referred to as 'the materiality provision,'" section 1971 "was designed to eliminate practices that could encumber an individual's ability to register to vote" by prohibiting officials from blocking voters from registering or voting based on trivial clerical errors made on government paperwork. *Friedman v. Snipes,* 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004)(emphasis omitted). "This was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age," *Condon v. Reno,* 913 F. Supp. 946, 949-50 (D.S.C. 1995), since "[s]uch trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants," *Florida NAACP,* 522 F.3d at 1173. Section 1971(a)(2)(B) is a no fault statute. Congress made it irrelevant that the error or omission was committed by an election official rather than the voter, or vice versa. In protecting the right to vote with this statute, aimed at arbitrary denial of the right to vote, Congress was not opening the door to any evidentiary dispute over who caused the problem. If the error or omission was immaterial, Congress declared it could not be the basis for a vote denial.

Ohio law does not make printing one's name on a ballot envelope material to any aspect of voting. OHIO CONST. ART. V, §I provides: "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections." None of these requirements include having the voter print his name on the provisional ballot envelope instead of having it printed by poll workers. This is especially true when election officials are otherwise able to verify the identity and when the voter signed the envelope. Such a failure of the voter or the election official to print his name on the envelope constitutes an "other act requisite to voting," the omission of

which is not "material" to determining whether the voter is qualified to vote.[3] Furthermore, poll workers in other counties within the 15th Congressional district printed the name of the provisional voter. If printing the name by the provisional voter is not needed for all voters, it cannot be required of any. Though perhaps having the voter print the name might be useful, Congress specifically stated that the requirement must be material. *See, e.g., Schwier v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2003) (disclosure of Social Security number is immaterial to voter registration); *Washington Assoc. of Churches v. Reed,* 492 F. Supp. 2d at 1270-71 (requirement that state match potential voter's name, date of birth, and driver's license or Social Security digits to information in either the Social Security Administration database or the motor vehicles database before allowing that person to register to vote violates § 1971 because a failure to match such information is immaterial to eligibility). Congress sought to outlaw denying the right to vote based on unnecessary or duplicative information. Once there is evidence of qualification that is accepted as satisfactory for some voters, asking for an additional piece of information for other voters can only be acceptable under § 1971 if there is a defensible reason to question the evidence of the latter.

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[3] Though in existence in various forms since 1871, Section 1971 was strengthened by the Civil Rights Act of 1960, Pub. L. 86-449, Title VI, 74 Stat. 86 (1960), when an expansive definition of the word "vote" was added:

> When used in the subsection, the word "vote" includes all action necessary to make a vote effective ***including, but not limited to, registration or other action required by State law*** prerequisite to voting, ***casting a ballot, and having such ballot counted*** and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election...

42 U.S.C. § 1971(e) (emphasis added). The paragraph offended by Plaintiffs Skaggs and Ohio Republican Party's argument, § 1971(a)(2)(B), was added in the Civil Rights Act of 1964, Pub. L. 88-352, Sec. 101, 78 Stat. 241 (1964). It is significant that, in the 1964 amendments, Congress included 42 U.S.C. § 1971(a)(3)(A) specifically providing that the broad definition of "vote" quoted above from § 1971(e) applies to these additions to § 1971(a).

In enacting various voting rights statutes, Congress was concerned both with changes in implementation by local officials, regardless of what state law required, and with states adopting new discriminatory legislation when facing a court decision invalidating an existing practice. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). As with the Voting Rights Act of 1965, the clear language of § 1971 is liberally construed. *United States v. McLeod*, 385 F.2d 734, 748 (5th Cir. 1967) (§ 1971 should be construed "liberally" to fulfill the protective aspect of "American Federalism"); *United States v. Mississippi*, 380 U.S. 128, 137-38 (1965) (relying on the language of the statute to reject defense argument that "otherwise qualified by law" could include laws "even though those laws were unconstitutional"); *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (construing various sections of the Voting Rights Act of 1965, noting that "compatible with the decisions of this Court the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective,'"[4] and concluding with other indicia that Congress intended "to give the Act the broadest possible scope."). With § 1971 Congress sought to place voters on an equal footing and to remove the unequal and pretextual excuses for denial of the right to vote.

