

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

NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	Civil Action No. C2-06-896
Plaintiffs,	:	Judge Algenon L. Marbley
	:	
vs.	:	
J. KENNETH BLACKWELL,	:	<u>PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION</u>
Defendant.	:	
	:	

Plaintiffs respectfully move this Court under Federal Rule of Civil Procedure 65 for a preliminary injunction that enjoins the enforcement of all voter-identification laws in House Bill 3. The voter-identification laws should be enjoined on five separate grounds:

1. In early voting, Ohio Boards of Elections are applying conflicting interpretations of six parts of the new laws that are vague, confusing or impossible to apply, which will disenfranchise some voters and treat them unequally, and will cause the election to be conducted in a fundamentally unfair manner, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

2. The laws impose more burdensome identification requirements on Election Day voters than on absentee voters, which will treat these voters unequally in violation of the Fourteenth Amendment.
3. The laws do not allow an entire category of voters (those who do not have the required identification but do have a Social Security number) to vote on Election Day, which will disenfranchise these voters and treat them unequally, and will cause the election to be conducted in a fundamentally unfair manner, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.
4. The laws require only some voters (those who provide a utility bill, bank statement, government check, paycheck or other government document) to provide proof of their current address, which will treat these voters unequally and place an undue burden on them in violation of the Fourteenth Amendment.
5. The laws impose a poll tax on voters who cannot otherwise vote on Election Day by requiring them to pay for a state-identification card and, in some cases, a birth certificate, simply so that they can exercise their right to vote, in violation of the Twenty-Fourth and Fourteenth Amendments.

Plaintiffs also seek an order declaring that the new law that governs the eligibility of provisional ballots to be counted (Ohio Rev. Code § 3505.183) is unconstitutionally vague and internally inconsistent, and so will not be applied uniformly by Boards of Elections, thus working a patent and fundamental unfairness on the voters in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs further request that the Court issue an order that interprets this statutory provision and directs the Defendant to set forth the

specific and uniform procedures that Boards of Elections must apply when determining whether provisional ballots should be counted in the upcoming November 7, 2006 election.

Court orders issuing the requested preliminary injunction and declaratory relief are required. Proposed Orders are attached as Exhibits A and B.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION AND DECLARATORY RELIEF**

Plaintiffs respectfully request a preliminary injunction that enjoins the enforcement of all voter-identification laws in House Bill 3. The voter-identification laws should be enjoined on five separate grounds: (1) Boards of Elections are applying conflicting interpretations of six parts of the laws, (2) Election Day voters are subject to more burdensome identification requirements than absentee voters, (3) voters who do not have the required identification, but do have a Social Security number, are barred from voting on Election Day by either regular or provisional ballot, (4) the only voters who must provide proof of their current addresses are those who provide a utility bill, bank statement, government check, paycheck, or other government document, and (5) voters who cannot vote on Election Day because they lack the required identification must pay a poll tax by purchasing a state-identification card and, in some cases, a birth certificate.

Plaintiffs further seek an order that declares that the new provisional-ballot law that governs the counting of provisional ballots (Ohio Rev. Code § 3505.183(B)) is unconstitutionally vague, and that interprets this statutory provision and identifies the procedures that Boards of Elections must follow when determining whether provisional ballots are eligible to be counted.

I. THE VOTER-IDENTIFICATION LAWS ARE FATALLY FLAWED

A. Overview Of The New Voter-Identification Laws

In 2006 the Ohio General Assembly passed House Bill 3, which amended the Ohio Election Code to require that voters provide specific types of identification in order to cast a regular ballot in state and federal elections held in Ohio. Under the new laws, a registered voter who appears in a polling place to vote must provide documentary proof of her identity

in the form of a current and valid photo identification, a military identification that shows the voter's name and current address, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and current address of the elector.¹

(A "photo identification" must show the voter's name, current or former address and photograph.² It must also include an expiration date that has not passed and have been issued by either the U.S. Government or the State of Ohio.³) A registered voter who provides one of these required forms of identification shall be permitted to cast a regular ballot.⁴

B. Boards of Elections Are Applying Conflicting Interpretations Of Six Different Parts That Are Vague, Confusing Or Impossible To Apply

