

**IN THE EIGHTH APPELLATE DISTRICT COURT
FOR THE COUNTY OF CUYAHOGA**

STATE OF OHIO *EX REL.* :

PERRIS J. MACKEY, an individual :

COLLEEN PIRIE, an individual :

and :

**PEOPLE FOR THE AMERICAN
WAY FOUNDATION**, an organization on
its own behalf and on behalf of its members, :

Relators. :

v. :

J. KENNETH BLACKWELL
Secretary of State, Ohio,
in his official capacity
180 East Broad Street, 16th Floor
Cleveland, OH 44115

and :

**CUYAHOGA COUNTY BOARD OF
ELECTIONS**
2925 Euclid Avenue
Cleveland, OH 44115

and :

MICHAEL VU
Director, County Board of Elections,
Cuyahoga County
2925 Euclid Avenue
Cleveland, Ohio 44115

Respondents. :

Case No.: _____

**ORIGINAL ACTION IN
MANDAMUS**

**VERIFIED COMPLAINT FOR EMERGENCY PEREMPTORY WRIT OF
MANDAMUS**

PRELIMINARY STATEMENT

1. Relators seek an emergency peremptory writ of mandamus to prevent the disenfranchisement of the individual Relators and thousands of Cuyahoga County voters caused by the unlawful conduct of the Ohio Secretary of State and the Cuyahoga County Board of Elections (“County Board”) and its Director. On Election Day, November 2, 2004, approximately 24,400 provisional ballots were cast in Cuyahoga County. Reports indicate that precinct judges and poll workers were deeply confused about the circumstances under which a provisional ballot was to be offered to a voter instead of a “regular” ballot. They often did not understand the affirmations and personal information required of provisional voters. They lacked clarity as to what actions were required of them as election officials when handling provisional ballots. As a result, many precinct officials gave inconsistent and sometimes erroneous directions to voters casting provisional ballots. The procedural consistency required to protect citizens’ equal right to vote was lacking at the State, county, and even the precinct level. The Secretary of State’s failure to provide clear, uniform, and legally valid standards, and the actions taken by the County Board of Elections when providing these provisional ballots on November 2, 2004, and the counting of them thereafter, has led and threatens to lead to the rejection of thousands of provisional ballots cast on Election Day.

2. The County Board of Elections is currently in the process of verifying the validity of the provisional ballots cast in Cuyahoga County. Secretary of State Blackwell has failed to provide sufficiently clear instructions to assure that ballots are counted in a uniform and proper manner statewide. In the absence of such clear guidance, Respondent Vu has repeatedly changed the criteria for determining whether a provisional ballot will be counted. Some requirements were announced only to be withdrawn and then later reasserted, all in a period of a few days. Some of the criteria for validation and verification have not been committed to writing in a comprehensive set of uniform standards.

3. Moreover, several provisional ballot requirements in Cuyahoga County violate governing state and federal law. For example, the County has invalidated provisional ballots of properly registered voters whose forms were not included in the County's electronic database, or whose provisional ballot envelopes did not contain signatures or information that should not have been required under federal law. In addition, although Secretary of State Blackwell instructed precinct workers to direct voters to the correct precinct if they had to vote by provisional ballot and they appeared at the wrong precinct, many voters did not receive this assistance. In many precincts the election officials were overwhelmed with the number of voters and did not attempt to assist voters in locating the correct precinct. Some precinct officials tried to call the County Board of Elections for this information but the Board of Elections did not answer their calls in many instances because they too were overwhelmed. Some voters traveled to several different precincts to try to locate the correct precinct, and did not receive adequate poll worker assistance. The county Board of Elections has rejected and is continuing to reject the provisional ballots of citizens who cast votes in the wrong precinct despite the provisional voters' not having received the assistance promised and directed by Secretary Blackwell. Relief by this court is necessary to ensure that provisional ballots cast on Election Day are counted as required by state and federal law and to preserve the integrity of the election process in Cuyahoga County.

JURISDICTION AND VENUE

4. This Court has original jurisdiction over petitions for writs of mandamus pursuant to Ohio Revised Code § 2731.02.

PARTIES

5. Relator People for the American Way Foundation ("PFAWF") is a national organization founded to promote civic participation, freedom of thought, expression, and religion, a sense of community, and tolerance for others. One of the ways PFAWF accomplishes its mission is through the non-partisan education and registration of voters. PFAWF has organized extensive non-partisan voter registration drives, issued voter intimidation reports, conducted workshops to educate local members about their voting rights, and promotes civic participation by urging its members and

others to exercise their rights to vote. PFAWF is incorporated in Delaware, has its principal place of business in Washington, D.C., and currently maintains an office in Ohio located at 432 East 109th Street, Cleveland, Ohio 44108. In Ohio, PFAWF has engaged in an extensive non-partisan voter registration and turnout effort in minority communities that historically have been underrepresented in the electoral process, and has registered thousands of first-time voters in Ohio, as well as conducting “election protection” efforts to help ensure that voters could cast a vote that counts on Election Day. Additionally, PFAWF has co-sponsored post-election public hearings in multiple counties, including Cuyahoga County, documenting the obstacles erected by state and local election officials to voters’ exercise of their rights during the November 2, 2004 election. PFAWF has over 600,000 activists and members, including over 15,000 activists and members in Ohio, approximately 2,000 of whom reside in Cuyahoga County.

