

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

THE STATE OF OHIO ex rel.	:	
DANA SKAGGS, et al.,	:	
	:	Case No. 2:08-CV-1077
Plaintiff - Relator,	:	
	:	
v.	:	Judge Marbley
	:	
JENNIFER L. BRUNNER	:	
SECRETARY OF THE STATE	:	
OF OHIO, et al.,	:	
	:	
Defendant - Respondent.	:	

**MOTION OF DEFENDANT, JENNIFER BRUNNER,
OHIO SECRETARY OF STATE, FOR SUMMARY JUDGMENT**

Defendant Ohio Secretary of State Jennifer Brunner moves this Court, pursuant to Fed. R. Civ. P. 56(c), for an order granting summary judgment. No genuine issues of material fact exist and the Defendant is entitled to judgment as a matter of law. A memorandum in support of this motion is incorporated by reference.

Respectfully submitted,

**NANCY H. ROGERS
ATTORNEY GENERAL**

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Ohio Secretary of State*

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Complaint in this case seeks to disenfranchise approximately 1,000 Franklin County voters who cast provisional ballots on November 4, 2008 *and who were in fact properly registered and eligible to vote*. Plaintiffs have not alleged that any of the provisional ballots in question were fraudulent, or cast by ineligible voters, or cast in the wrong precinct. As a matter of law, Plaintiffs are not entitled to the extraordinary relief they seek.

Plaintiffs would have this Court find a defect not with the ballots themselves, but rather with the completion of the Provisional Ballot Affirmation form used by the Franklin County Board of Elections ("Board") that accompanied each provisional ballot (and constitutes the envelope in which each provisional ballot is stored until such time as the Board decides the vote should be counted). According to the allegations in the Complaint and the information presented at the Temporary Restraining Order Hearing on November 17, 2008, the alleged deficiencies in the Provisional Ballot Affirmation forms challenged by the plaintiffs fall into four categories:

- (1) Forms that contain the individual's printed name, but no signature;
- (2) Forms that contain the individual's signature, but no printed name;
- (3) The individual's name and signature appear on the face of the form, but somewhere other than in the blanks designated on the form for name and signature; or
- (4) The form fails to indicate the type of voter identification document the individual presented to the poll worker before receiving a provisional ballot.

However, these “defects” in the affirmation forms are not valid reasons to reject the provisional ballots.

Ohio law is clear that neither a printed name nor a signature is a necessary prerequisite for a ballot to be counted. Indeed, Ohio law imposes an affirmative legal duty upon *poll workers*, not voters, to ensure that the Provisional Ballot Affirmation forms are fully and properly filled out. If information is missing from the form, it necessarily is the result of poll worker error, and federal law – specifically Directive 2008-103 – issued by this Court, forbids the rejection of an otherwise proper provisional ballot that is irregular due to error by the poll worker.

Even if the Plaintiffs offer a contrary interpretation of Ohio law, summary judgment must still be granted. The Secretary of State is, by statute, the chief elections official. RC 3501.04. She is under no clear legal duty to advise the Franklin County Board of Elections to reject any provisional ballots at issue. Rather, in the face of two competing reasonable interpretations of state election law, courts must defer to the conclusions of the Secretary. And in this case, the Secretary has reached the reasonable – if not unavoidable – legal conclusion that these provisional ballots should be counted. For all these reasons, and because there are no material facts in dispute, the Secretary respectfully asks the Court to grant summary judgment in her favor and deny the Plaintiffs’ request for a writ of mandamus.

II. STATEMENT OF THE CASE

This case originally arose when Plaintiffs filed a petition for a Writ of Mandamus and Motion for a Temporary Restraining Order in the Ohio Supreme Court on November 13, 2008, naming Ohio Secretary of State Jennifer Brunner and the Franklin County Board of Elections as Relator-Defendants. On November 14, 2008 Secretary Brunner filed a Notice of Removal to the

Federal District Court for the Southern District of Ohio. The case was originally removed to Judge Frost's Court, but was transferred by Judge Frost to Judge Marbley. *See* Transfer Order Attached as Exhibit 1. The case was transferred in response to the Motion to Consolidate filed by Secretary Brunner.