For the reasons stated in Plaintiffs' motion for temporary restraining order, six aspects of these new voter-identification laws are confusing, vague, or impossible to apply and render the statute unconstitutional.⁵ Boards of Elections are applying these portions of the law differently and unequally to absentee voters, who (like provisional voters) must acknowledge that they face criminal penalties if they violate election laws. The uncertainty surrounding these laws is likely to chill voters from exercising their right to vote, and their unequal application will cause the election to be conducted in a fundamentally unfair manner. Because the constitutional rights of Plaintiffs' members will be violated, this Court should enjoin the enforcement of these laws.

¹ Ohio Rev. Code § 3505.18(A)(1).

² *Id.* §3501.01(AA).

³ *Id.*

⁴ *Id.* § 3505.18(B).

⁵ Those six aspects are: (1) the definition of "current" in the phrase "current utility bill...", (2) the definition of "other government document," (3) whether the Photograph Number on a driver's license may be accepted, (4) whether military identifications may be accepted even though they do not show addresses, (5) whether Boards of Elections are wrongly refusing to accept driver's licenses that show a former address, and (6) whether Boards of Elections may require early in-person voters to satisfy the identification requirements applicable to Election Day rather than absentee voters.

C. Election Day Voters Are Subject To More Burdensome Identification Requirements Than Are Absentee Voters

The new voter-identification laws are also fatally flawed because they impose more of a burden on Election Day voters than on absentee voters.

Any voter may vote by absentee ballot.⁶ Absentee voters may apply for and cast their ballots either by mail or in-person at the Board of Elections.⁷ When absentee voters apply for or return their absentee ballots, they can provide either a driver's license number, the last four digits of a Social Security number, *or* one of the required forms of identification.⁸ They therefore need not provide the required identification to cast their votes and have them be counted, although they may choose to do so.

By contrast, voters who vote at polling places on Election Day must provide one of the required forms of identification to cast a regular ballot.⁹ Unlike absentee voters, they are not permitted to provide their Social Security number or driver's license number in lieu of the required identification. The new voter-identification laws therefore treat voters who vote on Election Day less favorably than absentee voters who cast their votes before or on Election Day.

D. Voters Who Do Not Have The Required Identification, But Do Have A Social Security Number, Are Barred From Voting On Election Day

The new voter-identification laws are also fatally flawed because they will disenfranchise voters who do not have the required identification, but do have a Social Security number, and who attempt to vote on Election Day.

⁶ Ohio Rev. Code § 3509.02(A).

⁷ *Id.* § 3509.05.

⁸ *Id.* §§ 3509.03(E), 3509.04, 3509.05(A).

⁹ *Id.* § 3505.18.

Only those voters who provide the required identification may cast a regular ballot on Election Day. The laws allow a *provisional* ballot to be cast by five groups of voters who either cannot or will not produce the required identification:

1. A voter who “has but is unable to provide” the required identification “but has a social security number” may provide the last four digits of his Social Security number and then cast a provisional ballot.¹⁰
2. A voter who “has but is unable to provide” the required identification and “has a social security number but is unable to provide the last four digits” may cast a provisional ballot but must return to the Board of Elections within ten days after Election Day to provide either the required identification or the last four digits of his Social Security number.¹¹
3. A voter who “does not have” the required identification “and cannot provide the last four digits of the elector’s social security number because the elector does not have a social security number” may cast a provisional ballot after he “execute[s] an affirmation under penalty of election falsification that the elector cannot provide the identification required under that division or the last four digits of the social security number for those reasons.”¹²
4. A voter who “does not have” the required identification “and cannot provide the last four digits of the elector’s social security number because the elector does not have a social security number,” and who also “declines to execute” the required

¹⁰ *Id.* §§ 3505.18(A)(2), 3505.181(A)(2).

¹¹ *Id.* §§ 3505.18(A)(3), 3505.181(B)(7), 3505.181(8), 3505.181(8)(a).

