

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

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

Plaintiffs,

and

OHIO DEMOCRATIC PARTY,

Intervenor-Plaintiff,

vs.

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

Defendant.

Civil Action No. C2-06-896

CONSOLIDATED WITH

Civil Action Nos. C2-08-913 & C2-08-1077

Judge Algenon L. Marbley

Magistrate Judge Terence P. Kemp

**MEMORANDUM OF *NEOCH*
PLAINTIFFS IN OPPOSITION TO
MOTION OF SKAGGS PLAINTIFFS FOR
A TEMPORARY RESTRAINING ORDER**

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

Plaintiffs,

vs.

THE STATE OF OHIO,

Intervenor-Defendant.

OHIO REPUBLICAN PARTY, *et al.*,

Plaintiffs,

vs.

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

Defendant,

and

VETERANS FOR AMERICA,

Intervenor-Defendant.

STATE EX REL. SKAGGS, *et al.*,

Plaintiffs,

vs.

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

Defendant.

A. Introduction.

For their memorandum in opposition to the *Skaggs* Plaintiffs’ motion for a temporary restraining order, the *NEOCH* Plaintiffs incorporate and adopt the well-reasoned arguments advanced by Defendant Brunner (Doc. No. 13 in Case No. C2-08-1077) and Intervenor-Plaintiff Ohio Democratic Party (Doc. No. 157). In addition, the *NEOCH* Plaintiffs submit an additional argument for this Court’s consideration.

B. The Disputed Ballots Are In Dispute Precisely Because Of Poll Worker Error.

The starting point for this Court’s analysis should be the text of its October 27, 2008 Order. In that Order, this Court held that “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.” (Doc. No. 143 at 2.)

Pursuant to this Court’s Order, Defendant Brunner promptly issued Directive 2008-103, which states: “[P]ursuant to the court order, I hereby instruct the boards of elections **that**

provisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker's failure to sign a provisional ballot envelope *or failure to comply with any duty mandated by R.C. 3505.181.*" (first emphasis in original, second emphasis added).

The key question for this Court, therefore, is whether R.C. § 3505.181 requires poll workers to ensure that the voter provides her name and signature on the provisional ballot affirmation statement before being allowed to cast a provisional ballot. If that duty is mandated by the statute, then the voter may not be penalized—and her vote may not be discarded—merely because the poll worker failed to fulfill his duty.

On this point, the statute is clear. Section 3505.181 provides:

(B)(2) The individual *shall be permitted to cast a provisional ballot* at that polling place *upon the execution of a written affirmation* by the individual *before an election official* at the polling place 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) (emphasis added). In other words, voters should not be permitted to cast a provisional ballot until they execute the written affirmation in front of the poll worker.¹

The next question is whether the written affirmation requires the voter to write her name and signature. While the statute is silent on this point, the Franklin County Provisional Ballot Application is not. That application clearly requires the voter to both print their name and sign their name as part of the written affirmation. (See Exhibit A, first column). If either the printed name or the signature is missing, then the written affirmation has not been properly executed.

¹ The only exception in the statute is if the voter refuses to sign the affirmation. In that event, the election official is *required to write down the voter's name* on the provisional ballot affirmation form. R.C. § 3505.181(B)(3) & (6). In either event, whether written by the voter or the election official, the voter's name must be included on the form.

In sum, the statute requires the poll worker to obtain and witness an executed affirmation before giving the voter a provisional ballot, and the voter must sign and print her name to execute the affirmation. Therefore, if the voter either did not print her name, did not sign her name, or both—but was given a provisional ballot anyway—then the poll worker erred and failed to follow a duty mandated by R.C. § 3505.181. Accordingly, under the plain text of this Court's October 27, 2008 Order, the disputed ballots must be counted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16th, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

/s/ Caroline H. Gentry

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EXHIBIT A
PROVISIONAL BALLOT APPLICATION • F WALKIN 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)
 I, _____ 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, with have lived in this state for 30 days immediately preceding this 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, under 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 _____
 VOTER'S SIGNATURE (REQUIRED) _____ Date _____

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 3505.16(A)(3)

(CLEARLY PRINT NAME)
 I 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 _____
 VOTER'S SIGNATURE _____ Date _____

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