Amici acknowledge *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), in which the Sixth Circuit held that 42 U.S.C. § 1971(a)(2)(B) was directly enforceable only by the attorney general. How this section may be enforced, of course, has no bearing on whether Relators' suggested statutory interpretation conflicts with federal law. Nevertheless, *McKay's* one paragraph discussion of § 1971 cites the subsection, added in 1957, in which Congress gave the Attorney General the authority to enforce this statute. The court did not discuss, and presumably

[4] *Allen v. State Bd. of Elections* construed the definition of "vote" found in 42 U.S.C. § 1973(l)(c)(1). The definition of "vote" in § 1971(e) is not different in any relevant respect. Both sections include the phase "all action necessary to make a vote effective."

had not been made aware by briefing, that private litigants had enforced § 1971 since 1871, and that Congress was aware of this private enforcement when it sought to strengthen the Act by expanding this authority to include the Attorney General. As discussed immediately below, *McKay's* holding is contrary to the statutory history of the Act, precedent discussing the enforcement of federal voting rights legislation, and the decision of another circuit.

Schwier v. Cox, 340 F.3d 1284, 1294-97 (11th Cir. 2003), discussed and disagreed with the Sixth Circuit in *McKay*. The Eleventh Circuit in *Schwier v. Cox* noted that the original version of § 1971 had been utilized by private litigants since 1871. 340 F.3d at 1295.[5] The original statute protected the right to vote only against discrimination based on race, color or previous condition of servitude. The statute thus did little more than intone the language of the Fifteenth Amendment. The statute was repeatedly amended between 1957 and 1965 to expand its coverage, essentially codifying the "freezing principle," the doctrine developed in the former Fifth Circuit to prohibit unequal application of voting requirements. *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964). Although there have been fewer reported cases on § 1971 since the 1960s, the chronology of amendments reveals Congress' intent to expand the law to assure full protection of the right to vote in a manner that extends to provisional voters' claims here.

The original statute, 42 U.S.C. § 1971, now § 1971(a)(1), declares that citizens who are otherwise qualified to vote in any state "shall be entitled and allowed to vote ... without distinction of race, color, or previous condition of servitude." The Voting Rights Act of 1957, the

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[5] As *Schwier v. Cox* discussed, private litigants had enforced § 1971 through suits authorized by 42 U.S.C. § 1983 since the latter was enacted in 1871. The first part of § 1971, now codified as § 1971(a)(1), was Section 1 of the Enforcement Act of 1870, ch. 113, 16 Stat. 140. Section 1983 came from the Civil Rights Act of 1871, 17 Stat. 13, § 1 (1871). *See Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971). Sections 1971 and 1983 were used as the basis for striking down the white primary. *See Smith v. Allwright*, 321 U.S. 649, 651, n. 1 (1944) (quoting text of the two statutes then codified as 8 U.S.C. §§ 31 and 43); *Chapman v. King*, 62 F. Supp. 639, and n. 1 (M.D.Ga. 1945), *aff'd*, 154 F.2d 460 (5th Cir. 1946).

first civil rights statute enacted since the end of Reconstruction, Pub. L. 85-315, 71 Stat. 634 (1957), added sections (b), (c) and (d) to § 1971. Section (b) protected citizens from intimidation, threats or coercion under color of law or otherwise which would interfere with their right to vote in federal elections.[6] Section (c) gave the Attorney General the authority to file civil suits for injunctive relief to enforce sections (a) and (b). And section (d) gave authority to hear private suits instituted under section 1971 to federal district courts and authorized federal courts to exercise authority "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."[7]

