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November 20, 2008

Michael Stinziano, Director
Franklin County Board of Elections
280 East Broad Street, Room 100
Columbus, Ohio 43215

RE: Tie votes of November 14, 2008 concerning four categories of provisional ballots

Dear Director Stinziano:

The Franklin County Board of Elections met on November 14, 2008. During this special board meeting the board voted on several motions concerning categories of provisional ballots with irregularities on the provisional ballot affirmation form. Four of these motions resulted in a tie vote of the board. In accordance with R.C. 3501.11(X), and with the procedures outlined in the Ohio Election Official Manual, the Franklin County Board of Elections submitted the tie votes, including position statements of the board members and a transcript of the meeting, to me on November 18, 2008. After a full review of these materials, and for the reasons outlined below, I vote with Board Members Anthony and Marinello in favor of all four motions to deem valid and process the four categories of provisional ballots described below. Accordingly, the votes contained on the provisional ballots at issue must be included as valid votes in the official canvass of the November 4, 2008 election. My analysis and decision follow.

Background

The 2008 General Election was held on November 4, 2008. There were over 27,000 provisional ballots cast in Franklin County during the 2008 General Election. Board staff began reviewing provisional ballot affirmations after Election Day to determine whether the provisional ballots should be counted. On November 14, 2008, the board held a special meeting to consider whether provisional ballots that had similar irregularities would be counted in the official canvass.

The board reached tie votes on the following motions:

- 1) Board Member William A. Anthony, Jr., made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains the signature of the voter but not the written name of the voter if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Kimberly E. Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Douglas F. Preisse and Board Member Michael F. Colley voted against the motion, resulting in a tie vote. (Tr. 11, 15).¹

¹ References to the transcript of the November 14, 2008 special board meeting are referred to by the abbreviation "Tr." and the page number.

- 2) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains the printed name of the voter but not the signature of the voter if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Priebe and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 17, 21).
- 3) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains both the printed name of the voter and the signature of the voter but not in the place designated for the name and signature in column one of Franklin County's provisional ballot affirmation form if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Priebe and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 22, 23).
- 4) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains both the printed name of the voter and the signature of the voter but no verification that the voter provided identification in column two of Franklin County's provisional ballot affirmation form if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Priebe and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 31, 33-34).

Discussion

The tie votes of the Franklin County Board of Elections concern whether certain provisional ballots cast in the 2008 General Election with similar irregularities on the provisional ballot affirmation form should be counted in the official canvass. Prior to Election Day, and pursuant R.C. 3501.05(B), I issued two directives to the Ohio county boards of elections providing instructions for the processing and counting of provisional ballots. These directives were the result of settlement negotiations in the federal court case captioned *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-CV896 (S.D. Ohio). Directive 2008-101 interprets R.C. 3505.181, 3505.182 and 3505.183 and outlines the process by which boards of elections must process and count provisional ballots, while Directive 2008-103 specifically addresses the issue of poll worker error in processing provisional ballots. The U.S. District Court for the Southern District of Ohio adopted Directives 2008-101 and 2008-103 as orders of the court.

Ohio's current provisional voting process provided in R.C. 3505.181, 3505.182 and 3505.183 was enacted by House Bill 3, effective May 2, 2006. In order to vote a provisional ballot in Ohio, R.C. 3505.181(B)(2) requires a voter to execute a written affirmation "before an election official at the polling place." The voter is also required to provide identification to the election official, who records the type of identification provided by a voter, or if the voter does not have

identification, to execute an affirmation as provided in R.C. 3505.181(B)(6). If a voter declines to execute an affirmation, the election official must record the voter's name and note on the provisional ballot envelope that the voter declined to execute an affirmation. The election official must then transmit the provisional ballot back to the board of elections under R.C. 3505.181(B)(3) and (6). Thus, R.C. 3505.181(B) places a duty on poll workers to interact with voters and to oversee the completion and execution of the provisional ballot affirmation.

