

IN THE SUPREME COURT OF OHIO

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

Relators,

vs.

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

Respondents.

Case No.

08-2206

ORIGINAL ACTION IN  
MANDAMUS

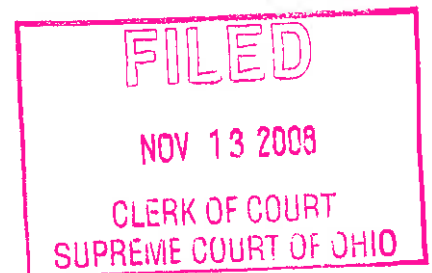
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AFFIDAVIT OF MATTHEW M. DAMSCHRODER

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COUNSEL FOR RELATORS  
DANA SKAGGS AND KYLE FANNIN





Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19<sup>th</sup> House District (the “Undecided Races”). The outcome of each of these three elections may be determined by the provisional ballots the Board of Elections is now reviewing for eligibility but which have not yet been counted.

3. Over 27,000 provisional ballots were cast in Franklin County in the Election. A voter may cast a provisional ballot if the voter’s name does not appear in the poll list; the voter fails to provide required identification at the polling place on the day of the Election; the voter previously requested an absentee ballot; and for other reasons specified in R.C. 3505.181.

4. If a voter seeks to cast a provisional ballot, the voter is provided a Provisional Ballot Application prepared by the Board of Elections and a ballot. A true and accurate original of the Provisional Ballot Application used by the Board of Elections in the Election is attached as Exhibit A. The Provisional Ballot Application specifically requires that the voter provide her name, signature, and verifying identification information or, alternatively, requires her to sign the identification verification affirmation required by R.C. 3505.18(A)(4). The Provisional Ballot Application is printed on an envelope into which the voter inserts her provisional ballot, which is then sealed by the voter.

5. The Board of Elections, upon receipt of the Provisional Ballot Application, is mandated to use the information required of the voter on the Application to determine the eligibility of the voter to cast a provisional ballot. The voter-provided information is cross-checked against the information of the Board of Elections, and of

other county Boards of Elections, to determine the eligibility of the provisional ballot voter.

6. Upon completion of the review of a Provisional Ballot Application, if the provisional ballot voter is determined by the Board of Elections to be eligible to vote, the envelope on which the Provisional Ballot Application is printed is opened and the ballot is removed. To assure the secrecy of the provisional voter's ballot choices, the Provisional Ballot Application envelope is then separated from the ballot it contains and the ballot is then commingled with all other provisional ballots cast in the Election. As a consequence, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of any particular provisional voter, making an after-the-fact assessment of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional ballot voter impossible. Thus, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from the Application envelopes.

7. R.C. 3505.183(D) provides that all provisional ballots must be counted simultaneously:

No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election.

Thus, the Board of Elections cannot open and count any provisional ballot until the eligibility of each and every Provisional Ballot Application has been reviewed and resolved.

8. Initial processing suggests that the majority of the Provisional Ballot Applications have been submitted by voters who are eligible under Ohio statutes. As such, their Applications will be opened and their ballots will be counted if this initial processing is confirmed by the Board of Elections. Initial processing also suggests that a number of the Provisional Ballot Applications are fatally flawed because the voter who tendered the provisional ballot is either not properly registered to vote or voted in an incorrect precinct. If this initial processing is confirmed by the Board of Elections, these Applications will not be opened or counted.

9. While the determination of eligibility of a high percentage of provisional ballot voters is clear, dispute has arisen regarding the eligibility under Ohio statutes of two separate categories of provisional ballots.

10. The first involves Provisional Ballot Applications on which the provisional ballot voter failed to provide both her name and her signature. The Provisional Ballot Application, attached as Exhibit A, clearly indicates that the provisional voter is *required* to provide both her name and her signature. The form highlights this requirement in capital letters, underscored, and in bold type: the provisional ballot voter is directed to “CLEARLY PRINT NAME-**REQUIRED**” and provide the “VOTER’S SIGNATURE-**REQUIRED**.” Nonetheless, approximately 3-4% of the Provisional Ballot Applications lack either the name or signature or both that is specifically required by the Application.

11. On March 31, 2008, Brian Shinn, Assistant General Counsel, Secretary of State of Ohio, responded to a series of questions from the Board of Elections regarding procedures for counting provisional ballots. In response to a question regarding a voter’s

failure to provide both her name and signature on a provisional ballot application, Mr. Shinn, as Assistant General Counsel for the Secretary of State, gave the following instruction:

- 5) Voter did not print his or her name on column 1 but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.

[Emphasis in original.]

A copy of Mr. Shinn's e-mail of March 31, 2008, which was sent directly to me by Mr. Shinn, is attached as Exhibit B.