The 1957 amendments changed the substantive protections of § 1971, expanded the ability to enforce it, and the remedies available to private citizens.[8] For instance, the Attorney General did not have authority to sue under § 1971 until the 1957 amendments. Previously, the Attorney General could only proceed through criminal prosecution. *See* Attorney General Herbert Brownell, Jr., letter of April 9, 1956 to the Speaker of the House of Representatives, published as part of H. Rep. No. 291 on The Civil Rights Act of 1957, 1957 U.S.C.C.A.N. 1966, at 1978-79. Brownell sought authority to file civil suits in part because, in his words, "[criminal

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[6] Notably, Congress did not make racial discrimination an element of § 1971(b). Sections 1971(a)(2)(A) and (B) likewise are not limited to racial discrimination and as noted in the text, this part of the statute flatly prohibits allowing immaterial errors or omissions a basis for discarding ballots, regardless of who made the error or omission.

[7] 42 U.S.C. § 1971(d); *Schwier v. Cox*, 340 F.3d at 1296. The removal of the administrative exhaustion barrier was a significant expansion for enforcement of the statute.

[8] One of the debates in 1957 was whether the Attorney General should also be authorized to file suits for damages. 1957 U.S.C.C.A.N. 1969. The final version limited suits by the Attorney General to seeking injunctive relief. *See* § 1971(c). But the 1957 Act also amended 28 U.S.C. § 1343 to add what is now § 1343(a)(4), giving federal district courts jurisdiction to hear civil actions "by any person" "[to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote*." (Emphasis added.) *See* sec. 121 of Public Law 85-315, 71 Stat. 637. Because the Attorney General could not sue for damages according to the same 1957 legislation, these provisions cannot be reconciled with *McKay's* holding that only the Attorney General can sue to enforce § 1971.

cases in a field charged with emotion are extraordinarily difficult for all concerned." *Id.* The committee report explains that insofar as state judicial remedies, this language was declaratory of existing law because *Lane v. Wilson*, 307 U.S. 268, 274 (1939), had settled there was no need to exhaust judicial remedies. But the committee report noted that the language dispensing with exhaustion of state administrative remedies was necessary because some courts had enforced such a requirement. H. Rep. No. 291, 85th Cong., 1st Sess, reprinted in 1957 U.S.C.C.A.N., 1966, 1975. Furthermore, the removal of the exhaustion barrier could only apply to private litigants; it was not a doctrine that could have applied to the Attorney General. *See Schwier*, 340 F.3d at 1296.

It is equally important for this Court to send a clear signal that disfranchisement by clerical error will not be tolerated. Disfranchisement of voters for imperfect paperwork inspired Congress to adopt Section 1971 of the Civil Rights Act, but unfortunately, such discriminatory (and unnecessary) policies are not simply a vestige of a far gone era. Even today, in Ohio and elsewhere, election officials have adopted a range of ministerial policies and procedures that have had the effect – if not the intent – of disfranchising voters because of trivial errors.

A pair of recent decisions from this Court indicates that Ohio law's approach to evaluating election disputes mirrors the federal government's aim in enacting Section 1971. In *State ex rel. Colvin v. Brunner*, Slip Op. No. 2008-Ohio-5041 at ¶62 (Sept. 29, 2008), a dispute over early voting eligibility, this Court emphasized its "duty to liberally construe election laws in favor of the right to vote." Likewise, in *State ex rel. Myles v. Brunner*, Slip Op. No. 2008-Ohio-5097 at ¶22 (Oct. 2, 2008), this Court recognized it "must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections." At issue in *Myles* was whether a box had to be checked on an absentee ballot request form in order for it to be honored,