¹² *Id.* §§ 3505.18(A)(4), 3505.181(A)(4).

affirmation, may cast a provisional ballot but must return to the Board of Elections within ten days after Election Day and execute the affirmation.¹³

5. A voter who “has but declines to provide” the required identification or “has a social security number but declines to provide” the last four digits of that number may cast a provisional ballot but must return to the Board of Elections within ten days after Election Day and provide either the required identification or the last four digits of their Social Security numbers.¹⁴

While this complex law appears to be comprehensive, it in fact fails to include a sixth category of voters—those who lack the required identification but have a Social Security number. These voters cannot vote on Election Day. It is unlikely that these voters know that they have been disenfranchised in this manner. The Defendant has not only failed to give notice of that fact, but has wrongly assured these voters that they *can* vote on Election Day. Specifically, the new voter-identification laws required each Board of Elections to send a notice to every registered voter listing the required identification, and then stating: “Voters who do not provide one of these documents will still be able to vote by providing the last four digits of the voter’s social security number and by casting a provisional ballot.”¹⁵ These voters will likely rely on this assurance and show up at the polls on Election Day, only to be turned away because the new laws *do not give them the right to vote*.

¹³ *Id.* §§ 3505.18(A)(5), 3505.181(A)(12), 3505.181(B)(7), 3505.181(B)(8), 3505.181(B)(8)(a)(iii).

¹⁴ *Id.* §§ 3505.18(A)(6), 3505.181(A)(13), 3505.181(B)(7), 3505.181(B)(8), 3505.181(B)(8)(a).

¹⁵ *Id.* § 3501.19.

E. The Only Voters Who Must Provide Proof Of Their Current Addresses Are Those Who Provide A Utility Bill, Bank Statement, Government Check, Paycheck, Or Other Government Document

The new voter-identification laws allow many voters to vote, and to have their votes counted, without requiring them to show proof of their current addresses. For example, voters who provide driver's licenses or state-identification cards with their former addresses can cast regular ballots.¹⁶ Voters who have the required identification, but not with them, can provide their Social Security number and cast a provisional ballot.¹⁷ Voters who do not have either the required identification or a Social Security number can simply affirm that fact and then cast a provisional ballot.¹⁸ None of these voters is required to show proof of their current addresses.

By contrast, voters who provide a “utility bill, bank statement, government check, paycheck, or other government document” are required to provide proof of their current addresses.¹⁹ Unlike other voters, these voters must prove their identities *and* their residence. No justification for this difference appears in the statute.

F. Voters Who Cannot Vote On Election Day Because They Lack The Required Identification Must Pay A Poll Tax By Purchasing A State-Identification Card And, In Some Cases, A Birth Certificate

For the reasons stated above, the laws will unfairly deprive some voters—those who have a Social Security number but not the required identification, those who do not have a current utility bill or similar identification with their current address—of the right to vote on Election Day. These voters can only vote on Election Day if they purchase a state-identification card which, for some people, will require them to purchase additional documentation to obtain that card, such as a birth certificate. Requiring voters to pay money to vote constitutes a poll tax.

¹⁶ *Id.* §§ 3501.01(AA), 3505.18(A)(1).

¹⁷ *Id.* §§ 3505.18(A)(2), 3505.18(A)(3), 3505.181(A)(2), 3505.181(A)(3).

¹⁸ *Id.* §§ 3505.18(A)(4), 3505.18(A)(5), 3505.181(A)(4), 3505.181(A)(12).

¹⁹ *E.g.*, Ohio Rev. Code § 3505.18(A)(1).

II. THE COURT SHOULD ENJOIN THE NEW VOTER-IDENTIFICATION LAWS

For the reasons stated above, the voter-identification laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Twenty-Fourth and Fourteenth Amendments, and they should be preliminarily enjoined.

A. The Voter-Identification Laws Violate Due Process Because Their Application Will Cause The Election To Be Fundamentally Unfair

Courts have held that the right to substantive due process will be denied if an election “is conducted in a manner that is fundamentally unfair.”²⁰ The Due Process Clause is violated not by “garden[-]variety” election irregularities but instead by pervasive errors that undermine the integrity of the vote.²¹ While holding that “[t]his is not an exhaustive description of electoral problems that might be fundamentally unfair,” the Ninth Circuit has formulated this two-part test for determining whether an election is so fundamentally unfair that it violates due process:

A general pattern emerges from all of these cases taken together. Mere fraud or mistake will not render an election invalid. However, a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.²²

Elections are also fundamentally unfair if a challenged action “so upsets the evenhandedness of the election that it works a patent and fundamental unfairness on the voters.”²³

Therefore, this Court should find that the new voter-identification laws violate the right of Plaintiffs’ members to substantive due process if any of the three following tests are met: (1)

²⁰ *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (citing cases).