12. Mr. Shinn's March 31, 2008 instruction that a voter's failure to provide both her "Name AND signature" was consistent with the Secretary of State's pre-Election reading of R.C. 3505.183(B)(1)(a) which states in pertinent part:

... the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

- (a) The individual's name and signature;

In Directive 2008-101 ("SOS Directive 2008-101"), the Secretary of State instructed that the failure of a provisional ballot voter to provide both her name and her signature on the Provisional Ballot Application precluded a Board of Election from treating the provisional ballot as eligible and required that the Provisional Ballot Application "shall neither [be] open[ed] nor count[ed]":

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:

\* \* \*

c) The individual did not provide the following:

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

\* \* \*

[Bold emphasis in original;  
bold italics emphasis added.]

SOS Directive 2008-101 is attached as Exhibit C and may be accessed at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-101.pdf>.

13. Consistent with the direction of the Secretary of State in SOS Directive 2008-101 and Mr. Shinn's e-mail instruction of March 31, 2008, the Prosecuting Attorney of Franklin County, Ohio has advised the Board of Elections that Ohio statutes require that the provisional ballot voter must provide both her name and her signature to be eligible to have her Provisional Ballot Application opened and her ballot counted. A true and accurate copy of the correspondence of the Prosecuting Attorney of Franklin County, Ohio is attached as part of the e-mail chain attached as Exhibit D.

14. The Board of Elections was prepared to follow the pre-Election instructions of the Secretary of State and disqualify as fatally flawed all provisional ballots that did not comply with Mr. Shinn's conclusion that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ."

15. However, on Monday, November 10, after the Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve Stivers by nearly 400 votes for the 15<sup>th</sup> Congressional District seat, Bob DeRose, a lawyer for the Kilroy Committee, challenged the determination of the Secretary of State

that R.C. 3505.181(B)(1)(a) requires that the Provisional Ballot Application, to be eligible to be counted, must contain both the name and the signature of the provisional ballot voter. Mr. DeRose went so far as to assert that a provisional ballot must be counted even if it lacks both the printed name and the signature of the provisional ballot voter. Mr. DeRose's e-mail of 10:29 a.m., November 10, 2008, addressed to the Board of Elections is attached as part of the e-mail chain attached as Exhibit D.

16. Mr. DeRose sent electronic copies of his e-mail of November 10, 2008 to a number of people, including Mr. Shinn, Assistant General Counsel, Ohio Secretary of State. Mr. DeRose's e-mail was sent at 10:29 a.m. At 6:04 p.m. the same day, Mr. Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . . ." Rather, in response to the DeRose request, Mr. Shinn directed that the Board of Elections deem eligible those Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." Mr. Shinn went so far as to indicate that if a voter's signature is found on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e.; it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." A true and accurate copy of Mr. Shinn's e-mail of Monday evening, November 10, 2008 is attached as part of the e-mail chain attached as Exhibit D.



17. On Wednesday, November 12, 2008 at 6:19 p.m., Mr. Shinn confirmed that Secretary of State Brunner concurred with, and had adopted, his November 10 directions to count provisional ballots on which the affirmation does not bear both the name and the signature of the provisional voter. A true and accurate copy of Mr. Shinn's November 12 e-mail is attached as part of the e-mail chain attached as Exhibit D.

18. As a result of Mr. Shinn's reversal of the instruction that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . .," internal discussions indicate the Board of Elections will tie in its vote on whether it should reject as ineligible Provisional Ballot Applications that do not bear both the voter's "Name AND signature" as required by R.C. 3505.183(B)(1)(a).

19. In the case of a tie vote by the members of the Board of Elections, the Secretary of State determines the eligibility of the Provisional Ballot Applications that do not bear both the "Name AND signature" of the voter. R.C. 3501.11(X). The Secretary of State has already prejudged the issue, indicating that she will direct that Provisional Ballot Applications that do not bear both the "Name AND signature" of the voter must nonetheless be determined to be eligible to be counted. Given the number of such disputed provisional ballots, the determination of the eligibility of these Applications could prove decisive in one or more of the three Undecided Races.

20. When the Board of Elections votes on the eligibility of the Applications that fail to set forth both the "Name AND signature" of the voter, the Board will also confront a decision as to the eligibility of a second category of Provisional Ballot Applications that are facially deficient under Ohio statute.

21. R.C. 3505.181 requires that a provisional voter provide required identification verification at the poll or, alternatively, at the Board of Elections within ten (10) days after the Election. The required verification mandated in R.C. 3505.18 includes such simple measures as writing in the voter's Ohio driver's license number or the last four digits of the individual's social security number on the Provisional Ballot Application. See Step 2: Voter Identification of Exhibit A attached.

22. The identification verification requirements of R.C. 3505.181 are necessary to assure that the person who tenders the Provisional Ballot Application is, in fact, the person identified on the Provisional Ballot Application.