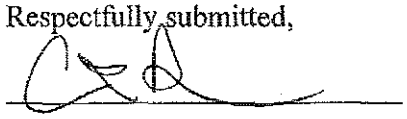
where the board of elections was otherwise able to determine the voter's identity and eligibility, and this Court ultimately decided it was unnecessary. *Id.* at ¶¶22-23, citing *Stern v. Cuyahoga Cty. Bd. of Elections* (1968), 14 Ohio St.2d 175, 180, 43. O.O. 2d 286, 237 N.E.2d 313 ("Absolute compliance with every technicality should not be required in order to constitute substantial compliance, unless such complete and absolute conformance to each technical requirement of the printed form serves a public interest and a public purpose"). Similarly, in the instant case, the Franklin County Board of Elections was able to determine that the 1,000 provisional envelopes at issue were submitted by voters who were identified as properly registered and eligible to vote. Thus, much like in *Myles*, Relators' objections here are to immaterial technicalities. And much like in *Colvin*, *Amici* respectfully urge this Court to err in favor of these voters.

It is axiomatic that the right to vote is "a fundamental matter in a free and democratic society," *Reynolds v. Sims,* 377 U.S. 533, 561-62 (1964), and this fundamental right must not be denied because of meaningless clerical errors that have no bearing on a voter's eligibility to vote. *Cf Bishop v. Lomenzo,* 350 F. Supp. 576, 587 (E.D.N.Y. 1972) ("The state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies."). This principle led Congress to adopt Section 1971, and it should lead this Court to order the provisional ballots at issue be counted.

CONCLUSION

For these reasons, *amici* respectfully ask this court to deny Relators' request for a writ and declare that no ballot should be rejected based on any omission that is not material to the voter's qualifications.

Respectfully submitted,



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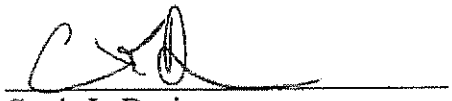

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Plaintiffs,

v.

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

Defendant.

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

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

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Other Authorities

Statement of Interest of *Amici Curiae*

The ACLU of Ohio is one of the 53 affiliates of the American Civil Liberties Union Foundation, Inc. (ACLU), a nationwide, non-profit, nonpartisan organization with nearly 550,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU and its affiliates, including the ACLU of Ohio, have been active in defending the equal right of all citizens to participate in the electoral process. The ACLU has operated a Voting Rights Project since 1966. The ACLU of Ohio has nearly 30,000 supporters and members statewide. Through the Voting Rights Project, the ACLU of Ohio, and other ACLU offices nationwide, the ACLU has provided representation to plaintiffs in hundreds of voting cases involving electoral processes throughout the country, including Ohio. The attorneys for the Voting Rights Project of the ACLU have represented voters, candidates and political parties in courts within the areas covered by each of the Circuits of the United States Courts of Appeals. Together, the Voting Rights Project of the ACLU and the ACLU of Ohio have litigated several cases on behalf of Ohio voters, namely *Stewart v. Blackwell*, 5:02-cv-02028 (N.D. Ohio); *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006); *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio 2008); *Project Vote et al. v. Madison County Board of Elections*, 1:08-cv-02266 (N.D. Ohio 2008); and *ACLU v. Taft*. 02-00766 (S.D. Ohio). In addition, the Voting Rights Project of the ACLU and the ACLU of Ohio have filed *amicus curiae* briefs in several voting cases, including this Court's recent cases of *State ex rel. Colvin v. Brunner*, 2008-Ohio-5041, and *State ex rel Myles v. Brunner*, 2008-Ohio-5097.

Proposition of Law No.1: Discarding the votes of identifiable and eligible voters whose provisional ballots contained voters' signatures but not printed names and other immaterial errors violates Section 1971 of the Civil Rights Act of 1964.

Relators argue that roughly one thousand provisional ballots should not be counted because the voter's ballot lacked a printed name on the provisional ballot envelope or other envelope errors, even though the board of elections is able to verify the voter's identity and eligibility to cast a ballot (hereafter referred to as "affected provisional ballots"). There is no specific requirement in Ohio law requiring an individual voter to print his or her name on their provisional ballot envelope. *See* OHIO REV. CODE § 3505.181(B)(4) (in describing the procedure for handling provisional ballots, the code directs that "[i]f the appropriate local election official to whom the ballot or voter or address information is transmitted ...determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election.").