6. Relator Perris J. Mackey (“Mackey”) is an adult individual residing at 22540 Coulter Avenue, Euclid, Ohio 44117. He is a duly registered Ohio voter who cast a provisional ballot that was rejected.

7. Relator Colleen Pirie (“Pirie”) is an adult individual residing at 3813 ½ Marvin Avenue, Cleveland, Ohio 44109. She is a duly registered Ohio voter who cast a provisional ballot that was rejected.

8. Respondent J. Kenneth Blackwell (“Blackwell”) is the Secretary of State of Ohio. In that capacity, he is Ohio’s chief election officer and is responsible for administering all statewide elections, including those for federal office. Among other duties, Respondent Blackwell: issues instructions by directives and advisories to members of the boards regarding the proper methods of conducting elections; prepares rules and instructions for the registration of voters, maintenance of the rolls, and conduct of elections; determines and prescribes the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees, and boards; compels election officials in the several counties to observe the requirements of the election laws; and oversees the

canvassing of election results and totals and announces election results. Respondent Blackwell is sued in his official capacity.

9. Respondent Cuyahoga County Board of Elections (“County Board”) and its members are the Secretary of State’s designated representatives for election matters in Cuyahoga County. Ohio Rev. Code § 3501.06. Pursuant to Ohio Rev. Code § 3509.06, it is the Board of Elections’ responsibility to review provisional ballots for validity.

10. Respondent Michael Vu (“Vu”, collectively with Respondent Blackwell and Respondent County Board, “Respondents”) is the Director of the County Board of Elections for Cuyahoga County. Pursuant to Ohio Revised Code § 3501.09, the Secretary of State certifies the Director selected by the County Board. Respondent Vu is sued in his official capacity in connection with his actions taken under color of state and federal law.

FACTS

11. Relators bring this case to prevent the disenfranchisement of the individual Relators and many others by Respondents. Despite being duly registered voters, and completing provisional ballots as instructed by precinct election officials (hereinafter “poll workers”), individual Relators and others similarly situated are in jeopardy of being disenfranchised because Respondents’ policies and practices violate state and federal law. As demonstrated below, Relators have a clear legal right to the relief requested and Respondents have a clear legal duty to perform the official acts requested.

Casting a Provisional Ballot

12. On Election Day, 2004, over 24,400 Cuyahoga County voters cast provisional ballots along with thousands of others statewide. Unlike regular ballots, which are cast and are then immediately and unconditionally counted, a provisional ballot is a paper ballot sealed in an envelope for later review. After Election Day, officials are required to determine whether each such provisional ballot will be counted.

13. Voters were permitted to cast a provisional ballot for one of the following reasons on Election Day: they were registered to vote, but their name did not appear in

the poll books produced from the county's electronic voter registration database; they either moved or changed their name but did not update their voter registration information; or they were a first-time voter who had not previously provided identification and lacked acceptable proof of identity when they attempted to vote on Election Day. Additionally, as a result of a court-ordered injunction on Election Day, voters who requested, but did not receive an absentee ballot in time to vote absentee were permitted to cast provisional ballots. In many additional cases, voters were erroneously given provisional ballots when they should have been given "regular" ballots, because of poll workers' mistaken application of election law.

14. Although some counties previously allowed voters to vote by provisional ballot if their name was not on the list of registered voters, the provisional ballot procedure used on November 2, 2004 was new both for most voters and the poll workers entrusted with administering the election. Even though voters had previously been allowed to vote by provisional ballot if they had not updated their voter registration to reflect, for example, a new address, this was the first election in which voters statewide were permitted to cast provisional ballots for the additional reasons described above, which were mandated by the federal Help America Vote Act.

15. Respondent Blackwell issued a directive in September, 2004 stating that voters were required to cast provisional ballots in the correct precinct for those ballots to count. That directive was upheld in federal court on October, 23, 2004 based in part on Respondent Blackwell's representations that poll workers would direct voters to the correct precinct. *See Sandusky County Democratic Party v. Blackwell*, 386 F.3d 815 (6th Cir. 2004).