The form of the provisional ballot affirmation is provided in R.C. 3505.182. Pursuant to R.C. 3501.05(G), and consistent with R.C. 3505.182, this office adopted Secretary of State Form 12-B ("SOS Form 12-B") as the official Provisional Ballot Affirmation form. Pursuant to R.C. 3501.05(C) and 3501.27(B), and to aid Ohio's county boards of elections in training poll workers regarding the proper administration of elections, this office developed the Poll Worker Manual and Poll Worker Quick Reference Guide. Directive 2008-27 requires Ohio's county boards of elections to train poll workers using the Poll Worker Manual and Poll Worker Quick Reference Guide. Additionally, the directive requires boards of elections to provide a copy of these documents to all poll workers and to provide three copies of the Poll Worker Quick Reference Guide to each precinct for use on Election Day.

Clear direction is provided in SOS Form 12-B, the Poll Worker Manual (on page 40) and the Poll Worker Quick Reference Guide (in the "Processing Provisional Ballots Voted" section) that poll workers must review provisional ballot affirmation forms to ensure that the affirmation is properly completed by voters before the poll worker executes the election official verification section of SOS Form 12-B. This requirement is consistent with the express authority of poll workers to administer elections at precincts (R.C. 3501.33 and 3501.22), the statutory mandate that poll workers be trained regarding election laws and procedures (R.C. 3501.27), and the duty of poll workers to interact with voters and to oversee the completion of the provisional ballot affirmation (R.C. 3505.181(B)).

Unfortunately, the Franklin County Board of Elections does not use SOS Form 12-B as its provisional ballot affirmation form. Instead, the board has adopted a form that is inconsistent with SOS Form 12-B. It is unclear whether the Franklin County Board of Elections instructed its poll workers using the Poll Worker Manual and Poll Worker Quick Reference Guide as required by Directive 2008-27. However, Franklin County's poll workers still must comply with Ohio election law and the directives, advisories, rules and instructions for the conduct of elections promulgated by the Secretary of State. Moreover, the failure of a poll worker to do so constitutes poll worker error. Under Directive 2008-103 and the October 27, 2008 federal court order no provisional ballot may be rejected by a board of elections for reasons that are attributable to poll worker error.

Directive 2008-101, which interprets R.C. 3505.181, 3505.182 and 3505.183, provides the steps that boards of elections must follow in reviewing and processing provisional ballots. Section VI.D.1. of the directive provides the necessary information for a provisional ballot to be counted:

Ballots Eligible to be Counted

Where **ALL** of the following apply, board staff responsible for processing provisional ballots must recommend to the board that a provisional ballot shall count, and a board of elections shall count the provisional ballot:

- a) The individual named on the affirmation is properly registered to vote;
- b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;
- c) The individual provided the following:
 - (1) His or her name and signature as the person who cast the provisional ballot;
 - (2) A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
 - (3) A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;or
 - (4) His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by an election official;or
 - (5) A completed affirmation under R.C. 3505.18(B)(4) (SOS Form 10-T).
- d) If applicable, the individual has provided additional information to the board of elections as may be required, i.e. because he or she falls into one of the four categories of provisional voters who **must** provide additional information to the board of elections during the ten days after the day of an election, and discussed in more detail below; and
- e) If applicable, the individual has been afforded a hearing conducted under R.C. 3503.24, which has resulted in the inclusion of the provisional voter's name in the official registration list.

Finally, the determination of the validity of provisional ballots must also be viewed in the context of the Supreme Court of Ohio's reminders in *State ex rel. Myles v. Brunner*, 2008-Ohio-

5097, ¶ 22, that election officials “must avoid unduly technical interpretations [of election law] that impede the public policy favoring free, competitive elections,” and in *State ex rel. Colvin v. Brunner*, 2008-Ohio-5041, ¶ 62, that election laws are to be “liberally construed in favor of the right to vote according to one’s belief or free choice, for that right is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state.”

1. Provisional ballot affirmations containing the voter’s signature but not the printed name

The first category of provisional ballots with affirmation form irregularities includes ballots that contain the signature of the voter but not the printed name of the voter. The motion provides that these provisional ballots may be counted if the board’s staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.1 or 4. (above), the provisional ballot must be counted if the voter’s name and signature were recorded by the voter or if the printed name was recorded by the voter or a poll worker. If the voter did not provide his or her written name, the poll worker was required to review the form and to instruct the voter to record it. Moreover, if the board had used SOS Form 12-B, the poll worker would have been required to print the voter’s name in the election official verification. Thus, the failure to record the name of the voter was poll worker error, and poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a signature in the affirmation form but not a printed name must be counted.