The Franklin County Board of Elections created its own envelope form for use in the 2008 general election even though a provisional ballot envelope format was prescribed by the Secretary of State. Franklin County's envelope-form states that a voter is required to print his or her own name on the form. Had the board used the Secretary's prescribed form, a poll worker would have filled out the form for the provisional voter and simply asked the voter to sign. Neighboring Madison and Union Counties used the Secretary's forms and procedures. Notably, these types of inter-county disparities in the treatment of provisional ballots formed the basis for a federal court lawsuit, *NEOCH v. Brunner*, Case No. 2:06cv896 (S.D. Ohio filed 2006). Among other claims in that case,[1] at issue in *NEOCH* were the need to establish clear standards for the acceptance or rejection of provisional ballots and the impact of poll worker error. The parties in

[1] The *NEOCH* Plaintiffs also asserted claims relating to voter identification and homeless voters, neither of which is relevant to the instant mandamus action.

that case settled the former by way of Secretary of State Directive 2008-101, which was adopted as an order of the federal court on October 24, 2008. *NEOCH v. Brunner*, No. 2:06cv896 (S.D. Ohio Oct. 24, 2008) (order adopting Directive 2008-101 and withdrawing without prejudice that portion of the Plaintiffs' Motion for Preliminary Injunction). Three days later, the federal court disposed of the latter issue, namely, the effect of poll worker error. By agreement of the parties, the *NEOCH* court ordered that "an eligible voter casting a provisional ballot should not be disenfranchised because of poll worker error in processing a provisional ballot." *NEOCH v. Brunner*, No. 2:06cv896 (S.D. Ohio Oct. 27, 2008) (ordering the Secretary of State to instruct county 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 properly complete a provisional ballot envelope).[2]

Amici assert that Franklin County election officials would violate Section 1971 of the Civil Rights Act, 42 U.S.C. § 1971(a)(2)(B), if they were allowed to discard ballots solely because the voter or election official failed to print the voter's name but the ballot otherwise contained the signature and/or other identifying information such that election officials could verify his identity. Section 1971 provides that:

> No person acting under color of law shall ... 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.

42 U.S.C. § 1971 (a)(2)(B).

Section 1971 was enacted as part of "a spurt of federal enforcement of voting rights after a long slumber ..." *Florida NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). "[O]ften

[2] A copy of the Oct. 27, 2008 decision in *NEOCH* is included as Attachment A.

referred to as 'the materiality provision,'" section 1971 "was designed to eliminate practices that could encumber an individual's ability to register to vote" by prohibiting officials from blocking voters from registering or voting based on trivial clerical errors made on government paperwork. *Friedman v. Snipes,* 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004)(emphasis omitted). "This was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age," *Condon v. Reno,* 913 F. Supp. 946, 949-50 (D.S.C. 1995), since "[s]uch trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants," *Florida NAACP,* 522 F.3d at 1173. Section 1971(a)(2)(B) is a no fault statute. Congress made it irrelevant that the error or omission was committed by an election official rather than the voter, or vice versa. In protecting the right to vote with this statute, aimed at arbitrary denial of the right to vote, Congress was not opening the door to any evidentiary dispute over who caused the problem. If the error or omission was immaterial, Congress declared it could not be the basis for a vote denial.

Ohio law does not make printing one's name on a ballot envelope material to any aspect of voting. OHIO CONST. ART. V, §I provides: "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections." None of these requirements include having the voter print his name on the provisional ballot envelope instead of having it printed by poll workers. This is especially true when election officials are otherwise able to verify the identity and when the voter signed the envelope. Such a failure of the voter or the election official to print his name on the envelope constitutes an "other act requisite to voting," the omission of