Secretary Brunner filed a Motion to Consolidate the current case with the *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-CV896 (S.D. Ohio) ("*NEOCH*") case. In that case, pursuant to settlement negotiations, Secretary Brunner issued Directives 2008-101 and 2008-103, which were adopted by this Court in two separate orders. *See* Orders Attached as Exhibits 2 and 3. Directive 2008-101 outlined the process by which provisional ballots should be processed and counted, and Directive 2008-103 specifically addressed the issue of poll worker error in processing provisional ballots.

On November 15, this Court held a hearing on the Notice of Removal, reserving judgment until November 17, 2008. On November 17, 2008, this Court determined that the Plaintiffs were actually raising issues under Directives 2008-101 and 2008-103, which were adopted and annexed by the Court, as well as issues of Equal Protection. As a result, the Court held that removal was proper and immediately proceeded with oral arguments on the Motion for Temporary Restraining Order filed by Plaintiffs. After oral arguments, Plaintiffs decided to withdraw their Motion for Temporary Restraining Order. The Court is now prepared to decide the merits of the case in an expedited manner and Defendant submits this Motion for Summary Judgment accordingly.

III. STATEMENT OF THE FACTS

On November 4, 2008, more than 27,000 Franklin County voters cast provisional ballots. *Damschroder Aff.* ¶ 3. In her role as the state's chief elections official, Secretary Brunner has

promulgated a provisional ballot affirmation/identification envelope for use by voters who must cast a provisional ballot. Unfortunately, the Franklin County Board of Elections elected not to use the Secretary of State's prescribed Provisional Ballot Affirmation form (SOS Form 12-B). *See* Ex. 4 Affidavit of Patricia A. Wolfe at Ex. C. Instead, Franklin County crafted its own Provisional Ballot Affirmation form, one which differs from the Secretary's form in critical respects.

The Secretary's form contemplates that a poll worker must print the voter's name and then sign the form. There is no statement on the Secretary's form that the individual voter must both print his name and sign the form. Franklin County's provisional ballot affirmation form, however, reflects the premise that the requirement of completing the envelope rests with the voter – not the poll worker. Furthermore, the Franklin County provisional ballot affirmation form states that the individual voter is required to provide both his printed name and signature. The Board included this requirement on the form despite the fact that a similar mandate does not appear on the Secretary's prescribed form and is not a correct statement of law.¹ As a result of this difference, the fate of hundreds of provisional ballots in Franklin County are at issue in this case, which could potentially decide three extremely close races.

The Secretary of State has required poll workers to be trained with the Secretary of State's Poll Worker Manual and Poll Worker Quick Reference Guide. Wolfe Aff. at ¶¶ 8-9. Both the Poll Worker Manual and the Quick Reference Guide direct poll workers to ensure that the provisional ballot envelopes are completed. Wolfe Aff. at ¶¶ 10-11. The Franklin County Board of Elections also trains poll workers with the Precinct Election Officials Training Manual

¹ Franklin County has also required that the voter provide his or her birthday on the provisional ballot envelope. It would appear based upon the arguments made by the Plaintiffs in this case that Franklin County should reject any provisional ballot which does not contain a date of birth, despite the fact that Ohio law does not provide that as a reason to reject a provisional ballot. RC 3505.183(B).

("Franklin County Poll Worker Manual"). Stipulation. Among other things, the Franklin County Poll Worker Manual outlines the duties of the poll workers with respect to elections. Regarding provisional balloting, the Franklin County Poll Worker Manual explicitly states "All required information MUST be completed for the Provisional Ballot to count." The Franklin County Poll Worker Manual goes on to explain to the poll worker what information is required including: printed name of the voter, current address of the voter, date of birth of the voter, and signature of the voter. This manual is provided to each poll worker for use on election day. Thus, although the Franklin County Provisional Ballot Affirmation form purports to place responsibility upon the voter to provide all necessary information, Franklin County correctly trains its poll workers that it is their duty to ensure the forms are correctly filled out.

