In The United States District Court
For The Southern District Of Ohio
Eastern Division

THE NORTHEAST OHIO COALITION FOR THE HOMELESS and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199,	:	
Plaintiffs,	:	
v.	:	
JENNIFER BRUNNER, OHIO SECRETARY OF STATE,	:	
Defendant.	:	**Case No. C2-06-896** **JUDGE MARBLEY**
THE NORTHEAST OHIO COALITION FOR THE HOMELESS and	:	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199,	:	
Plaintiffs,	:	
v.	:	
THE STATE OF OHIO,	:	
Intervenor-Defendant.	:	

OHIO REPUBLICAN PARTY, et al.	:	
Plaintiffs,	:	**Case No. 2:08CV913**
v.	:	**JUDGE MARBLEY**
JENNIFER BRUNNER, Secretary of State of Ohio,	:	**MAGISTRATE JUDGE KING**

Defendant. :

STATE EX REL. SKAGGS, et al.

Relators-Plaintiffs,

vs. **Case No. 2:08-cv-1077**

JENNIFER BRUNNER **JUDGE MARBLEY**
Secretary of State of Ohio

And

FRANKLIN COUNTY BOARD OF ELECTIONS,

Respondent-Defendants.

MEMORANDUM OF DEFENDANT JENNIFER BRUNNER, OHIO SECRETARY OF STATE, IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

The plaintiffs in this case are seeking an Order from this Court that would effectively disenfranchise hundreds of Franklin County voters who cast provisional ballots on November 4, 2008 *and were in fact registered and qualified 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. The entire case is based on the allegation that the Franklin County Provisional Ballot Affirmation for, which is different from the Secretary of State's prescribed Provisional Ballot Affirmation form (SOS Form 12-B) A, lacked either the printed name of the voter, the signature of the voter, or both. Plaintiffs are asking this Court to issue a Temporary Restraining Order to bar the counting of these provisional ballots.

The request for a Temporary Restraining Order should be denied, for two reasons. First, the plaintiffs in this case do not have standing to seek relief. There is no allegation that any of

the plaintiffs are qualified electors in the three Districts they identify as having undecided contests.

Second, injunctive relief should be denied because plaintiffs cannot show any likelihood of success on the merits, let alone a "strong" likelihood. Ohio law does not require both printed names and signatures as a prerequisite for counting provisional ballots, contrary to what plaintiffs have argued. The Secretary of State has adopted an interpretation of Ohio law which is reasonable and which serves to enlarge, not interfere with, the franchise. This Court should and must defer to that interpretation. Even when the statutory language is unambiguous, Ohio election law is not to be applied in a hyper-technical fashion that only serves to disenfranchise voters.

Before examining the temporary restraining order requirements, however, it is important for the Court to understand that this entire problem is as a direct result of the Franklin County Board of Elections deciding to use their own form for provisional ballots instead of the Secretary of State's prescribed form, Form 12-B (Attached as Exh. A). Under the Secretary's form, 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. Under Franklin County's provisional ballot envelope, however, the requirement on completing the envelope rests with the voter – not the poll worker. Furthermore, the Franklin County provisional ballot application also states that the individual voter is required to provide both his printed name and signature. They have included this on the form despite the fact that statement does not appear on the Secretary's prescribed form.[1]

[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 the ballot. RC 3505.183(B).

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 D2, email from Brian Shinn to Patrick Picccininni, et al., dated November 12, 2008.

Yet, despite the undeniable fact that some hard working poll workers made errors, the Plaintiffs in this case wish to disenfranchise possibly thousands of individuals who, through no fault of their own, signed their provisional ballot envelopes, were properly registered to vote, voted in the proper precinct, and presented the appropriate identification.[2]

I. Plaintiffs Have Failed To Show They Are Entitled To A Temporary Restraining Order.

Before issuing a motion for preliminary injunction, the Court must examine four separate factors:

(1) Whether the movant has a "strong" likelihood of success on the merits;

(2) Whether the movant would otherwise suffer irreparable injury;

(3) Whether issuance of a preliminary injunction would cause harm to others; and

(4) Whether the public interest would be served by the issuance of a preliminary injunction.