which is not "material" to determining whether the voter is qualified to vote.[3] Furthermore, poll workers in other counties within the 15th Congressional district printed the name of the provisional voter. If printing the name by the provisional voter is not needed for all voters, it cannot be required of any. Though perhaps having the voter print the name might be useful, Congress specifically stated that the requirement must be material. *See, e.g., Schwier v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2003) (disclosure of Social Security number is immaterial to voter registration); *Washington Assoc. of Churches v. Reed*, 492 F. Supp. 2d at 1270-71 (requirement that state match potential voter's name, date of birth, and driver's license or Social Security digits to information in either the Social Security Administration database or the motor vehicles database before allowing that person to register to vote violates § 1971 because a failure to match such information is immaterial to eligibility). Congress sought to outlaw denying the right to vote based on unnecessary or duplicative information. Once there is evidence of qualification that is accepted as satisfactory for some voters, asking for an additional piece of information for other voters can only be acceptable under § 1971 if there is a defensible reason to question the evidence of the latter.

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[3] Though in existence in various forms since 1871, Section 1971 was strengthened by the Civil Rights Act of 1960, Pub. L. 86-449, Title VI, 74 Stat. 86 (1960), when an expansive definition of the word "vote" was added:

> When used in the subsection, the word "vote" includes all action necessary to make a vote effective ***including, but not limited to, registration or other action required by State law*** prerequisite to voting, ***casting a ballot, and having such ballot counted*** and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election...

42 U.S.C. § 1971(e) (emphasis added). The paragraph offended by Plaintiffs Skaggs and Ohio Republican Party's argument, § 1971(a)(2)(B), was added in the Civil Rights Act of 1964, Pub. L. 88-352, Sec. 101, 78 Stat. 241 (1964). It is significant that, in the 1964 amendments, Congress included 42 U.S.C. § 1971(a)(3)(A) specifically providing that the broad definition of "vote" quoted above from § 1971(e) applies to these additions to § 1971(a).

In enacting various voting rights statutes, Congress was concerned both with changes in implementation by local officials, regardless of what state law required, and with states adopting new discriminatory legislation when facing a court decision invalidating an existing practice. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). As with the Voting Rights Act of 1965, the clear language of § 1971 is liberally construed. *United States v. McLeod*, 385 F.2d 734, 748 (5th Cir. 1967) (§ 1971 should be construed "liberally" to fulfill the protective aspect of "American Federalism"); *United States v. Mississippi*, 380 U.S. 128, 137-38 (1965) (relying on the language of the statute to reject defense argument that "otherwise qualified by law" could include laws "even though those laws were unconstitutional"); *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (construing various sections of the Voting Rights Act of 1965, noting that "compatible with the decisions of this Court the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective,'"[4] and concluding with other indicia that Congress intended "to give the Act the broadest possible scope."). With § 1971 Congress sought to place voters on an equal footing and to remove the unequal and pretextual excuses for denial of the right to vote.

Amici acknowledge *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), in which the Sixth Circuit held that 42 U.S.C. § 1971(a)(2)(B) was directly enforceable only by the attorney general. How this section may be enforced, of course, has no bearing on whether Relators' suggested statutory interpretation conflicts with federal law. Nevertheless, *McKay's* one paragraph discussion of § 1971 cites the subsection, added in 1957, in which Congress gave the Attorney General the authority to enforce this statute. The court did not discuss, and presumably

[4] *Allen v. State Bd. of Elections* construed the definition of "vote" found in 42 U.S.C. § 1973(l)(c)(1). The definition of "vote" in § 1971(e) is not different in any relevant respect. Both sections include the phase "all action necessary to make a vote effective."

had not been made aware by briefing, that private litigants had enforced § 1971 since 1871, and that Congress was aware of this private enforcement when it sought to strengthen the Act by expanding this authority to include the Attorney General. As discussed immediately below, *McKay's* holding is contrary to the statutory history of the Act, precedent discussing the enforcement of federal voting rights legislation, and the decision of another circuit.