16. Prior to requiring a voter to cast a provisional ballot instead of a regular ballot, poll workers were to confirm that the voter was not listed in the poll books or in an additional list of electors. As discussed above, poll workers were also required to ascertain that the person was attempting to vote in the correct precinct. In many areas of the State, the precinct requirement was not onerous, for it was simply a matter of ensuring that the voter was in the correct line within a polling place serving multiple precincts.

17. In Cuyahoga County, Respondents Vu and County Board required poll workers to call the Board of Elections' office to determine whether the voter was on the precinct rolls and attempting to vote at the proper precinct. On November 2, 2004, however, the County Board received thousands of phone calls and poll workers often found that the telephone line was busy. The precinct hotline that was set up to help poll workers locate a person's correct precinct was also often not available.

18. In addition to confirming the correct precinct for those voters who were not listed in the precinct rolls, Cuyahoga County poll workers were required (a) to instruct the provisional voter as to what personal information was required for their particular situation and what blanks the voter was to complete on the yellow provisional ballot envelope's form; (b) place the completed ballot in the correct yellow provisional ballot envelopes; (c) ensure that a Provisional Voter Statement of Affirmation sticker was attached to the back of the envelope; (d) ensure that the envelope's blanks pertinent to the particular reasons the voter had received the provisional ballot had been completed with all the necessary voter information; (e) ensure that the voter had signed both the front of the envelope and the Provisional Voter Statement of Affirmation sticker; (f) ensure that if the voter was casting a provisional ballot pursuant to HAVA, that a signed HAVA affirmation sticker was placed on the envelope; (g) ensure that a poll worker also signed as a witness on both the front of the envelope and the Provisional Voter Statement of Affirmation sticker; and (h) provide the voter with a card stating the toll-free phone number the voter could use to determine whether their provisional ballot was counted, and if it was not counted to find out why it was rejected. In Cuyahoga County, the poll workers were also directed to have the voter sign the precinct register book in the section designated for those voting by provisional ballot.

19. Certain supplies were needed at each precinct for poll workers to comply with all state and county directions and expectations for proper handling of provisional ballots, including the supplemental precinct registration book, the two types of affirmation stickers, and yellow provisional ballot envelopes.

20. In some precincts, when the supplies of stickers were exhausted, the poll workers refused to permit any voters to vote by provisional ballot. In other precincts,

voters were permitted to vote by provisional ballot, but no stickers were ever completed and affixed to any provisional ballot envelope.

21. Because the procedures were new, cumbersome, and confusing, and owing to high voter turnout, the procedures for proper poll worker handling of provisional ballots were often not followed. Many poll workers, including the presiding judges, were confused about the circumstances under which a voter was to be issued a provisional ballot instead of a “regular” ballot. They did not consistently check the provisional ballot envelopes to ensure that all required information was provided, that all personal information was listed, and that all affirmations had been signed by both the voter and one of the election officials. They also failed to provide the toll-free phone number to voters to find out whether their provisional ballot was counted.

22. Recognizing this mass confusion on Election Day, Respondent Blackwell issued Directive 2004-55 on November 5, 2004, which required the county Boards of Elections to accept provisional ballots without the Provisional Voter Statement of Affirmation sticker, so long as they contained an affirmation either on the provisional envelope, or on yet another sticker meant for voters who did not have the identification required under HAVA. This Directive, however, did not state that it was retroactive, so it is unclear whether provisional ballots lacking such an affirmation that were processed prior to this Directive have been deemed valid or rejected. Additionally, this Directive did not address the situations where the voter signed and completed only the Provisional Voter Statement of Affirmation sticker (rather than the envelope as well) or signed the precinct register page directed to provisional voters. Board of Elections’ workers determining the validity of these ballots thus have no clear direction from the State as to which types of omissions warrant rejection of a provisional ballot. A copy of Directive 2004-55 is attached as Exhibit A.

Counting Provisional Ballots

23. Pursuant to his authority under Ohio Revised Code § 3501.05(C), Respondent Blackwell issued Directive 2004-48 on October 29, 2004 to all eighty-eight (88) Boards of Elections throughout Ohio. This Directive provided instructions for the “Absentee/Provisional Counting and Ballot Security” to be used by the county Boards of

Elections following the closing of the polls on Election Day. A copy of Directive 2004-48 is attached as Exhibit B.

24. Directive 2004-48 is vague, incomplete, and insufficient to assure proper and uniform evaluation and counting of provisional ballots throughout the State. In substance, Directive 2004-48 provides little more than vague generalities concerning provisional ballots:

“Before a provisional ballot may be counted in the official canvass, the board of elections must confirm that the voter:

1. was registered to vote somewhere in Ohio during the thirty days before the election,
2. did not vote from a former address or by absentee ballot,
3. voted in the correct precinct,
4. completed and signed all required affirmation statements, and
5. in the case of a voter who did not provide HAVA-required identification information when registering, has provided an acceptable proof of the applicant’s identity by the close of polls on election day at either the polling location or the board of elections.