This tension gave rise to an email exchange between Brian Shinn, Assistant General Counsel & Elections Counsel of the Secretary of State's Office, and Patrick Piccininni of the Franklin County Prosecutor's Office in his role as counsel for the Franklin County Board of Elections, where debate ensued over how to count specific provisional ballots. Damschroder Aff. at Exs. B and D. As elections counsel for the Secretary of State has already informed the Franklin County Board of Elections:

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

Damschroder Aff. at Ex. D, p. 2, email from Brian Shinn to Patrick Piccininni, et al., dated November 12, 2008. It was on this basis that Plaintiffs have identified four types of problems

with provisional ballot envelopes: [1] where there is a printed name but no signature in the affirmation; [2] where there is no printed name but a signature in the affirmation; [3] where there is a printed name and a signature on the affirmation but they are not located in the place designated on the form for name and signature; and [4] where there is no proof on the affirmation form that valid identification was provided by the voter. Nevertheless, the Franklin County Board of Elections has subsequently voted on how to process such provisional ballot envelopes and has tied 2-2 on each of these four issues. Therefore, as a matter of law, pursuant to R.C. R.C. 3501.11(X), the position papers will be drafted by the four board members and submitted to the Secretary of State for her tie breaking decision. As a result, Plaintiffs have brought this petition for writ of mandamus to compel the Secretary of State to rule a specific way on this tie breaking decision. Specifically, the Plaintiffs seek a writ of mandamus to order the Secretary to reject any provisional ballots that fall into the four aforementioned categories.

Despite the fact that some hard working poll workers made errors, the Plaintiffs in this case wish to disenfranchise possibly thousands of individuals who were properly registered to vote, voted in the proper precinct, and presented the appropriate identification.

IV. LAW AND ARGUMENT

A. Standard of Review

“A moving party is entitled to a grant of its motion for summary judgment ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Univ. of Pittsburgh v. Townsend*, 542 F.3d 513, 522 (6th Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). It has long been held that the moving party bears the initial burden of showing that there is an absence of a genuine issue of material

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Townsend*, 542 F.3d at 522. The burden then shifts to the nonmoving party to “come forward with some probative evidence to support its claim.” *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (citing *Celotex*, 477 U.S. at 324). The Court must construe the evidence in the light most favorable to the nonmoving party. *Townsend*, 542 F.3d at 522 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)).

In order to be entitled to a writ of mandamus, Plaintiffs must establish [1] a clear legal right to the relief requested, [2] a corresponding clear legal duty on the part of Secretary Brunner to perform the requested action, and [3] the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 3. If no duty exists in law, the Court cannot create a legal duty enforceable in mandamus. *Id.*; *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St. 3d 172, 182, 2007-Ohio-5838, ¶ 46.

B. The Ohio Revised Code Imposes an Affirmative Duty Upon Local Election Officials to Ensure that Affirmation Forms are Fully Filled Out

The Revised Code imposes a number of affirmative duties upon the volunteers who staff the polling locations as poll workers. For example, if a poll worker discovers that an individual is at the wrong precinct, election officials must (1) direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote; (2) explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct; and (3) provide the telephone number of the board of elections in case the individual has additional questions. R.C. 3505.181(C)(1). Likewise, when a voter cannot cast a regular ballot but is eligible to vote provisionally, the poll worker has an affirmative duty to notify the individual that he or she can cast a provisional ballot. R.C. 3505.181(B)(1).

When it comes to provisional balloting, the duties of local election officials are extensive, and all lead to the same conclusion: the omission of a printed name or signature from the Affirmation Form reflects a breach of duty by the local election official. For example, R.C. 3505.181(B)(2) states:

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 stating that the individual is both of the following:

- (a) A registered voter in the jurisdiction in which the individual desires to vote;
- (b) Eligible to vote in that election.

R.C. 3505.181(B)(2) makes the election official a mandatory witness to the execution, that is, the completion, of the Provisional Ballot Affirmation form. It necessarily follows that if the voter submitted an Affirmation form that was missing information – a signature or a printed name -- the election official failed to do what he or she was required to do.