Schwier v. Cox, 340 F.3d 1284, 1294-97 (11th Cir. 2003), discussed and disagreed with the Sixth Circuit in *McKay*. The Eleventh Circuit in *Schwier v. Cox* noted that the original version of § 1971 had been utilized by private litigants since 1871. 340 F.3d at 1295.[5] The original statute protected the right to vote only against discrimination based on race, color or previous condition of servitude. The statute thus did little more than intone the language of the Fifteenth Amendment. The statute was repeatedly amended between 1957 and 1965 to expand its coverage, essentially codifying the "freezing principle," the doctrine developed in the former Fifth Circuit to prohibit unequal application of voting requirements. *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964). Although there have been fewer reported cases on § 1971 since the 1960s, the chronology of amendments reveals Congress' intent to expand the law to assure full protection of the right to vote in a manner that extends to provisional voters' claims here.

The original statute, 42 U.S.C. § 1971, now § 1971(a)(1), declares that citizens who are otherwise qualified to vote in any state "shall be entitled and allowed to vote ... without distinction of race, color, or previous condition of servitude." The Voting Rights Act of 1957, the

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[5] As *Schwier v. Cox* discussed, private litigants had enforced § 1971 through suits authorized by 42 U.S.C. § 1983 since the latter was enacted in 1871. The first part of § 1971, now codified as § 1971(a)(1), was Section 1 of the Enforcement Act of 1870, ch. 113, 16 Stat. 140. Section 1983 came from the Civil Rights Act of 1871, 17 Stat. 13, § 1 (1871). *See Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971). Sections 1971 and 1983 were used as the basis for striking down the white primary. *See Smith v. Allwright*, 321 U.S. 649, 651, n. 1 (1944) (quoting text of the two statutes then codified as 8 U.S.C. §§ 31 and 43); *Chapman v. King*, 62 F. Supp. 639, and n. 1 (M.D.Ga. 1945), *aff'd*, 154 F.2d 460 (5th Cir. 1946).

first civil rights statute enacted since the end of Reconstruction, Pub. L. 85-315, 71 Stat. 634 (1957), added sections (b), (c) and (d) to § 1971. Section (b) protected citizens from intimidation, threats or coercion under color of law or otherwise which would interfere with their right to vote in federal elections.[6] Section (c) gave the Attorney General the authority to file civil suits for injunctive relief to enforce sections (a) and (b). And section (d) gave authority to hear private suits instituted under section 1971 to federal district courts and authorized federal courts to exercise authority "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."[7]

The 1957 amendments changed the substantive protections of § 1971, expanded the ability to enforce it, and the remedies available to private citizens.[8] For instance, the Attorney General did not have authority to sue under § 1971 until the 1957 amendments. Previously, the Attorney General could only proceed through criminal prosecution. *See* Attorney General Herbert Brownell, Jr., letter of April 9, 1956 to the Speaker of the House of Representatives, published as part of H. Rep. No. 291 on The Civil Rights Act of 1957, 1957 U.S.C.C.A.N. 1966, at 1978-79. Brownell sought authority to file civil suits in part because, in his words, "[criminal

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[6] Notably, Congress did not make racial discrimination an element of § 1971(b). Sections 1971(a)(2)(A) and (B) likewise are not limited to racial discrimination and as noted in the text, this part of the statute flatly prohibits allowing immaterial errors or omissions a basis for discarding ballots, regardless of who made the error or omission.

[7] 42 U.S.C. § 1971(d); *Schwier v. Cox*, 340 F.3d at 1296. The removal of the administrative exhaustion barrier was a significant expansion for enforcement of the statute.