The board of elections shall begin verifying the above information immediately following the election and must complete the process by the conclusion of the official canvass. If this information is verified, the provisional ballot is to be included in the official canvass. If any of this information cannot be verified, the ballot cannot be counted.”

25. The failure of Respondent Blackwell to provide legally valid and uniform statewide procedures to determine the validity of provisional ballots and the actions taken to reject provisional ballots in Cuyahoga County by Respondents Vu and County Board have led to actual and potential disenfranchisement of thousands of voters in Cuyahoga County, whose votes have been and are being rejected. According to published reports, the Cuyahoga County Board voted to reject approximately eight thousand (8,000) provisional ballots, 33% of the provisional ballots in this election in the county, almost twice the percentage rejected in 2000.

26. Respondents’ failure to provide directives with prompt, clear, accurate, comprehensive, and appropriate provisional ballot requirements implementing their

responsibilities under federal and state law, and their failure to provide effective, timely training of election officials working at the polls, has caused precinct officials to create barriers to voters' rights to cast provisional ballots, and to have them validated and counted.

Injury to Relators

27. The frequent changes in the legal standards governing validation of Ohio and Cuyahoga County provisional ballots, the persistent failure of Respondent Blackwell to provide clear written criteria for the rejection of provisional ballots, and the rejection of provisional ballots because of non-material omissions or other errors pursuant to Respondents' actions have resulted in injury by Respondents to PFAWF's organizational and representational interests.

28. More specifically, Respondents' failures have caused and are continuing to cause PFAWF to receive and process many voter and member complaints that voting rights were abridged and are being abridged, significantly burdening PFAWF's resources. PFAWF is also unable to determine and advise its Ohio and national members definitively as to the legal criteria for accepting and rejecting provisional ballots in Ohio. Thus, PFAWF is blocked from educating its members as to how their ballots should be processed, and without this factual predicate, cannot request and receive its members' views as to appropriate reforms to undertaken via legislation at the State and federal levels. If these injuries are not remedied, moreover, PFAWF's efficacy as an organization for protecting voters' rights will be impaired, threatening negative impact on its membership retention and recruiting efforts. Such injuries will ultimately result in fewer organizational resources for achieving its mission.

29. By not employing consistent and appropriate standards concerning issuance of and then validation of provisional ballots, Respondents have additionally injured PFAWF members in Cuyahoga County. Bereft of consistent and appropriate written standards with uniform application, members have had to employ significant burdensome efforts to determine what the provisional ballot standards are on a given day, how they may have changed from a prior day and week, and whether these standards

have protected their right to vote provisionally. This abject lack of consistency and appropriate standards has caused these members' confidence in the fairness of County provisional ballot procedures to be significantly impaired. PFAWF members (particularly those whose provisional ballots were improperly rejected in Cuyahoga County) would have standing to sue in their own right, the interests that PFAWF seeks to protect are germane to the organizations interests, and the claims asserted and relief requested do not require the participation of all such individual members in this case.

30. Respondents' actions injured Relator Mackey. On Election Day, Mackey appeared at the correct polling place, but did not know the proper precinct. When told Mackey's address, an election official directed Mackey to vote at precinct J. When Mackey's name was not in the poll book in precinct J, Mackey was not permitted to vote a regular ballot, but had to cast a provisional ballot. The election officials failed to inform him of the correct precinct. Later, Mackey found out that his correct precinct was G. Because an election official told Mackey to vote in the wrong precinct and gave him the wrong ballot, Mackey was harmed. Respondent did not count Relator Mackey's provisional ballot.

31. Respondents' actions also injured Relator Pirie. Respondents allowed their clerical or administrative errors to force Pirie to cast a provisional ballot instead of a regular one. A long-time voter, Pirie's name was not in the poll book at her precinct. A mere clerical error kept her name off the rolls. She had filed a change of address form and phoned the County Board to confirm her registration. Pirie received a new registration card from the County Board before Election Day and offered that card when she attempted to vote. Respondents refused to honor their own registration proof. Compounding the harm, Respondents have rejected and did not count Pirie's provisional vote.

32. The lack of specific, uniform and consistent guidance from Respondent Blackwell caused the individual Relators' provisional ballots and thousands of others to be rejected due to non-material omissions or non-material errors, most of which were due to poll worker error, misinformation, or failure to carry out their duties in violation of the Voting Rights Act, the Ohio Revised Code, and the Fourteenth Amendment.

33. Relators have no plain and adequate remedy in the ordinary course of law. Respondent County Board has already announced preliminarily the rejection of thousands

of provisional ballots, including Relators', and plans to seek to certify the results of the election early next week. Published reports make clear that a recount of Ohio ballots will take place in accordance with state law and that action by this Court thus can provide relief to Relators before final certification, but even this recount process is to be completed within a matter of weeks and it will clearly require the remedy of mandamus to provide an adequate remedy.