23. Nonetheless, in approximately 10% of the Provisional Ballot Applications under review, the provisional voters failed to complete the Voter Identification or the Identification Affirmation sections of the Provisional Ballot Application ("Step 2") even though the Application clearly states, "To be completed by the Voter." As a result, these voters have failed to provide the statutorily required Identification Verification information.

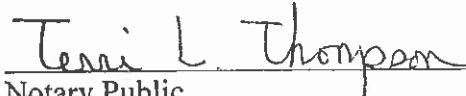
24. Internal discussions indicate the Board of Elections will tie when it votes on whether to treat the Provisional Ballot Applications that fail to provide the voter identification verification information or affirmation required by R.C. 3505.181 as fatally flawed and therefore ineligible to be counted or, alternatively, to treat such Provisional Ballot Applications as eligible to be counted. Again, the Secretary of State will break the tie vote on this issue, but there will not be time for judicial review after the Secretary of State makes her decision if the Provisional Ballot Applications are opened on or before November 19 as currently scheduled. Once the Provisional Ballot Applications are

opened and the ballot is separated from the Application, it will be impossible to determine which ballots were eligible under Ohio statute and which were not. Simply stated, once the provisional ballots are opened, it will be impossible to correct the error if this Court were subsequently to decide that the votes associated with these facially deficient Applications are in fact ineligible to be counted.

Further Affiant sayeth naught.

  
\_\_\_\_\_  
Matthew M. Damschroder

Sworn to before me and subscribed in my presence this 13<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
Notary Public



TERRI L. THOMPSON  
Notary Public, State of Ohio  
My commission expires 08/24/2009

859-001:189115

**EXHIBIT A**

**PROVISIONAL BALLOT APPLICATION • FRANKLIN COUNTY BOARD OF ELECTIONS  
WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.**

**STEP 1: VOTER INFORMATION**  
Each blank must be completed by the Voter.

\_\_\_\_\_  
(CLEARLY PRINT NAME - REQUIRED)  
solemnly swear or affirm that I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in this election, for which I am casting this provisional ballot. I am casting this provisional ballot because my name should appear on the official precinct list, but does not, my address has changed, my name has changed. I requested an absentee ballot and/or I am listed in the official precinct list as having requested an absentee ballot or for another reason. I declare under penalty of election falsification I am a citizen of the United States, will have lived in this state for 30 days immediately preceding the next election, and I will be at least 18 years of age at the time of the general election.

**CURRENT ADDRESS**  
HOUSE #/STREET \_\_\_\_\_ APT # \_\_\_\_\_  
CITY \_\_\_\_\_ ZIP CODE \_\_\_\_\_  
**FORMER ADDRESS:**  
STREET: \_\_\_\_\_  
CITY: \_\_\_\_\_  
COUNTY: \_\_\_\_\_  
**FORMER NAME (If applicable)**  
\_\_\_\_\_  
**DATE OF BIRTH REQUIRED**  
\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_(MM/DD/YYYY)  
I understand that if the information I provide on this provisional ballot application is not fully complete and correct, and/or 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, and/or if the board of elections determines that I have already voted in this election, this 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** \_\_\_\_\_ Date \_\_\_\_\_  
VOTER'S SIGNATURE (REQUIRED)

**STEP 2: VOTER IDENTIFICATION**  
To be completed by the Voter.

**You must provide one of the following forms of identification documentation**

**NOTE:** If you are unable to provide proof of identity or if your right to vote was challenged and you were unable to provide the necessary documentation to satisfy the challenge, you may provide proof of identity at the Board of Elections within 10 days after the election.

The last four digits of my Social Security Number are: \_\_\_\_\_

My Ohio Driver's License Number OR State Identification Card Number is: \_\_\_\_\_

Other form of photo identification displaying name and current address: \_\_\_\_\_ (specify kind of ID)

Other (copy of current utility bill, bank statement, government check, paycheck, or other government document that shows my name and current address) \_\_\_\_\_ (specify kind of ID)

No identification documentation and I have NO Social Security Number (complete identification affirmation below if applicable)

**IDENTIFICATION AFFIRMATION**  
ONLY FOR VOTERS WHO CHECKED 'NO ID' ABOVE  
RC 3505.18(A)(4)  
I, \_\_\_\_\_ (CLEARLY PRINT NAME) declare under penalty of election falsification that I cannot provide a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing my name and current address, nor the last four digits of my social security number because I have no social security number and further declare that I am the person named on this application and that I understand I may cast a provisional ballot.  
**X** \_\_\_\_\_ Date \_\_\_\_\_  
VOTER'S SIGNATURE

**STEP 3: POLL WORKER STATEMENT**  
To be completed by a Poll Worker

The preceding Provisional Ballot Application was subscribed and affirmed before me. The following is true concerning the reason necessary to issue a provisional ballot:

Voter's name is not in the Signature Poll Book

Voter has a LEGAL NAME CHANGE

Voter has an ADDRESS CHANGE

Number '2' is to the left of the signature box (undeliverable 60-day election notice)

Number '3' is to the left of the signature box (undeliverable registration acknowledgement notice)

Number '4' is to the left of the signature box (voter requested an ABSENTEE BALLOT)

"ATTORNEY IN FACT" is printed in signature box. Check here and also check the specific reason for a provisional ballot

The Voter is unable to provide valid identification

The Voter refuses to provide valid identification

Name or address on the Valid Non Photo Identification does NOT match the Signature Poll Book

Voter's name does not match the Signature Poll Book (Signature Poll Book has current legal name but ID does NOT have current legal name)

SPL, or MPL (and Precinct): \_\_\_\_\_  
(Check Location Street Guide for Information)

**X** \_\_\_\_\_  
POLL WORKER'S SIGNATURE

**STEP 4: VOTE!**  
After completing this application in its entirety:

1. **POLL WORKER:** Using the Precinct Street Listing, find the provisional voter's current address and write the ballot style number for the voter's address here:  
\_\_\_\_\_  
(Ballot Style Number)

2. **POLL WORKER:** Locate the provisional ballot pad(s) with the same ballot style number that you wrote above.

3. **POLL WORKER:** Give the provisional voter the provisional ballot and the Provisional Ballot Application envelope, and direct the provisional voter to a provisional voting booth (UNLESS THE VOTER IS DISABLED AND VOTING ON THE MACHINE) to mark the PAPER ballot.

4. **VOTER:** Carefully read all of the instructions. Once you have completed voting your provisional ballot, fold it in half and place it inside this envelope. Seal the envelope and deposit the envelope in the sealed ballot box.

THIS SPACE FOR OFFICE USE ONLY

# Provisional Application Worksheet

(for office use only)

Level	ID & Date	ID & Date	ID & Date	ID & Date
1 Initial Review	1	1	1	1
2 Verification	2	2	2	2
3 Voter Query Look-up	3	3	3	3
4 SQL Look-up (restricted use)	4	4	4	4
5 Bad Signature Review	5	5	5	5
6 Rejection Review	6	6	6	6
7 Check Old DWP for Voting	7	7	7	7
8 Out of County Verification	8	8	8	8
9 Legal Review	9	9	9	9
10 Accepted	10	10	10	10
11 Rejected	11	11	11	11
Reason for Rejection/Acceptance:				

**DO NOT WRITE BELOW THIS LINE: FOR FINAL REVIEW ONLY**

12 Approved: Y or N      Code: 001

13 Rejected: Y or N      Code: 006    200    250    300    350    400    450    500    600    800    850

Signatures of Final Reviewers: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Comments:

- |                                     |                                 |
|-------------------------------------|---------------------------------|
| APPL APPLICATION                    | 001 APPROVED                    |
| APR APPROVED                        | 006 FORM INCOMPLETE             |
| DOB DATE OF BIRTH                   | 200 NOT REGISTERED              |
| DWP DISTRICT/WARD/PRECINCT          | 250 REGISTERED AFTER CUTOFF     |
| FIF FOUND IN FRANKLIN CO            | 300 NO SIGNATURE                |
| INC FORM INCOMPLETE                 | 450 VOTED ABSENTEE              |
| NE PRECINCT SPLIT NOT ELIGIBLE      | 500 SIGNATURE DOESN'T MATCH     |
| NR NOT REGISTERED                   | 600 VOTED IN WRONG PRECINCT     |
| NRIC NOT REGISTERED IN OTHER COUNTY | 800 UNDERAGE                    |
| NS NO SIGNATURE                     | 850 PRECINCT SPLIT NOT ELIGIBLE |
- 
- |                             |                                 |
|-----------------------------|---------------------------------|
| ODL OHIO DRIVERS LICENCE    | 001 APPROVED                    |
| OS ON SYSTEM                | 006 FORM INCOMPLETE             |
| PA PROVISIONAL APPLICATION  | 200 NOT REGISTERED              |
| PW PROVISIONAL WORKSHEET    | 250 REGISTERED AFTER CUTOFF     |
| RAC REGISTERED AFTER CUTOFF | 300 NO SIGNATURE                |
| SPB SIGNATURE POLL BOOK     | 450 VOTED ABSENTEE              |
| SSN SOCIAL SECURITY NUMBER  | 500 SIGNATURE DOESN'T MATCH     |
| U UNDERAGE                  | 600 VOTED IN WRONG PRECINCT     |
| VOC VOTED IN OLD COUNTY     | 800 UNDERAGE                    |
| WVP VOTED IN WRONG PRECINCT | 850 PRECINCT SPLIT NOT ELIGIBLE |
- \* COUNT = BALLOT ACCEPTED  
 NO COUNT = BALLOT REJECTED

**From:** Shinn, Brian [mailto:bshinn@sos.state.oh.us]  
**Sent:** Monday, March 31, 2008 1:00 PM  
**To:** Damschroder, Matthew M.; Piccininni, Patrick J.  
**Cc:** White, Dennis L.; Wedekind, Michael; Thomsen, Katherine  
**Subject:** RE: Provisionals  
**Importance:** High

Denny and Matt,

Todd and I have discussed most of the situations below. It is my understanding that your board would appreciate written responses.