[2] This problem is even more acute based upon the fact that Franklin County erroneously required possibly tens of thousands of people to vote provisional ballots who should have been given regular ballots in the first place.

McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *Cabot Corp. v. King*, 790 F. Supp 153, 155 (N.D. Ohio 1992). The standard for granting an emergency injunction is more stringent than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because it is "an 'extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted). "In making its determination, the district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." *Id.* The foregoing are "factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors." *In re DeLorean Motor Co., 755* F.2d 1223, 1229 6th Cir. 1985).

In this case, plaintiffs cannot meet the first two requirements. They cannot show a threat of irreparable harm, due to their lack of standing. And they cannot show a strong likelihood of success on the merits because they are advocating an incorrect legal position.

II. Plaintiffs Lack Standing To Bring This Action

"It is to be presumed that a cause lies outside" the federal courts' "limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994). That requires proof of Article III standing, which is a "fundamental element in determining federal jurisdiction over a 'case' or 'controversy' as set forth in Article III of the Constitution." *Morrison v. Bd. of Educ.*, 521 F.3d 602, 608 (6th Cir. 2008) (citing *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312 (1997)). Not just any injury will suffice; the injury must be "concrete and particularized," *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992), "distinct and palpable." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990). It is axiomatic that establishing standing in accordance with Article III is done by "tracing a concrete and particularized injury to the defendant--whether actual or imminent--and establishing that a favorable judgment would provide redress." *Morrison*, 521 F.3d at 608 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992)). In fact, the Supreme Court has "emphasized repeatedly" that the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990).

In this case, Plaintiffs have failed to establish the they have suffered any particularized or individual harm that was in addition or different to any other voter that cast a ballot in the 15th District Congressional race, the 19th and 20th Ohio House races or any voter anywhere in Franklin County. Whether all voters who cast a provisional ballot without printing their name on the Franklin County specific provisional ballot envelope have those ballots counted or rejected does not impact in any manner the fact that these particular plaintiffs had their votes counted. It will not impact or negate their vote.[3] In fact, there is not even an indication that the Plaintiffs were voters that were among those whose ballots are subject to dispute because they did not fill in their name. Quite to the contrary, only one of the plaintiffs actually even cast a provisional ballot, but never alleges that it was one subject to the discrepancy at issue in this case. For these reasons, Plaintiffs have failed to establish that they have suffered any individual particularized harm and thus lack standing to bring this action.

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[3] Most troubling, however, is that it appears both Madison and Union counties – which make up portions of the Fifteenth Congressional District – used the Secretary of State's prescribed provisional ballot envelope and further had their poll workers put the voters' names on the envelope. An equal protection problem may well arise if voters in the Union and Madison counties portions of the Fifteenth Congressional district have their provisional ballots counted while provisional ballots containing the same errors in Franklin County are rejected.

III. Plaintiffs Cannot Show A Strong Likelihood of Success on The Merits

When determining whether to count a provisional ballot, it is important for this Court to remember three different items must be examined. The first is RC 3505.183, which states the statutory requirements for the counting of provisional ballots. The second item is Directive 2008-101, which was issued in an attempt to settle the *Northeast Ohio Coalition for the Homeless* ("NEOHC") case. That directive was incorporated by an order of this Court. Although it is true that Directive 2008-101 actually 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. Finally, the Plaintiffs completely ignore Directive 2008-103. That Directive, also adopted by this Court as an order, clearly provides that a provisional ballot cannot be rejected because of poll worker error. Based upon the fact that the Secretary's prescribed provisional envelope form does not require a voter to print his name and furthermore that Franklin County – as well as the other counties in the State were instructed to have their poll workers examine provisional ballot envelopes after the voter returned the envelope, the lack of a printed name can only be attributed to poll worker error. Under that scenario, this Court has already ordered that such provisional ballots cannot be rejected on that ground.