Violation of Ohio Rev. Code § 3503.13

34. Relators reallege every allegation contained in each of the paragraphs set forth above as if fully set forth herein.

35. Ohio Revised Code § 3503.13 provides that the original voter registration forms submitted by registered voters constitute the official record of the Board of Elections of persons eligible to vote in the general election.

36. Respondent County Board experienced a significant increase in voter registration prior to the October 4, 2004 voter registration deadline for the November 2, 2004 General Election. The Board was not able to process the increased number of voter registration forms with their permanent employees.

37. It is unacceptable and a violation of § 3503.13 for the Respondents to rely solely on electronic databases to determine voters' eligibility to have provisional ballots counted because the poll books available to the poll workers on Election Day were prepared from these same databases, and they are incomplete. Under § 3503.13, the voters' eligibility should be based upon the official record, namely, the voter registration cards. These records are available to Respondents Vu and County Board.

38. Cuyahoga County attempted to index all of the registrations, but were still unable to do so prior to Election Day. The County Board hired temporary night employees to transcribe the requisite information from the paper forms and type it into the computerized registration database. On information and belief, mistakes made when entering data into the electronic database created an incomplete and incorrect database used by poll workers at polling places on Election Day.

39. On information and belief, the County Board has indexed and organized the original (paper) voter registration forms of all prior registrants and only one-half of

registration forms received this year in a manner that permits a Board of Elections employee to locate the original if questions arise about the accuracy of the voter's computerized record, and specifically, the validity of the registration or the voter's attempt to cast a valid provisional ballot.

40. On information and belief, Respondent County Board has not indexed and organized approximately 170,000 of the original (paper) voter registration forms of these new registrants in any manner that can permit the board's employees to check the accuracy or the validity of the registration or the voter's attempt to cast a valid provisional ballot.

41. Approximately five thousand six hundred (5,600) persons in Cuyahoga County were forced to file provisional ballots because their names and addresses did not appear on the computerized voter registration lists maintained by the Boards of Elections.

42. In addition to failing to index all of the new voter registration forms, an indeterminate number of voters have had provisional ballots rejected, because Respondent County Board erroneously processed their registration applications. As a result, many duly registered voters were not included in the database due to no fault of their own, but strictly due to the county Boards of Elections' error.

43. Respondent County Board did not direct a systematic effort to check all paper registration forms, whether or not indexed, where a voter's registration cannot be verified on the electronic computerized database, and the provisional ballots cast by individual Relators and others similarly situated will not be counted unless the County Board searches all original registration cards currently maintained in their records, to identify and confirm their status as registered voters.

44. Respondents' failure to direct the examination of all of the "precinct registers," consisting of the original voter registration cards submitted by individual Relators and others similarly situated, to determine whether to accept a provisional ballot, is a violation of their duty under Ohio Revised Code § 3503.13.

Violation of Voting Rights Act (42 U.S.C. § 1971(a)(2)(B))

45. Relators reallege every allegation contained in each of the paragraphs set forth above as if fully set forth herein.

46. The Voting Rights Act, 42 U.S.C. § 1971(a)(2)(B), provides in relevant part:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

47. Respondents have violated and continue to violate this provision of the Voting Rights Act by refusing to instruct the county Board of Elections to count provisional ballots containing non-material omissions or non-material error. Although neither Respondent County Board nor Respondent Vu have made clear the specific reasons for rejecting provisional ballots on this ground, upon information and belief, such non-material omissions and errors include: (i) the absence of either the voter's signature or a poll worker's countersignature on the provisional ballot envelope, even when the voter was not instructed was to sign the envelope, or when the voter had already signed the poll book; or (ii) the absence of a Provisional Voter Statement of Affirmation or HAVA affirmation sticker.

48. The voter's signature or the poll worker countersignature on the envelope is not material or necessary to determine the qualification of any voter to vote in an election. These requirements are entirely superfluous if the Provisional Voter Statement of Affirmation or HAVA affirmation sticker on the provisional ballot envelope is otherwise complete and accurate or if the voter has signed the poll book.

49. The signature for the poll worker on the bottom of the provisional ballot envelope purports to attest to the fact that the ballot had been "Checked for Completeness and Accuracy." But nowhere in the Ohio Revised Code or federal law is there any requirement for a poll worker countersignature on a provisional ballot attesting to the "Completeness and Accuracy" of the Provisional Voter Statement of Affirmation, or a HAVA or any other sticker if other required information is included, and these

requirements are not material to determining the voter's eligibility to cast a provisional ballot.