This conclusion is borne out by other sections of the Revised Code. For example, when an individual does not sign the Affirmation form, the election official has an affirmative duty to “record” (i.e. print) the individual’s name on the Affirmation form and the fact that the individual refused to sign. R.C. 3505.181(B)(6). Here we have unsigned Affirmation forms that contain printed names but no indication that the individual declined to sign the Affirmation.² The Affirmation form is missing information that the election official was required to provide, not the voter.

As noted above, the Secretary’s prescribed provisional envelope form does not require a voter to print his name. Furthermore Franklin County, as well as the other counties in the State,

² Although the Plaintiffs spoke in terms of a religious objection for declining to sign the affirmation form, there is no limitation in Ohio law on reasons for failing to sign the Affirmation form.

was instructed to have their poll workers examine Provisional Ballot Affirmation forms after the voter returned the Affirmation form to the poll worker. Damschroder Aff. at Exs. B and D; Wolfe Aff. at ¶ 10. This has been the consistent advice of the Secretary of State since 2006. Wolfe Aff. at ¶ 10; Exhibit 5 Affidavit of Jacqueline J. Rothschuh at ¶ 8. Therefore, the lack of a printed name can only be attributed to poll worker error.

The provisional ballot Affirmation forms have blanks to indicate which form of Voter ID was used. The responsibility for checking the boxes relating to Voter Identification belongs to the election official. "The appropriate local election official shall record the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation." R.C. 3505.181(B)(6). If those boxes were left blank, the fault is clearly the election official's, not the voter's.

C. There is No Basis in Law for Rejecting These Ballots

On October 27, 2008, this Court issued an Order which expressly stated that a provisional ballot cast by an otherwise eligible voter could not be rejected for reasons attributable to poll worker error. *See* Exhibit 3. The Court specifically identified a poll worker's failure to follow a duty prescribed by R.C. 3505.181 as an inadequate reason for rejecting a provisional ballot. The Court's Order is consistent with the Secretary's Directive 2008-103, which clearly provides that a provisional ballot cannot be rejected because of poll worker error.

The October 27, 2008 Order followed, and explicitly adopted, an Order issued three days earlier by Judge Sargus. *See* Exhibit 2. Judge Sargus' Order adopted the Secretary's Directive 2008-101 as an order of this Court. Directive 2008-101 allows for a provisional ballot to be counted so long as the individual's name is recorded in the written affirmation statement.

[Directive 2008-101, Page 7]. Given these Orders and Directives, and the Revised Code provisions already mentioned, the Court should find as a matter of law that the Secretary of State is under no affirmative legal duty to advise boards to reject these provisional ballots, rather the law requires that these provisional ballots must be opened and counted.

The plaintiffs cannot identify any authority for rejecting these provisional ballots or claiming the Secretary of State has a legal duty to do so. First, plaintiffs point to R.C. 3505.182, which states, in pertinent part, “[t]he form of the [provisional ballot] written affirmation shall be printed upon the face of the provisional ballot envelope and shall be **substantially** as follows,” and then proceeds to describe a model form that includes blanks for “name” and “signature.” The conceptual flaw in plaintiffs’ argument is that R.C. 3505.182, to the extent it imposes requirements, speaks to the appearance of the blank Affirmation form, not the mandatory content of a completed form. Stated differently, the legal flaw in plaintiffs’ argument is that, by its plain terms, R.C. 3505.182 requires only “substantial” compliance, not strict compliance. Substantial compliance with an election law is acceptable when, as here, the statute expressly says so. *State ex rel. Stokes v. Brunner*, ____ Ohio St.3d ____, 2008 Ohio 5392, at ¶33; *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008 Ohio 566, at ¶ 21. Therefore, R.C. 3505.182 not only fails to prove that printed name and signature are both indispensable, it actually undercuts the argument.