The Ohio Supreme Court has recently reaffirmed the principle that courts "must avoid unduly 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.

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." 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. Additionally, the Franklin County Board of Elections has adopted a provisional ballot affirmation form that is inconsistent with the Secretary of State's prescribed form (Form 12-B). The Secretary's form specifically instructs election officials at polling places who are charged with administering the provisional ballot laws to write in the name of the voter voting a provisional ballot.

Second, plaintiffs rely upon R.C. 3505.183(B)(1)(a) section (B)(1)(a) 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, reading that language as a strict requirement would lead to unequal and absurd results, and violate the principle that election laws should be liberally construed to promote voter participation. *State ex rel. Colvin v. Brunner*, 2008 Ohio 5041, at ¶ 62.

The motion posits two scenarios, the first of which is an affirmation that contains the individual's name, but lacks a signature. Assuming the voter is registered, voted in the correct precinct, and was not required to provide additional information or identification to the board but

failed to do so, Ohio law *requires* this provisional ballot be counted. This result is inescapable, based on the fact that Ohio law does not require a signed affirmation in the first place.

R.C. 3505.182 addresses the situation where a voter refuses to execute an affirmation. The last sentence of that Code provision instructs local election officials, should a voter decline to execute an affirmation, to "comply with division (B)(6) of section 3505.181 of the Revised Code." R.C. 3505.181(B)(6) states that if a voter declines to execute an affirmation, then the appropriate election official must record the individual's name and the fact that the voter declined to execute an affirmation, and include that information with the transmission of the ballot, as provided under subpart (B)(3).

R.C. 3505.181(B)(3) lays out the next step in the process: the election official at the polling place must transmit the ballot, along with the affirmation, r the voter's name if he declines to execute an affirmation, "to an appropriate local election official for verification under division (B)(4) of this section." R.C. 3505.181(B)(4) states that if the appropriate election official who receives the information determines that the individual is eligible to vote, "the individual's provisional ballot **shall** be counted as a vote in that election."

Clearly, the provisional ballot counts (assuming eligibility is established) when there is a printed name but no signature if the individual *refuses* to sign an affirmation. Such a ballot is indistinguishable from a provisional ballot that includes an unsigned affirmation. In other words, plaintiffs' position would lead to the result that the provisional ballot of an individual who refused to sign would be counted, but the provisional ballot of an individual who forgot to sign would not. In Directive 2008-101, the Secretary of State took the more reasonable position that both ballots should be counted if eligibility could be otherwise established.

The same problem arises with the inverse scenario, namely, a provisional ballot affirmation that has a signature but no name. Under plaintiffs' theory, a voter who agrees to sign the affirmation, but whose printed name is accidentally omitted, is in a worse position than the voter who refuses to sign. Such a result would make no sense. Why is a printed name adequate in the one case but not the other? Such an outcome is especially puzzling when one considers that adopting the rule plaintiffs suggest would create no benefit in terms of detecting or deterring voter fraud. A fraudulent voter might conceivably write a false name but not risk a false signature, but the converse would rarely if ever be true: why use a false signature but not print the name?

The only logical conclusion is that in both scenarios, a provisional ballot that has a signature but no name must be counted. And this is precisely the position taken by the Secretary of State in interpreting Directive 2008-101 and Directive 2008-103.Ensuring that the provisional ballot affirmation is correctly filled out is the responsibility of the poll worker, not the voter. Poll workers are trained to make sure the voter signs the affirmation, and the name appears at the top. The failure of a poll worker to do so is exactly the type of poll worker error that should not be held against a voter under Directive 2008-103.

One point bears repeating: these are <u>not</u> 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 a technical violation if plaintiffs prevail. This is not the result the Ohio Supreme Court has reached in comparable cases. Nor is it a result calculated to have any beneficial effect on Ohio elections or on public confidence in the supposedly immutable principle that every vote counts.

IV. Conclusion

For the reasons set forth herein, the Secretary asks the Court to DENY any injunctive relief.

Respectfully submitted,

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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 14th day of November, 2008.

/s Richard N. Coglianese