Violation of Help America Vote Act (42 U.S.C. § 15482(a))

50. Relators reallege every allegation contained in each of the paragraphs set forth above as if fully set forth herein.

51. Where an individual voter's name does not appear on the official list of eligible voters for the polling place, or an election official maintains that the individual is not eligible to vote, HAVA, 42 U.S.C. § 15482(a), requires of the individual only two written affirmations before the individual must be permitted to cast a provisional ballot that is to count. The individual must affirm that he or she is (1) "a registered voter in the jurisdiction in which the individual desires to vote" and (2) "eligible to vote" in an election for Federal office. 42 U.S.C. §§ 15482 (a) & (a)(2).

52. Respondents have violated and continue to violate HAVA by refusing to count provisional ballots for reasons not specified in 42 U.S.C. §§ 15482.

Violation of Equal Protection Clause

53. Relators reallege every allegation contained in each of the paragraphs set forth above as if fully set forth herein.

54. The Equal Protection Clause of the U.S. Constitution, Amendment Fourteen, applies to all aspects of the exercise of the franchise. Having once granted the right to vote on equal terms, a State may not, by later arbitrary and disparate treatment, accord differential value among electors' votes so that one person's vote will be tabulated while that of another citizen similarly situated will be invalidated. The Clause's protection of individuals' voting rights extends to the right to have provisional ballots issued and evaluated under uniform and consistent standards.

55. Variations occurred throughout Cuyahoga County and throughout the state in, for instance, the reasons for refusing a voter a regular ballot and instead permitting the voter only to cast a provisional ballot; the amount of information and the completeness of the provisional ballot instructions given to the voter, including whether the voter needed to provide a signature, and where to sign; the care the poll workers took to confirm that

the provisional ballots were completed as required (including their signature and proper use of the affirmation stickers).

56. Additionally, by withholding the Election Official signature or other information, or by inadvertently failing to sign or to provide complete and clear instructions to the provisional ballot voter, a poll worker possessed unchecked and unilateral power to nullify a citizen's provisional ballot vote. Respondents' delegation of this veto power to poll workers violates the Equal Protection Clause, because different voters' ballots have been processed and thus evaluated under different standards, depending on the individual poll worker.

57. For several weeks prior to the General Election, Respondent County Board was unable to answer phone calls from voters in a reasonable period of time because they were overwhelmed with processing the new voter registrations, preparing for Election Day activities, and other duties. This meant that voters who tried to call to confirm their correct precinct were unable to obtain this information from the County Board.

58. On or about October 25, 2004, Respondent Blackwell issued "Directive No. 2: Provisional Voting: Home Precinct Balloting Only," which instructed all county Boards of Elections to redirect a voter who was attempting to vote in the incorrect precinct. However, voters would still be allowed to vote provisionally, but if they did their votes would not be counted. It stated that poll workers should instruct voters that "if he or she is not voting in the proper precinct, the voter's ballot will not be counted." This Directive did not require the voter to sign an affirmation that they received this notice.

59. On information and belief, on Election Day poll workers offered varied responses to voters who did not present themselves at the correct precinct (hereinafter "displaced voters"). Some poll workers advised displaced voters that if they were not in their proper precinct, their votes would not be counted. By contrast, however, poll workers at other precincts offered displaced voters a provisional ballot despite knowing that a provisional ballot cast in the wrong precinct would not be counted; some poll workers incorrectly assured these voters that their provisional ballots would still be

counted. Still other voters were never even informed that they were in the wrong precinct, and were directed to cast provisional ballots without ever being informed that their vote would not count.

60. For a number of displaced voters, poll workers did not accurately tell them they were at the wrong precinct, identify their correct precinct, and redirect them to their proper precinct and polling place. This is what occurred to Relator Mackey, as described above.

61. The arbitrariness and wide variability in poll worker guidance to voters as to their rights to cast provisional ballots, and to provide information as to the correct precinct for the displaced voter's ability to cast a valid ballot, as well as the wide variability and lack of uniformity across the state concerning the implementation of Respondent Blackwell's directives, constitute a violation of the Equal Protection Clause.

Violation of Ohio Revised Code § 2506 and Procedural Due Process -- Fourteenth Amendment

62. Relators reallege every allegation contained in each of the paragraphs set forth above as if fully set forth herein.

63. The Due Process Clause of the U.S. Constitution, Fourteenth Amendment, requires that before citizens may be deprived of a right or privilege by the State, they must be afforded minimal due process, defined as timely notice and a meaningful opportunity to be heard.

64. The right to vote is a fundamental constitutional right.

65. On information and belief, the Respondent County Board printed cards containing a toll-free telephone number by which provisional voters could discover whether their vote was counted, and if not, the reason why. Respondent Blackwell was required by HAVA, 42 U.S.C. § 15482(a)(5)(B), to establish some mechanism by which provisional voters could receive this information. But in a large number of polling places, these cards were not distributed to the provisional voters and thus, the State has failed to give minimal, much less effective, notice to the provisional voter as to whether the vote was counted.