Second, plaintiffs rely upon R.C. 3505.183(B)(1)(a), which does in fact state that, in order to count a provisional ballot, “the individual’s name and signature” must be included in the affirmation. However, that section stands in apparent conflict with R.C. 3505.181(B)(2), which clearly indicates that all provisional ballots should be counted so long as the voters are registered in the jurisdiction and eligible to vote. In such circumstances, the Secretary of State, as the

statutory chief elections official in the State (R.C. 3501.04), is authorized to interpret the laws in the way best calculated to promote the franchise, and the courts must defer to her interpretation so long as it is reasonable. *State ex rel. Colvin v. Brunner*, 2008 Ohio 5041.

Finally, plaintiffs suggest that counting these votes, even though some lack signatures, would eliminate the crime of voter fraud under R.C. Chapter 3599. Nothing could be further from the truth. R.C. 3599.12(A)(1) makes it a crime to vote or attempt to vote in any election in a precinct in which that person is not a legally qualified elector. Other sections of R.C. 3599.12 make it a crime to attempt to vote twice or impersonate another voter. None of these provisions depends on the presence or absence of a signature.

So far in this Memorandum, the Secretary has not addressed one category of supposedly defective Affirmation Form: those that have the individual's name and signature written somewhere other than in the designated blanks. Here again, if an individual put the information in the wrong place on the Affirmation form, the poll worker should have discovered the "error" before accepting the ballot. But the objection to these ballots raises a more fundamental point: why should it matter where the information is written, so long as the information appears and is accurate? Plaintiffs cannot identify any statute that expressly commands the placement of name and signature in a particular space on the form. And even if they could, the Ohio Supreme Court has repeatedly affirmed the principle that courts "must avoid undue technical interpretations [of election laws] that impede the public policy favoring free, competitive elections." *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22 (quoting *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3). Yet this is precisely what plaintiffs seek to achieve: a rigid, hyper-technical statutory construction that would achieve no valid end but would serve to disenfranchise hundreds of otherwise eligible voters.

IV. CONCLUSION

It cannot be emphasized enough that these are not provisional ballots from unregistered or unqualified voters. Plaintiffs concede that ineligible provisional ballots have already been culled. This case concerns only the provisional ballots of registered, eligible voters, whose votes will not be counted because of an alleged technical violation if plaintiffs prevail. These provisional ballots should be counted as a matter of law, and for this reason, defendant, the Ohio Secretary of State, respectfully asks the Court to grant summary judgment in her favor.

Respectfully submitted,

NANCY H. ROGERS
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Ohio Secretary of State

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 18th day of November, 2008.

/s Richard N. Coglianesse

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

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

v.

**JUDGE FROST
MAGISTRATE JUDGE KING
2:08-CV-1077**

JENNIFER L. BRUNNER

ORDER

Review of the documents that have been filed in the above-captioned action leaves the Court with no question that transfer of this case from the docket of the Honorable Gregory L. Frost to the docket of the Honorable Algenon L. Marbley is warranted.

IT IS SO ORDERED.

/s/ Gregory L. Frost
**GREGORY L. FROST
UNITED STATES DISTRICT JUDGE**

/s/ Algenon L. Marbley
**ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE**

**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

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.

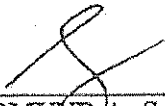
ORDER

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 refiling.

IT IS SO ORDERED.

10-24-2008
DATED



EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

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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

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 aforesaid court action and its attempted settlement. Contacting voters to provide additional information during ten days

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

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

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

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

c) Additional information required at post-election challenge hearing

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

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

3. Failure to provide additional required information

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

B. Step 2 – Preliminary Analysis on Provisional Ballot Eligibility

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

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

1. Not Registered or Not Eligible

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

2. Registered, Eligible, and Affirmation Completed

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

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

3. Registered, Eligible, but No Provisional Ballot Affirmation

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

C. Step 3 – Additional Analysis on Provisional Ballot Eligibility

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

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

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

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

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

1. Ballots Eligible to be Counted

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

- a) The individual named on the affirmation is properly registered to vote;
- b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;
- c) The individual provided the following:

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

or

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

or

- (5) A completed affirmation under R.C. 3505.18(B)(4) (SOS Form 10-T).