²¹ *Id.*

²² *Bennett*, 140 F.3d at 1226-27.

²³ *Caruso v. Yamhill County*, 422 F.3d 848 (9th Cir. 2005).

the election is conducted in a manner that is fundamentally unfair; or (2) voters will likely rely (or did rely) on a published or established election procedure that is changed and thus results in significant disenfranchisement; or (3) the new laws so upset the evenhandedness of the election that they work a patent and fundamental unfairness on the voters. The application of the voter-identification laws meets all three tests for two of the five actions challenged by Plaintiffs.

1. ***The laws are fundamentally unfair because they are vague, confusing, impossible to apply, and are being differently applied.***

The new voter-identification laws violate the right to substantive due process because they are vague, confusing, impossible to apply, and in fact are being differently applied. First, it is fundamentally unfair to disenfranchise voters by promulgating vague, confusing, and impossible-to-apply rules that are in fact being differently applied Boards of Elections, while failing to provide any meaningful guidance about them or ensure that they are uniformly applied.

Second, voters will reasonably rely on the notice that the Ohio Election Code required be mailed to them, which lists the acceptable identification requirements and contains this text:

Voters must bring identification to the polls in order to verify identity. Identification may include a current and valid photo identification, a military identification that shows the voter's name and current address, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than this reminder or a voter registration notification, that shows the voter's name and current address.²⁴

Boards of Elections that change these procedures or apply different interpretations of them will cause significant disenfranchisement of voters.

²⁴ Ohio Rev. Code § 3501.19.

Under the third test, the confusion and disparate application of the voter-identification laws to date shows that they have already upset, and will continue to upset, the evenhandedness of the election. This will work a patent and fundamental unfairness on the voters.

2. ***The laws are fundamentally unfair because they will disenfranchise voters who lack the required identification but have a Social Security Number.***

The new voter-identification laws also violate the right to substantive due process because they disenfranchise one group of voters on Election Day, namely, those voters who do not have the required identification but do have Social Security numbers. It is fundamentally unfair to disenfranchise these voters, particularly since voters who show *less* identification (that is, who lack both the required identification and a Social Security number) can vote on Election Day. It is difficult to imagine what rationale could justify denying these voters the right to vote.

Second, voters will reasonably rely on the notice that the Ohio Election Code required be mailed to them, which listed the acceptable identification requirements and contained this text:

Voters who do not provide one of these documents will still be able to vote by providing the last four digits of the voter's social security number and by casting a provisional ballot.²⁵

This notice is simply not accurate. Because Boards of Elections must follow the law, voters who rely on this assurance will be denied the right to vote, resulting in significant disenfranchisement.

Third, the arbitrary denial of the right to vote on Election Day to an entire group of voters will necessarily have the effect of upsetting the evenhandedness of the election and working a patent and fundamental unfairness on the voters.

²⁵ *Id.* § 3501.19.

B. The Voter-Identification Laws Will Violate The Fourteenth Amendment By Placing An Undue Burden On Certain Voters

While state voting regulations are “constitutionally suspect” if they are “reasonable and nondiscriminatory,”²⁶ this Court must apply the following approach when determining whether a State’s election laws unduly burden the right to vote in violation of the Fourteenth Amendment:

[A] court ... must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.²⁷

The new laws place an undue burden on three groups of voters.

1. ***The laws burden voters who provide the wrong identification or are chilled from voting because the laws are vague, confusing, and impossible to apply.***

The character and magnitude of the injury resulting from these unconstitutional laws is palpable and severe. Voters who are confused by the vague laws or given incorrect information by their Board of Elections may provide the wrong form of identification. Absentee voters who provide the wrong identification when they return their absentee ballots will be deprived of the right to vote with no due process, i.e., no notice or an opportunity for a hearing. Absentee and provisional voters who are confused by these vague laws may be deterred from exercising their right to vote after learning of the possible criminal penalties that will apply if they violate Ohio’s election laws. The deprivation of these voters’ right to vote constitutes a severe injury.