Generally, most issues about provisional ballot affirmation statements are covered by Directive 2007-06 on pages 14-16, which explains the provisions of R.C. 3505.183 with regard to provisional ballot affirmation statements.

Under R.C. 3505.183(B)(1), the board is required to examine its records to determine whether the person who cast the provisional ballot is registered and eligible to vote. The only information that is REQUIRED TO BE INCLUDED IN THE AFFIRMATION FOR THE VOTE TO BE COUNTED IS: 1. [3505.183(B)(1)(a)] the voter's name and signature; 2. [3505.183(B)(1)(b)] a statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted; and 3. [3505.183(B)(1)(c)] a statement that the individual is eligible to vote in the election in which the provisional ballot is being voted. All other information is optional and is intended to aid the board in identifying whether the voter is registered in the jurisdiction. Contrary to Franklin County's provisional ballot envelope, date of birth is NOT REQUIRED. Even if the voter did not provide ID, the provisional ballot still may be counted under R.C. 3505.183(B)(4)(a)(vii) if the voter completed the affirmation statement under R.C. 3513.18(A) OR R.C. 3513.181(B).

Answers to your specific questions:

- 1) More than one ballot in the provisional ballot envelope – apparently some of your poll workers for whatever reason instructed voters to complete a party ballot or even both party ballots and an issues-only ballot. Unlike the absentee ballot statutes, there is no specific statute that says that a provisional ballot cannot be counted if there are multiple ballots in a provisional envelope. If your board determined that the voter was eligible to vote in the primary for a party, then that ballot should be counted only. If the person is only eligible to vote issues, then the issues-only ballot would be counted. If the person did not name a party on the envelope or on a form 10-W or 10-X, then the issues-only ballot is the one that would be counted. All other ballots should not be counted and should be voided. The poll workers in these precincts should be questioned and instructed NOT to issue multiple ballots in the future.
- 2) Poll worker did not sign affirmation statement – the ballot should still be counted if the voter provided the required information outlined above. No statute makes the poll worker signature necessary for the ballot to be counted.
- 3) Poll worker signed but did not check box for ID. As stated above, if the statutory requirements are met, then the ballot may be counted without ID being provided as

**EXHIBIT**

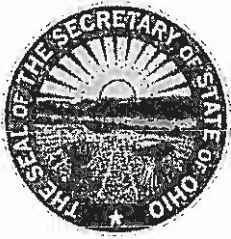
**B**

long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.

- 4) If only column one of Franklin County's provisional ballot envelope is completed then the ballot still may be counted for the reasons stated above (because column one contains all the information and statements required by statute) as long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.
- 5) Voter did not print his or her name on column one but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.
- 6) Voter was issued an absentee ballot, and the voter brought it to polling place on election day. Rather than instructing the voter to deliver the absentee ballot to the board of elections or issuing the voter a provisional ballot, the poll worker had the voter complete a provisional ballot envelope and placed the voted absentee ballot in it. The ballot can be counted IF the affirmation statement was properly completed as described above and IF the board can determine that no other absentee ballot was cast by the voter. The voter should not be disenfranchised due to the poll worker's error.

You may contact me if you have any questions about these explanations.

Brian Shinn



**JENNIFER BRUNNER**  
**OHIO SECRETARY OF STATE**

180 EAST BROAD STREET, 16TH FLOOR  
COLUMBUS, OHIO 43215 USA  
TEL: 1-877-767-6446 FAX: 1-614-644-0649  
WWW.SOS.STATE.OH.US

**DIRECTIVE 2008-101**

October 24, 2008

To: ALL COUNTY BOARDS OF ELECTIONS  
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS

Re : Guidelines for Determining the Validity of Provisional Ballots

This directive is issued as a means to settle ongoing litigation now pending in the United States District Court for the Southern District of Ohio, Case No. C2:06-0896 and captioned Northeast Ohio Coalition for the Homeless v. Brunner.

This directive provides guidelines for Ohio's boards of elections in processing and counting provisional ballots. This includes guidelines on determining the validity of provisional ballots under Ohio law and, generally, the timeframes during which boards may process provisional ballots to determine their eligibility for counting. This directive complements, but does not supersede, Directive 2008-81, Guidelines for Provisional Voting.