- d) If applicable, the individual has provided additional information to the board of elections as may be required, i.e. because he or she falls into

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

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

2. Ballots Not Eligible to be Counted

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

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

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

- (2) A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and

- (3) A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;

or

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

- d) The individual has already cast a ballot, including an absentee ballot, for the election in which he or she cast the provisional ballot;

- e) If applicable, the individual has not provided additional information to the board of elections as may be required, i.e. because he or she falls into one of the four categories of provisional voters who **must** provide additional information to the board of elections during the ten days after the day of an election, and discussed in more detail below; and

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

- g) The individual failed to provide or execute any of the following:

- (1) a current and valid photo identification;

- (2) a military identification;

- (3) an original or a copy of any of the following bearing the voter's name and current address:

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

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

E. Step 5 – Disqualification of Provisional Ballots and Retention

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

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

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

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

VII. ADDITIONAL REQUIREMENTS

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

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

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

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

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

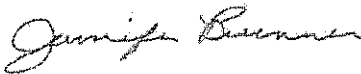
VIII. OBSERVERS

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

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

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

Sincerely,



Jennifer Brunner

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

THE STATE OF OHIO ex rel.	:	
DANA SKAGGS, et al.,	:	
	:	Case No. 2:08-CV-1077
Plaintiff - Relator,	:	
	:	
v.	:	Judge Marbley
	:	
JENNIFER L. BRUNNER	:	
SECRETARY OF THE STATE	:	
OF OHIO, et al.,	:	
	:	
Defendant - Respondent.	:	
	:	

AFFIDAVIT OF PATRICIA A. WOLFE

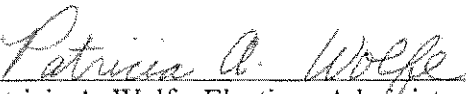
I, Patricia A. Wolfe, having been duly sworn and cautioned according to law, hereby state that I am over the age of eighteen years and am competent to testify to the facts set forth below based upon my personal knowledge.

1. From 1984 to March 1992, I was employed by the Coshocton County (Ohio) Board of Elections, where I served in the positions of Director and Deputy Director, performing the statutory duties of those offices, and such other duties as assigned to me by the board, relative to the administration and conduct of elections in that county.
2. I have been employed in the Elections Division of the Ohio Secretary of State's Office since March 1992, through three administrations, during which time I have served in the positions of Assistant Elections Administrator, Elections Administrator, and Director of Elections. I currently am the Elections Administrator for the Office of Ohio Secretary of State Jennifer Brunner.
3. I am, and since 1997 have been, a Certified Elections Registration Administrator ("CERA"). To retain my CERA certification, I must successfully complete specified continuing education courses offered by the Elections Center and Auburn University (Alabama).

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.