[8] One of the debates in 1957 was whether the Attorney General should also be authorized to file suits for damages. 1957 U.S.C.C.A.N. 1969. The final version limited suits by the Attorney General to seeking injunctive relief. *See* § 1971(c). But the 1957 Act also amended 28 U.S.C. § 1343 to add what is now § 1343(a)(4), giving federal district courts jurisdiction to hear civil actions "by any person" "[to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote*." (Emphasis added.) *See* sec. 121 of Public Law 85-315, 71 Stat. 637. Because the Attorney General could not sue for damages according to the same 1957 legislation, these provisions cannot be reconciled with *McKay's* holding that only the Attorney General can sue to enforce § 1971.

cases in a field charged with emotion are extraordinarily difficult for all concerned." *Id.* The committee report explains that insofar as state judicial remedies, this language was declaratory of existing law because *Lane v. Wilson*, 307 U.S. 268, 274 (1939), had settled there was no need to exhaust judicial remedies. But the committee report noted that the language dispensing with exhaustion of state administrative remedies was necessary because some courts had enforced such a requirement. H. Rep. No. 291, 85th Cong., 1st Sess, reprinted in 1957 U.S.C.C.A.N., 1966, 1975. Furthermore, the removal of the exhaustion barrier could only apply to private litigants; it was not a doctrine that could have applied to the Attorney General. *See Schwier*, 340 F.3d at 1296.

It is equally important for this Court to send a clear signal that disfranchisement by clerical error will not be tolerated. Disfranchisement of voters for imperfect paperwork inspired Congress to adopt Section 1971 of the Civil Rights Act, but unfortunately, such discriminatory (and unnecessary) policies are not simply a vestige of a far gone era. Even today, in Ohio and elsewhere, election officials have adopted a range of ministerial policies and procedures that have had the effect – if not the intent – of disfranchising voters because of trivial errors.

A pair of recent decisions from this Court indicates that Ohio law's approach to evaluating election disputes mirrors the federal government's aim in enacting Section 1971. In *State ex rel. Colvin v. Brunner*, Slip Op. No. 2008-Ohio-5041 at ¶62 (Sept. 29, 2008), a dispute over early voting eligibility, this Court emphasized its "duty to liberally construe election laws in favor of the right to vote." Likewise, in *State ex rel. Myles v. Brunner*, Slip Op. No. 2008-Ohio-5097 at ¶22 (Oct. 2, 2008), this Court recognized it "must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections." At issue in *Myles* was whether a box had to be checked on an absentee ballot request form in order for it to be honored,

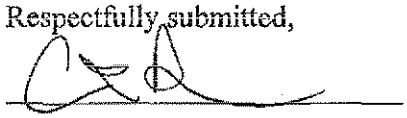
where the board of elections was otherwise able to determine the voter's identity and eligibility, and this Court ultimately decided it was unnecessary. *Id.* at ¶¶22-23, citing *Stern v. Cuyahoga Cty. Bd. of Elections* (1968), 14 Ohio St.2d 175, 180, 43. O.O. 2d 286, 237 N.E.2d 313 ("Absolute compliance with every technicality should not be required in order to constitute substantial compliance, unless such complete and absolute conformance to each technical requirement of the printed form serves a public interest and a public purpose"). Similarly, in the instant case, the Franklin County Board of Elections was able to determine that the 1,000 provisional envelopes at issue were submitted by voters who were identified as properly registered and eligible to vote. Thus, much like in *Myles*, Relators' objections here are to immaterial technicalities. And much like in *Colvin*, *Amici* respectfully urge this Court to err in favor of these voters.

It is axiomatic that the right to vote is "a fundamental matter in a free and democratic society," *Reynolds v. Sims,* 377 U.S. 533, 561-62 (1964), and this fundamental right must not be denied because of meaningless clerical errors that have no bearing on a voter's eligibility to vote. *Cf Bishop v. Lomenzo,* 350 F. Supp. 576, 587 (E.D.N.Y. 1972) ("The state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies."). This principle led Congress to adopt Section 1971, and it should lead this Court to order the provisional ballots at issue be counted.

CONCLUSION

For these reasons, *amici* respectfully ask this court to deny Relators' request for a writ and declare that no ballot should be rejected based on any omission that is not material to the voter's qualifications.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief was served via U.S. Mail and electronic mail on this 1st day of December, 2008, upon the following:

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

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

Plaintiffs,

v.

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

Defendant.

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

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