66. The Ohio Revised Code, § 2506, provides citizens with an avenue to appeal orders of administrative agencies, the opportunity to be heard required by the federal Due Process Clause. Respondents, however, have failed to provide voters with notice of whether the vote was counted, to provide notice that records are being kept as to which provisional ballots were counted, and to specify particular procedures that should be followed to obtain a meaningful opportunity to be heard. In doing so, Respondents are denying voters the opportunity to initiate administrative review or action to protect their vote, in violation of both the Due Process Clause of the Fourteenth Amendment, and Ohio Revised Code § 2506.

67. Respondent County Board, supplemented by Respondent Blackwell's office, has the resources, the facilities, and the personnel to facilitate post-election hearings for those voters in the county whose provisional ballots are at risk of being rejected for legally impermissible reasons.

68. Providing the effective notice and a timely process for review compelled by the Due Process Clause would enable Respondent County Board to reverse its initial decisions to reject a provisional ballot where administrative or clerical errors were established. Without establishing such a process, routine bureaucratic oversights and errors by Respondent County Board cannot be corrected, and voters will be wrongfully deprived of their fundamental right to vote in violation of the Due Process Clause.

WHEREFORE, Relators request that this Court issue a peremptory writ of mandamus directing Respondents to do the following:

- A. Respondent Blackwell should issue an order, and Respondents Vu and County Board should implement an order, prohibiting the invalidating of provisional ballots on the grounds that:
 - (i) the voter's name does not appear in the county's electronic registration database, unless they have diligently conducted a search of the original paper registration records and there is no voter registration card for such provisional voter;

- (ii) they lack either the voter's signature or a poll worker's countersignature on the envelope, when the voter had already signed the poll book or a sticker; or
 - (iii) they lack either the Provisional Voter Statement of Affirmation or the HAVA affirmation sticker, when the voter had already signed the poll book or envelope.
- B. Respondent Blackwell should issue an order, and Respondents Vu and County Board should implement an order, notifying each voter whose provisional ballot is at risk of being or has been invalidated for any reason, by first class mail sent within 24 hours of this Court's order, stating:
 - (i) the specific reason(s) the ballot was rejected;
 - (ii) specifically how each such voter can contest the invalidation in a timely manner so that the voter's vote can count in the official election results; and
 - (iii) that if voters demonstrate that precinct election officials failed to notify them that they were at an incorrect precinct and to direct them to the correct precinct, the voters' provisional ballots will count in the official election results.

Respectfully submitted,

Leslye M. Huff
Attorney at Law
(Ohio Bar # 0070491)
26717 Hurlingham Road
Beachwood, OH 44122-2455
(216) 570-8123

Elliot M. Minberg
Vicky L. Beasley
Debbie Liu
Mike DeLuca
People For the American
Way Foundation
2000 M Street, NW, Ste. 400

Wash., DC 20036
(202) 467-4999

Attorneys for Relators

Verification

I, Perris J. Mackey, being duly cautioned and sworn, state that I have read the Verified Complaint for Emergency Peremptory Writ of Mandamus and, based upon personal knowledge, believe each of the factual allegations herein to be true.

PERRIS J. MACKEY

Sworn before me and subscribed in my presence this ____ day of November, 2004.

NOTARY

My commission expires on: _____

Verification

I, Colleen Pirie, being duly cautioned and sworn, state that I have read the Verified Complaint for Emergency Peremptory Writ of Mandamus and, based upon personal knowledge, believe each of the factual allegations herein to be true.

COLLEEN PIRIE

Sworn before me and subscribed in my presence this ____ day of November, 2004.

NOTARY

My commission expires on: _____

Verification

I, Maria Valle, a duly authorized representative of People For the American Way Foundation, having been properly cautioned and sworn, state that I have read the Verified Complaint for Emergency Peremptory Writ of Mandamus and, based upon personal knowledge, believe each of the factual allegations herein to be true.

MARIA VALLE

Sworn before me and subscribed in my presence this ____ day of November, 2004.

NOTARY

My commission expires on: _____

EXHIBIT A



Ohio Secretary of State J. Kenneth Blackwell
Elections Division - 180 E. Broad St., 15th Floor, Columbus, OH 43215
Tel. (614) 466-2585 Fax (614) 752-4360 e-mail: election@sos.state.oh.us

Directive 2004-55
November 5, 2004

ALL COUNTY BOARDS OF ELECTIONS
TO: Members, Directors & Deputy Directors

Affirmation statements and the counting of provisional ballots

Our office has been asked to provide direction on provisional ballots that do not include signed affirmation statements by voters. As you know, there are different affirmation statements required in Ohio for a provisional ballot. Specifically, the HAVA Affirmation, as a result of the enactment of the "Help America Vote Act" and the Provisional Voter Statement of Affirmation – Home Precinct Balloting ONLY required by the decisions in the federal court in Toledo and the Sixth Circuit Court of Appeals were to be used in the November 2, 2004 election. The Provisional Voter Statement of Affirmation – Home Precinct Balloting ONLY was to be given in addition to either the Ohio Provisional Ballot or the HAVA affirmation statement.