²⁶ *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (citations omitted).

²⁷ *Id.* at 780, 789 (citations omitted)

Defendant will likely argue that states have a compelling interest in preserving the integrity of its election process, including an interest in ensuring that the right to vote is not undermined by election fraud.²⁸ While this is true, it is not dispositive. “The Court thus has ‘upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.’”²⁹ But the voter-identification laws are not “generally applicable and evenhanded,” nor do they protect the integrity and reliability of the electoral process. If anything, they are causing and will cause massive confusion that will *undermine* the integrity and reliability of the electoral process. They therefore cannot survive any scrutiny by this Court. And, in any case, there is no legislative record or factual predicate that supports the challenged statutes as being a response to or deterrent of fraud. None.

2. *The laws burden Election Day voters who alone must provide the required identification.*

The character and magnitude of the injury suffered by Election Day voters who alone must provide the required identification is potentially severe. Unlike absentee voters, these voters may have to endure long lines before casting their votes. If they reach the head of the line and then are told that their identification is insufficient, they will either have to return home to get other identification and then stand in line again to cast a regular ballot, or cast a provisional ballot after providing their Social Security number. Absentee voters, by contrast, could use their Social Security number to cast an absentee ballot rather than a provisional ballot.³⁰ It is unclear what interest, if any, justifies imposing this additional burden on Election Day voters. There is no legislative record or factual record that supports imposing such a burden.

²⁸ *Burson v. Freeman*, 504 U.S. 191, 199, 112 S. Ct. 1846 (1992).

²⁹ *Id.* (quoting *Anderson*, 460 U.S. at 788 n.9).

³⁰ Although absentee and provisional ballots are both subject to a post-election verification process, the procedures for verifying absentee ballots are straightforward and likely to be uniformly applied but the procedures for verifying provisional ballots are complex, confusing, vague, internally inconsistent, and will likely not be uniformly applied. Compare Ohio Rev. Code § 3509.07 (absentee ballots) with Ohio Rev. Code § 3505.183 (provisional ballots).

3. *The laws burden voters who show certain forms of identification who alone must provide proof of their current addresses.*

Voters who can only prove their identity with a utility bill, bank statement, government check, paycheck, or other government document that shows a former address will be denied their right to vote, which constitutes a severe and palpable injury. Homeless people who kept some of these types of documents cannot use them to vote because they no longer live at that address, and may not have other acceptable identification. College students who have their bank statements mailed to their parents' addresses because they are in temporary housing or dormitories cannot use them to vote, and may not have other acceptable identification. There is no legitimate or compelling justification for requiring that only these voting-age eligible Americans and Ohioans must prove their residence. Again, there is no legislative history or factual predicate that supports imposing such a burden.

C. The Voter-Identification Laws Are Being Applied By Boards Of Elections In A Manner That Violates The Equal Protection Clause

The Supreme Court has held that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”³¹ The lines being drawn by Boards of Elections that are applying different interpretations of the new voter-identification laws violate the Equal Protection Clause.

The Supreme Court recently addressed a similar problem when it held that Florida committed a constitutional violation by failing to apply uniform standards to the counting of votes in a Presidential election.³² While the underlying principle applied by Florida courts—the command to consider the intent of the voter—was itself not objectionable, the Court found that

³¹ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)

³² *Bush v. Gore*, 531 U.S. 98, 105-06 (2000).

“[t]he problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules ... is practicable and, we conclude, necessary.”³³ A constitutional violation arises when states “accord[] arbitrary and disparate treatment to voters in its different counties.”³⁴ Boards of Elections that apply different and sometimes wholly contradictory interpretations of the voter-identification laws are in fact “accord[ing] arbitrary and disparate treatment to voters in ... different counties.” The Supreme Court even noted with disapproval “standards for accepting or rejecting contested ballots” that “vary not only from county to county but indeed within a single county....”³⁵

The application of the voter-identification laws violates the Equal Protection Clause in three respects.