**I. DEFINITIONS**

A. For purposes of this directive, "members of the board" means a majority vote of at least a quorum of the members of the board of elections taken at a public meeting,

B. For purposes of this directive, "processing" provisional ballots means:

- handling provisional ballots in provisional ballot envelopes ("envelopes") as they are cast at a board of elections office or other designated site or as they are returned from precincts on election night;
- moving or storing provisional ballots at a board of elections office or other designated site;
- reviewing envelopes and affirmation statements to initially determine the presumptive eligibility of provisional ballots to be counted;
- sorting provisional ballots in their envelopes into categories of eligible, questionable, and ineligible, and if a board so states in its policy and procedures, into subcategories of ineligible; and
- the making by board of elections staff of a recommendation to the members of the board as to the eligibility and/or ineligibility of provisional ballots cast in the county for the election in question.

**EXHIBIT**

**C**



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 document<sup>1</sup>;

- (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

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<sup>1</sup> 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.

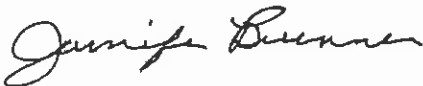
#### VIII. OBSERVERS

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

**From:** Shinn, Brian [mailto:bshinn@sos.state.oh.us]  
**Sent:** Wed 11/12/2008 6:19 PM  
**To:** Shinn, Brian; Piccininni, Patrick J.; Stinziano, Michael P.; Damschroder, Matthew M.  
**Cc:** O'Brien, Ron J.; Soulas, Nick A.; Wilson, Antoinette; Dora Rose; Bob DeRose  
**Subject:** RE: Provisional Ballots with Signatures issues

Michael and Matt,

I met with Secretary Brunner and our legal staff this afternoon. We discussed the provisional ballot issues raised in Mr. DeRose's email (below) that I responded to on Monday.

- 1) Secretary Brunner agrees with my earlier advice that a provisional ballot that contains the signature of a voter but not the written name **MUST BE COUNTED** if the person is a registered elector, the person voted in the correct precinct, and the person was not required to provide additional information to the board but failed to do so. R.C. 3505.182 prescribes the form of the provisional ballot affirmation but is only a substantial compliance statute. Directive 2008-81 (page 6) states that the voter must execute the affirmation and lists the required statements that must be included. "Execute" means sign. Franklin County uses a provisional ballot affirmation that is different from the SOS prescribed form (Form 12-B) in several regards. On our prescribed form, the poll worker is instructed to print the voter's name in the "Election Official Verification Statement." In contrast, Franklin County's form does not require the poll worker to print the person's name in step 3 or step 4. Thus, the Franklin County form omits a safeguard for the voter. While poll workers are trained to review the voter's affirmation statement before completing the poll worker statement, even the best trained poll workers make mistakes. It is not reasonable to assume that a person would sign a provisional ballot affirmation **BUT** refuse to write his or her name in. Directive 2008-101 must be read in conjunction with Directive 2008-103. Consequently, failure to write a voter's name on a provisional ballot affirmation is poll worker error that cannot be held against the voter under Directive 2008-103. Finally, we are all reminded by *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22: "we 'must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections.'" *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3, 598 N.E.2d 1149; cf. *Stern v. Cuyahoga Cty. Bd. of Elections* (1968), 14 Ohio St.2d 175, 180, 43 O.O.2d 286, 237 N.E.2d 313.
- 2) I will provide more information regarding our interpretation of the voter name but no signature issue tomorrow.
- 3) We stand by our requirement in Directive 2008-109 that a voter with an error or omission on his or her absentee ballot envelope must come to the board office to correct it. The board is not required to send out two staff members for a voter who cannot come to the board office. However, I know at least one board of elections that has decided to do so.
- 4) While the deadline for a voter who is required to provide additional information to the board for a provisional ballot to be counted is the tenth day, boards of elections have until the official canvass to resolve all issues regarding provisional ballots, such as

**EXHIBIT**

**D**

confirming voters who moved from one Ohio county to another but failed to update their address. See Directive 2008-101 (Page 2, section II).

Brian Shinn

**From:** Shinn, Brian  
**Sent:** Wednesday, November 12, 2008 9:42 AM  
**To:** 'Piccininni, Patrick J.'; Stinziano, Michael P.; Damschroder, Matthew M.  
**Cc:** O'Brien, Ron J.; Soulas, Nick A.; Wilson, Antoinette  
**Subject:** RE: Provisional Ballots with Signatures issues  
**Importance:** High

Michael and Matt,

I respectfully disagree with Patrick on number 1. I believe that Judge Sargus' order regarding poll worker error and Directive 2008-103 should be read liberally and in favor of counting provisional ballots rather than rejecting them solely based upon technicalities.