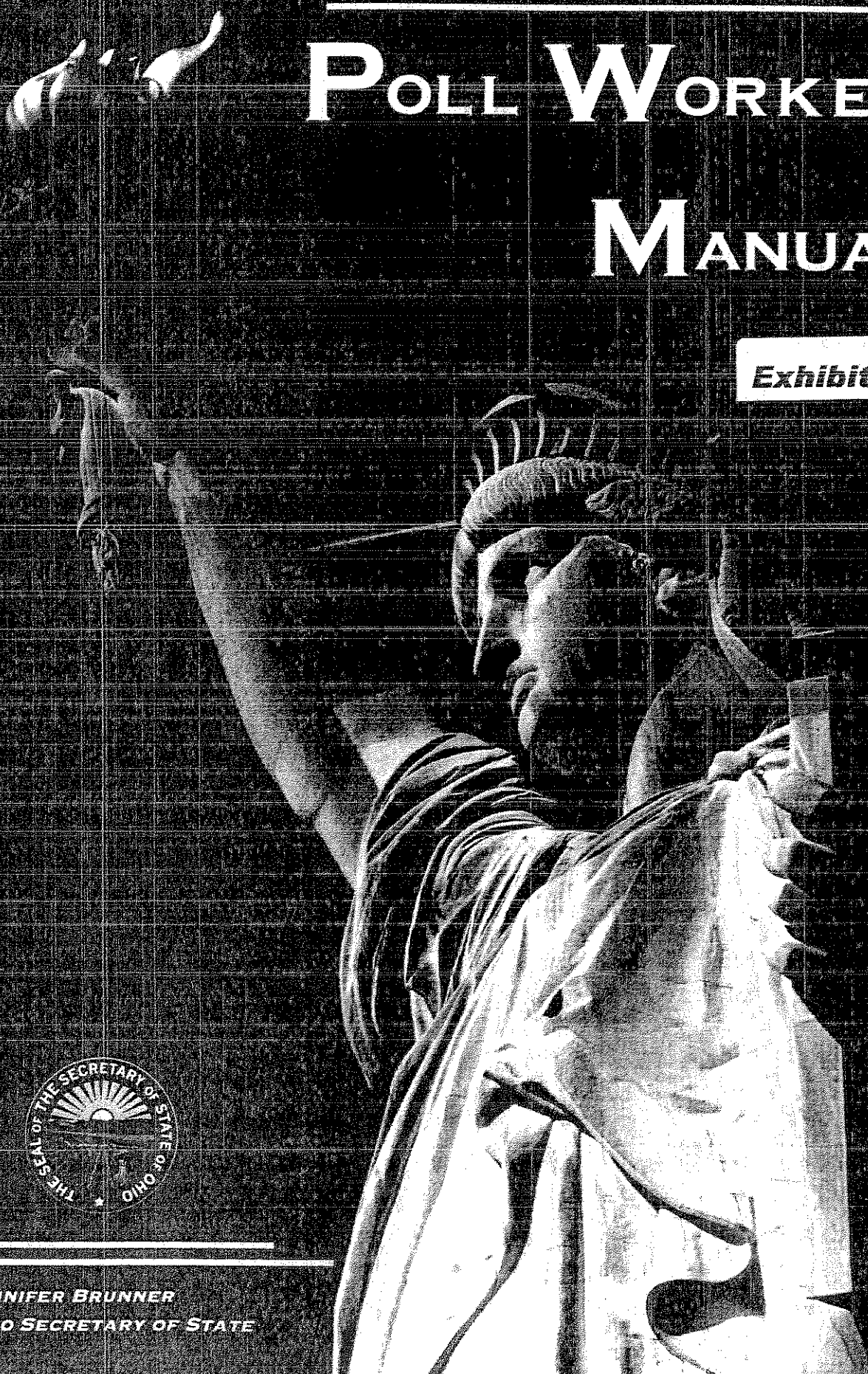

Brian E. Shinn, Attorney at Law
Notary Public - State of Ohio
My commission has no expiration. R.C.147.03.

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

Poll Worker Manual

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 (08/08)

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.

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 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

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

THE STATE OF OHIO ex rel.	:	
DANA SKAGGS, et al.,	:	
	:	Case No. 2:08-CV-1077
Plaintiff - Relator,	:	
	:	
v.	:	Judge Marbley
	:	
JENNIFER L. BRUNNER	:	
SECRETARY OF THE STATE	:	
OF OHIO, et al.,	:	
	:	
Defendant - Respondent.	:	
	:	

AFFIDAVIT OF JACQUELINE J. ROTHSCHUH

I, Jacqueline J. Rothschuh, having been duly sworn and cautioned according to law, hereby state that I am over the age of eighteen years and am competent to testify to the facts set forth below based upon my personal knowledge.

1. From June 15, 1992 to January 4, 2008, I was employed by the Guernsey County (Ohio) Board of Elections, where I served as Director, performing the statutory duties of that office, and such other duties as assigned to me by the board, relative to the administration and conduct of elections in that county.
2. I have been employed in the Elections Division of the Ohio Secretary of State's Office since January 7, 2008, in the position of Assistant Elections Administrator.
3. I am a graduate of the Ohio Association of Election Officials Professional Education and Certification Program.
4. 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.
5. In my position as Director of the Guernsey County Board of Elections, I was responsible for training poll workers regarding their duties in administering elections under Ohio election

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.