1. ***The laws are vague, confusing, and impossible to apply, and in fact are being differently applied by Boards of Elections.***

As in *Bush v. Gore*, the voter-identification laws violate the Equal Protection Clause because they do not set forth specific and uniform standards for Boards of Election to follow. The muddled statutory scheme and Defendant’s failure to guidance on the issue have led to Boards of Elections applying different interpretations of the laws to absentee voters who are casting their votes before Election Day—and in some cases, the same Board of Elections applying and stating different rules to different voters within the county. Since there is no legitimate (much less compelling) reason for treating these voters differently, these facts evidence a violation of the Equal Protection Clause.

³³ *Id.*

³⁴ *Id.* at 107 (citing *Gray v. Sanders*, 372 U.S. 368 (1963)).

³⁵ *Id.* at 106.

2. *The laws deny voters who lack the required identification but have a Social Security Number the right to vote on Election Day.*

The voter-identification laws also violate the Equal Protection Clause because they grant the right to vote by provisional ballot to all voters who cannot provide the required identification *except* for voters who lack the required identification but have a Social Security number. This group of voters is denied the right to cast any ballot on Election Day even though the laws allow voters to cast provisional ballots if they either (a) have the required identification but not with them and also have a Social Security number, or (b) do not have the required identification and also do *not* have a Social Security number. There is no reason that can be articulated—much less one that is legitimate or compelling—that justifies denying these voters the right to cast even a provisional ballot. Again, since there is no reason for treating these voters differently, their disenfranchisement violates the Equal Protection Clause.

3. *Only voters who show certain forms of identification must also provide proof of their current addresses.*

Finally, the voter-identification laws violate the Equal Protection Clause because they require only one group of voters—namely, those who provide a utility bill, bank statement, government check, paycheck, or other government document—to provide proof of their current addresses *as well as* proof of their identities. There is no legitimate or compelling reason for requiring some but not all voters to provide proof of their residence as well as their identities. Since there is no reason for treating these voters differently, this aspect of the new voter-identification laws also violates the Equal Protection Clause of the Fourteenth Amendment.

D. The Voter-Identification Laws Impose A Poll Tax On Some Voters

The Twenty-Fourth Amendment states that the right to vote “shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”

In *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), the U.S. Supreme Court held a \$1.50 poll tax assessed by the State of Virginia unconstitutional under the Equal Protection Clause. In its decision, the Court emphasized that poll taxes are absolutely prohibited:

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have not relation to wealth Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause. 383 U.S. at 666, 668.

The voter-identification laws impose a poll tax on voters who do not have the required identification and who cannot otherwise vote on Election Day—including those voters who do not have the required identification but do have Social Security numbers. This poll tax will adversely affect registered voters, including Plaintiffs' members, who do not have the required identification but do have Social Security numbers.³⁶

By law, the cost of a state-identification card ranges from \$ 3.50 to \$ 8.50.³⁷ In addition, some voters also must purchase the identification that is necessary to obtain a state-identification card. Mr. Brian Davis, the Executive Director of Plaintiff Northeast Ohio Coalition for the Homeless, explains the difficulties faced by homeless voters in this situation:

7. A birth certificate is the basis for all forms of identification. However, there is no national standard for the issuance of a birth certificate. In fact, a few states make it nearly impossible for a

³⁶ Attached as Exhibit C are the Declarations of Micky Trammell, Edward Rinn, James Caldwell and Anthony Willis, who are homeless individuals who do not have the required identification but do have Social Security numbers.

³⁷ Ohio Rev. Code § 4507.50.

homeless person to get a legitimate copy of their own birth certificate.

8. It is very difficult to obtain identification in the post-September 11th world, particularly for those without a home. In some instances it is easier to travel to one's place of birth in order to obtain a birth certificate, but that is often not an option for homeless people.

9. The process of obtaining a birth certificate is expensive and time-consuming. Some homeless people must wait six, eight or ten months to receive a birth certificate.³⁸

The cost of obtaining a birth certificate in Cleveland is \$ 19.00.³⁹ “Because many homeless people do not have identification or lose their identification, and because of the expense and delay associated with obtaining such identification, the new voter-identification laws in House Bill 3 will effectively deprive a substantial number of homeless people of their right to vote.”⁴⁰

III. THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

Federal Rule of Civil Procedure 65 governs the issuance of preliminary injunctions.