The form of the provisional ballot affirmation under R.C. 3505.182 is a substantial compliance statute. 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.

If you can determine based upon the address and signature that the person is a registered elector, voted in the correct precinct, and was not required to provide additional information, why would you not want to count the ballot? Otherwise, you are disenfranchising the person.

We will discuss this issue with Secretary Brunner this afternoon as well as the issue of no signature but name was printed on the affirmation and get back to you.

Brian Shinn

**From:** Piccininni, Patrick J. [mailto:pjpiccin@franklincountyohio.gov]  
**Sent:** Wednesday, November 12, 2008 7:11 AM  
**To:** Stinziano, Michael P.; Damschroder, Matthew M.  
**Cc:** Shinn, Brian; O'Brien, Ron J.; Soulas, Nick A.  
**Subject:** Provisional Ballots with Signatures issues  
**Importance:** High

Gentleman: After our discussion of Brian Shinn's email, Directives 2008-101, 2008-103 and the provisional voter envelope we are in agreement that:

1) While Directive 2008-103, provides that a provisional ballot may not be rejected for reasons that **are attributable** to poll worker error neither the directive nor the court order transformed all

voter errors into poll worker errors. Under Directive 2008-101 many responsibilities remain the voters. Specifically, Directive 2008-101, §VI(D)(2)(c)(1) provides that the Board of Elections shall not open nor count a provisional ballot shall if the voter failed to provide their **name and signature** as the person who cast the ballot. The directive adopted by the Court states that both are required. The voter shall complete the information. Nothing in Directive 2008-101, 2008-103 nor the various court orders altered that requirement. R.C. §3505.181 puts the obligation on the voter to complete the application any omission of required information is voter error not poll worker error. Thus, the failure of the voter to put their name on the ballot is not poll worker error requiring the ballot be counted. The ballot should not be opened and not counted.

2) As to the situation where the voter completed the entire application but failed to sign the affirmation is voter error that will invalidate the provisional ballot. The statute is clear that the **voter must complete** the written affirmation before a poll worker. RC §3501.011 provides that the signature is that of the voter. The duty mandated in R.C. §3505.181 is on the voter not the poll worker. Failure to do so is a fatal defect.

Patrick J. Piccininni  
Assistant Prosecuting Attorney, Civil Division  
Franklin County Prosecutor's Office  
373 South High Street, 13th Floor  
Columbus, Ohio 43215  
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614-462-3520  
614-462-6012 (fax)

Please note that this message and/or any attachments may contain confidential attorney work product and/or may otherwise be privileged or confidential and/or protected from disclosure by applicable law. If you are not the intended recipient, please accept my apology, but you are hereby notified that you have received this message in error. Any review, dissemination, distribution or copying of this message is strictly prohibited. If you have received this message in error, please notify me by reply or by telephone at 614-462-3520 and immediately delete this message and any attachments.

Thank you.

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**From:** Shinn, Brian [mailto:bshinn@sos.state.oh.us]  
**Sent:** Mon 11/10/2008 6:03 PM  
**To:** Bob DeRose; Stinziano, Michael P.; Damschroder, Matthew M.  
**Cc:** Megan Kelley; Randy Borntrager; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Coie); Nickolas, Eric; Piccininni, Patrick J.  
**Subject:** RE: Provisional Ballots with signature issues.

Michael and Matt,

I am writing to respond to some of the concerns raised by Mr. DeRose in his email. I have consulted with Directives 2008-101 and 2008-103 and R.C. 3505.181, 3505.182, and 3505.183. Michael also provided me with a copy of Franklin County's provisional ID envelope.

As a preliminary matter, your board should be using Directives 2008-101 and 2008-103 to determine the validity of provisional ballots rather than any old emails that I sent you after the primary election.

There are three situations regarding provisional ballots described in the email below. Here are my suggestions for handling these:

- 1) The voter provided a **signature** in the affirmation statement, but neither the voter nor the poll worker wrote the **voter's name** anywhere on the provisional ballot envelope – if your board can determine from the information provided by checking the address and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name was not recorded falls under the category of poll worker error described in Directive 2008-103.
- 2) The voter's name was written on the provisional ballot ID envelope but no signature – we will consult with Secretary Brunner and get back to you on Wednesday. There is an ambiguity that we need resolved before I can advise you on this situation.
- 3) The voter's name and signature are on the provisional ballot envelope but not necessarily in the correct places. If your board can determine from the information provided that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name and signature were in the wrong place falls under the category of poll worker error described in Directive 2008-103.

The other issue raised by Mr. DeRose's email is whether the board must contact provisional voters who failed to sign the provisional ballot envelope. The only provisional voters whom the board must contact under Directive 2008-101 (section VI.A.2.b on page 4) are provisional voters who are required to provide additional information to the board of elections. Unlike absentee voters under Directive 2008-109, the board is not required to contact provisional voters with errors on their provisional ballot envelope except for those specified in the previous sentence.