It is the opinion of this office that a signed affirmation statement is necessary to count a provisional ballot. In cases where a poll worker may have neglected to provide the voter with the Provisional Voter Statement of Affirmation – Home Precinct Balloting ONLY, that provisional ballot should be counted if it meets all additional requirements and has either the Ohio or HAVA provisional ballot affirmation signed by the voter. In an instance where the voter refused to sign an affirmation statement of any kind, that provisional ballot should not be counted.

When verifying provisional ballots, please refer to Directive 2004-48 for the requirements in addition to signed affirmation statements that must be met to count a provisional ballot. They are:

- 1) The voter was registered to vote somewhere in Ohio during the 30 days before the election,
- 2) The voter did not vote from a former address or by absentee ballot,
- 3) The voter voted in the correct precinct,
- 4) The voter completed and signed all required affirmation statements, and
- 5) In the case of a voter who did not provide HAVA required identification information when registering, has provided an acceptable proof of the applicant's identity by the close of polls on election day at either the polling location or the board of elections.

If you have any questions regarding this directive, please do not hesitate to contact the Elections Division at 614-466-2585.

Sincerely,

A handwritten signature in black ink that reads "J. Kenneth Blackwell". The signature is written in a cursive style with a large, looping initial "J".

J. Kenneth Blackwell

EXHIBIT B



Ohio Secretary of State J. Kenneth Blackwell
Elections Division - 180 E. Broad St., 15th Floor, Columbus, OH 43215
Tel. (614) 466-2585 Fax (614) 752-4360 e-mail: election@sos.state.oh.us

Directive 2004-48
October 29, 2004

ALL COUNTY BOARDS OF ELECTIONS

TO: Members, Directors & Deputy Directors

Absentee/Provisional counting and ballot security

For all ballots, boards of elections should have procedures in place to secure ballots. All ballots – voted, spoiled, and unused – should be stored in a secure area, such as a vault, storage room, or double-lock file. Only the director or director's designee should have one of the keys or combination, and only the deputy director or deputy's designee should have the other key or combination. No one else should have copies of the keys or combination. This procedure assures that no one person can gain access to the ballots. Teams of one Democrat and one Republican must be present with ballots at all times of processing.

Absentee ballots are to be counted on election night. Counties may begin to open absentee ballot envelopes the day before the election, November 1, 2004, if the volume of absentee ballots is so large that the board could not process all the ballots in order to be counted on Election Day. If a challenger has been appointed to be at the board, the board must give notice of the date, time and place of opening the envelopes to the challenger. The board must have teams of one Democrat and one Republican to open the envelopes. Proper security procedures for ballots must be observed at all times. The counting of the absentee ballots may not begin until Election Day.

R.C. 3509.07 contains the reasons for boards to reject an absentee ballot. It states "If election officials find that the statement accompanying an absentee voter's ballot or absent voter's presidential ballot is insufficient, that the signatures do not correspond with the person's registration signature, that the applicant is not a qualified elector in the precinct, that the ballot envelope contains more than one ballot of any kind, or any voted ballot that the elector is not entitled to vote, or that Stub A is detached from the absent voter's ballot or absent voter's presidential ballot, the vote shall not be accepted or counted. The vote of any absent voter may be challenged for cause in the same manner as other votes are challenged, and the election officials shall determine the legality of that ballot. Every ballot not counted shall be indorsed on its back "Not Counted" with the reasons the ballot was not counted, and shall be enclosed and returned to or retained by the board of elections along with the contested ballot."

Before a provisional ballot may be counted in the official canvass, the board of elections must confirm that the voter:

1. was registered to vote somewhere in Ohio during the 30 days before the election,
2. did not vote from a former address or by absentee ballot,
3. voted in the correct precinct,
4. completed and signed all required affirmation statements, and
5. in the case of a voter who did not provide HAVA required identification information when registering, has provided an acceptable proof of the applicant's identity by the close of polls on election day at either the polling location or the board of elections.

The board of elections shall begin verifying the above information immediately following the election and must complete the process by the conclusion of the official canvass. If this information is verified, the provisional ballot is to be included in the official canvass. If any of this information cannot be verified, the ballot cannot be counted. The minutes of the board's meeting to certify the results of the election must identify each ballot that was not counted and why each was not counted.

If you have any questions regarding this directive, please do not hesitate to contact the Elections Division at (614) 466-2585.

Sincerely,

A handwritten signature in cursive script that reads "J. Kenneth Blackwell". The signature is written in black ink and is positioned above the printed name.

J. Kenneth Blackwell