When ruling on a motion for preliminary injunction, this Court must balance four factors: (1) whether the movant has a strong or substantial likelihood of success on the merits, (2) whether the movant will suffer irreparable harm without the relief requested, (3) whether granting the relief requested will cause substantial harm to others, and (4) whether the public interest will be served by granting the relief requested.⁴¹ The Sixth Circuit has also held that “[i]n general, the likelihood of success that need be shown ... will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.”⁴²

³⁸ Declaration of Brian Davis (attached as Exhibit D), ¶¶ 7-9.

³⁹ *Id.* at ¶ 6.

⁴⁰ *Id.* at ¶ 10.

⁴¹ *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6th Cir. 1999).

⁴² *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982) (internal quotation and citation omitted).

A. Plaintiffs Have Shown A Strong Or Substantial Likelihood Of Success On The Merits Of Their Claims

Plaintiffs have shown a strong or substantial likelihood of success on the merits of their claims because the new voter-identification laws are unconstitutional on each of these grounds: (1) Boards of Elections are applying conflicting interpretations of six parts of the laws, (2) Election Day voters are subject to more burdensome identification requirements than absentee voters, (3) voters who do not have the required identification, but do have a Social Security number, are barred from voting on Election Day by either regular or provisional ballot, (4) the only voters who must provide proof of their current addresses are those who provide a utility bill, bank statement, government check, paycheck, or other government document, and (5) voters who cannot vote on Election Day because they lack the required identification must pay a poll tax by purchasing a state-identification card and, in some cases, a birth certificate.

Defendant has argued that Plaintiff's claims must fail because of the Supreme Court's recent decision in *Purcell v. Gonzalez*.⁴³ That case is not on point, however, because the Court's decision to vacate and remand a Ninth Circuit injunction of Arizona's voter-identification law was based on particular procedural matters (a court decision altering election procedures without a written opinion, oral argument, or a factual record) which are absent here. The decision did not establish a bright-line rule that federal courts should decline to hear election cases in the weeks before an election. Indeed, the *Purcell* Court expressly noted that "the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges," and "underscore[d]" that its decision "express[ed] no opinion" on "the correct disposition" on the merits of voters' challenge to Arizona's voter-identification law.

⁴³ 590 U.S. ____ (2006).

Moreover, the district court in that case had conducted a preliminary injunction hearing and expressly held that the plaintiffs in that case did not demonstrate a likelihood of success on the merits. Here, by contrast, the law and the facts establish that Plaintiffs have demonstrated a strong or substantial likelihood of success on the merits. There is no basis for denying relief in this circumstance.

B. Plaintiffs' Members Will Suffer Irreparable Harm If This Court Does Not Grant The Requested Relief

The flaws in the statute that are at issue here do not concern trivial or tangential aspects of voting. Instead, the flaws in the new voter-identification laws will have the effect of depriving voters, including entire categories of voters, of their fundamental right to vote. Deprivation of that right cannot be remedied by any subsequent or monetary relief. This Court can only prevent irreparable harm to these voters by issuing the requested injunction.

C. Granting The Relief Requested Will Not Substantially Harm Others

An injunction that enjoins enforcement of the voter-identification laws will not harm others. While the State of Ohio does have an interest in ensuring that the election is conducted with integrity and without fraud, that interest can be vindicated through the criminal prosecution of individual voters who commit such fraud. There has been no showing of widespread voter fraud in previous elections that would suggest any other conclusion. Granting the requested relief will not cause substantial harm to others.

D. The Public Interest Will Be Served By Granting The Requested Relief

Because the voter-identification laws are being applied in manner that is depriving voters of their constitutional rights, the public interest will be well-served by granting the requested relief. Moreover, the public will benefit not only because an injunction will prevent individual

voters from being disenfranchised, but also because such an order will prevent widespread unequal treatment and possible chaos on Election Day.