Finally, I caution anyone from releasing information about the number of provisional ballots based upon observer information. Observers were sworn not to disclose information that might compromise the secrecy of the ballot.

Let me know if you have any questions.

Brian Shinn  
Assistant General Counsel  
Ohio Secretary of State Jennifer Brunner

**From:** Bob DeRose [mailto:bderose@bnhmlaw.com]  
**Sent:** Monday, November 10, 2008 10:29 AM  
**To:** Stinziano, Michael P.; mmdamsch@vote.franklincountyohio.gov  
**Cc:** Shinn, Brian; Megan Kelley; Randy Borntreger; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Coie)  
**Subject:** Provisional Ballots with signature issues.  
**Importance:** High

Michael and Matt,

I am writing concerning the 800 individuals who were made to cast a provisional ballot and who have signature issues determined by you to be “fatally flawed.” As the Kilroy for Congress campaign understands the situation, provisional ballots that either lack a printed name but have a signature in the affirmation or have a printed name but lack a signature in the affirmation, will not be counted and the Board of Elections does not intend to notify the voter to come to the Board to cure the defect. It is the position of the Kilroy for Congress campaign that the Board’s position is incorrect because it does not follow the Ohio Revised Code nor the directives of the Ohio Secretary of State.

A review of R.C. §3505.181 provides at Section (B) (2):

The individual [voter] 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. (*emphasis added*)

Section (B) (2) uses the term “before” as a preposition meaning, “in the presence of an election official.” R.C. §3505.181 confers upon the poll worker the duty to have the voter complete the provisional ballot envelope in their presence. The use of the word “before” as a preposition is supported by R.C. §3505.182 where in the Revised Code mandates that a poll worker attest to the voter’s completion of the affirmation. In relevant part, R.C. §3505.182 requires the following language to be used on provisional ballots and same is used by the Franklin County Board of Elections; “The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this ..... day of ..... (Month), ..... (Year).” Finally, R.C. §3505.182 requires that the poll worker sign their name to the provisional ballot envelope to attest to the voter’s completion of the provisional ballot envelope’s affirmation section. Further, in the event an individual declines to sign the affirmation, R.C. §3505.182 directs the poll worker to follow procedures set out in R.C. §3505.181 (B)(6).

R.C. §3505.181 (B)(6) requires that “at the time an individual casts a provisional ballot, ... the appropriate election official shall record...the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual’s name and include that information with the transmission of the ballot under division (B)(3) of this section.”

Read together, R.C. §3505.181 and R.C. §3505.182 confer upon the poll worker a duty to make sure that the affirmation section of the provisional ballot envelope is completed correctly by the voter. This duty was codified in SOS Directive 2008-81. The poll worker’s duty would include making certain that the voter placed their printed name in the correct section and signed the affirmation. Permitting a provisional ballot to be cast without the necessary information in the voter affirmation section is contrary to the poll

worker's statutory duty, especially since a poll worker is required by statute to record the affirmation or the declination of a voter to affirm. It stands to reason that the poll worker would check each provisional ballot for the information necessary to discharge their statutory duties and when the information is incomplete they would inquire of the voter if they intended not to sign or place their printed name in the affirmation section. The lack of a signature or a printed name on a provisional ballot envelope's affirmation section is the result of a poll worker's error in not checking the provisional ballot before it was cast. Pursuant to SOS Directive 2008-103, "provisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker's ...failure to comply with any duty mandated by R.C. 3505.181." As such, any provisional ballot that lacks a printed name but has a signature, or that has a printed name but lacks a signature, or lacks a printed name and has no signature was cast on November 4, 2008 as a result of poll worker error. It is our understanding that approximately 620 of the 800 provisional ballots contain a signature but lacks a printed name. As to these 620 provisional ballots that were cast by an otherwise eligible voter, meaning that there is sufficient information to confirm the identity of the voter, these should be reviewed for registration, their signature compared to the registration and counted as a vote. It is our understanding that approximately 30 provisional ballots have a printed name but lack a signature. As to these 30 provisional ballots, because you have a name and the precinct where the provisional ballot was cast, the Board of Elections should immediately notify these voters of the defect and have them come into the Board to sign the affirmation. As to the remaining provisional ballots that lack a printed name and lack a signature; to the extent that the Board can determine the voter's identity from other sources, the ID provided by the voter, the Board should notify the voter of the defect and have them come into the Board to cure.

This issue is of extremely high importance and needs to be addressed immediately since time is running out for these individuals to cure their defects. Because of the time sensitive nature of this issue, I have copied Brian Shinn on this email. Also, can you confirm the numbers I cited for each of the signature issue? Thank you.

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