E. The Court Should Not Require Plaintiffs To Post A Bond

The Court has the discretion to issue the requested relief without requiring Plaintiffs to post a bond.⁴⁴ Because there is no risk that Defendant will be monetarily damaged if the Court issues a preliminary injunction, this Court should not require Plaintiffs to post bond.

IV. THE COURT SHOULD DECLARE THAT THE PROVISIONAL-BALLOT LAW IS UNCONSTITUTIONALLY VAGUE AND DIRECT THE DEFENDANT TO PROVIDE GUIDANCE REGARDING HOW IT SHOULD BE APPLIED

Plaintiffs also seek an order declaring that the new law that governs the eligibility of provisional ballots to be counted (Ohio Rev. Code § 3505.183(B)) is unconstitutionally vague and internally inconsistent, and so will not be applied uniformly by Boards of Elections, and that directs the Defendant to set forth the procedures to be applied. Although the Defendant could reasonably have been expected to issue such guidance, it has not been provided. Absent such direction, these laws cannot be applied uniformly and their inconsistent application will work a patent and fundamental unfairness on the voters in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The new provisional-ballot law is set forth in Ohio Revised Code § 3505.183(B). It sets forth various requirements for Boards of Elections to apply when examining provisional ballots to determine whether they are eligible to be counted.

Unfortunately, these requirements are vague. For example, each Board of Elections must examine “its records” when determining whether provisional voters are both registered and

⁴⁴ *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F. 3d 1171 (6th Cir. 1995).

eligible to vote. Ohio Rev. Code § 3505.183(B)(1). But it does not explain which records should be consulted, require all Boards of Elections to consult the same records, or even require an individual Board of Elections to consult the same records for all of its provisional voters.

Similarly, the law requires Boards of Elections to evaluate “additional information” provided by the voter either on the Provisional Ballot Affirmation Form or during the ten days after Election Day. Ohio Rev. Code § 3505.183(B)(2). It does not, however, explain how this information should be evaluated. For example, it does not require Boards of Elections to take affirmative steps to verify provisional voters’ identities, or explain how any such steps should be taken (e.g., comparing the data with data maintained by the Ohio Bureau of Motor Vehicles). The statute also does not require all Boards of Elections to follow the same procedures, or require individual Boards of Elections to apply the same procedures to all provisional voters.

The law also is internally inconsistent. While one section directs the Board of Elections to count a provisional ballot if all of five factors apply, another provision directs the Board of Elections to reject a provisional ballot if any of eight factors apply.⁴⁵ It is unclear whether Boards of Elections will follow the first or second provision, and again there is no requirement that all Boards of Elections make the same choice, or that individual Boards of Elections apply the same test to all provisional voters.

Finally, in perhaps the most alarming provision, Boards of Elections are permitted to reject and not count provisional ballots if they *cannot determine* whether the voter is eligible, registered and qualified to vote. There are no standards to guide Boards of Elections when exercising their discretion to reject ballots under this provision. For example, the statute would conceivably allow Boards of Elections to reject ballots simply because they find themselves

⁴⁵ Compare Ohio Rev. Code § 3505.183(B)(3) with Ohio Rev. Code § 3505.183(B)(4).

unable—whether due to technical constraints, an insufficient amount of time before the results must be certified, or insufficient manpower—to determine whether all of the voters who cast provisional ballots are qualified, registered and eligible to vote.

These deficiencies in the statute could have been largely cured had the Defendant issued the appropriate guidance regarding their interpretation and application by Ohio's Boards of Elections. Unfortunately, the Defendant has not, to date, issued guidance instructing Boards of Elections regarding how to apply these laws in a uniform manner. In light of these vague and conflicting provisions of this new law, the lack of guidance by the Defendant, and the impact on the significant number of voters who will be required to cast provisional votes, Plaintiffs respectfully request that this Court issue an order that declares these statutory provisions to be unconstitutionally vague and that directs the Defendant to issue a directive that sets forth the specific and uniform procedures that Boards of Elections must apply when determining whether provisional ballots should be counted in the upcoming November 7, 2006 election.

V. CONCLUSION

For the reasons stated, this Court should grant this Motion and issue the proposed orders attached as Exhibits A and B.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2006, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

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