2. Provisional ballot affirmations containing the voter’s printed name but no signature

The second category of provisional ballots with affirmation form irregularities includes ballots that contain the printed name of the voter but not the signature of the voter. The motion provides that these provisional ballots may be counted if the board’s staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.4. (above), the provisional ballot must be counted if the voter’s name was recorded by the voter or by a poll worker. Section VII of Directive 2008-101 specifically states that “the statutory scheme contemplates at least one circumstance where a provisional voter does not have to provide a signature” for the provisional ballot to be counted.

There is specific statutory authority for this conclusion in Directive 2008-101. The last sentence of R.C. 3505.182 provides that “[i]f the individual declines to execute the affirmation, an appropriate local election official shall comply with division (B)(6) of section 3505.181 of the Revised Code.” Under R.C. 3505.181(B)(6):

If, at the time that an individual casts a provisional ballot, the individual *** declines to execute such an affirmation *** the appropriate local election official shall record *** the fact that the individual declined to execute such an

affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section.

R.C. 3505.181(B)(3) provides

An election official at the polling place shall transmit the ballot cast by the individual, the voter information contained in the written affirmation executed by the individual under division (B)(2) of this section, or the individual's name if the individual declines to execute such an affirmation to an appropriate local election official for verification under division (B)(4) of this section.

R.C. 3505.181(B)(4) states "If the appropriate local election official to whom the ballot or voter or address information is transmitted under division (B)(3) of this section **determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election.**"

Finally, R.C. 3505.183 specifically provides:

(B)(1) To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. **If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; otherwise,** the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

- (a) The individual's name and signature;
- (b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted;
- (c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

Thus, even in the absence of poll worker error, there is clear statutory authority for counting the provisional ballot of a voter that includes the printed name of the voter on the provisional ballot

affirmation but no signature. Moreover, poll workers are required by R.C. 3505.181(B)(6) to record that a voter has declined to execute an affirmation and the failure of a poll worker to do so constitutes poll worker error. Poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing the printed name of a voter in the affirmation form but no signature must be counted.

3. Provisional ballot affirmations containing the voter's printed name and signature but not in the spaces designated on Franklin County's provisional ballot affirmation form

The third category of provisional ballots with affirmation form irregularities includes ballots that contain both the printed name and signature of the voter but not in the place designated for the name and signature in column one of Franklin County's provisional ballot affirmation form. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day, if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.1 or 4. (above), the provisional ballot must be counted if the voter's name and signature were recorded by the voter in the affirmation. As stated above, poll workers are required to review the affirmation to ensure that it is properly completed before completing the election official verification. If the poll workers had complied with this duty the voter would have been instructed by the poll workers to complete the affirmation properly and would likely have corrected their envelope by placing their name and signature on the appropriate lines, since these voters had already once provided their name and signature. Thus, the failure of poll workers to review the provisional ballot affirmation and instruct the voter to complete the form properly clearly was poll worker error, and poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a name and signature in the affirmation form but not in the spaces designated on the form for name and signature must be counted.

4. Provisional ballot affirmations containing the voter's printed name and signature but no verification of identification on the provisional ballot affirmation form

The fourth category of provisional ballots with affirmation form irregularities includes ballots that contain both the printed name and signature of the voter but lack verification on the face of the affirmation that the voter provided identification to the poll worker. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.2.g. and R.C. 3505.183(B)(4)(a)(vii), a provisional ballot may not be counted if the voter did not provide identification, the last four digits of the voter's social security number or execute an affirmation stating that the person does not have identification or a social security number.

Under SOS Form 12-B and Franklin County's provisional ballot affirmation form, the poll worker was required to mark whether the voter failed or refused to provide identification. The absence of the designation whether the voter failed or refused to provide identification is poll worker error, and consistent with my duty to interpret the election laws liberally in favor of upholding the right to vote, it is appropriate to assume that the voter provided identification. Poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a name and signature in the affirmation form but no verification on the face of the affirmation that the voter provided identification to the poll worker must be counted.

Decision

For the foregoing reasons, I vote with Board Members Anthony and Marinello **in favor** of all four motions to deem valid and process the four categories of provisional ballots described above. Accordingly, those motions pass. The Franklin County Board of Elections is hereby instructed to begin processing provisional ballots in accordance with this tie vote decision unless there is an order in the federal case of *State ex rel. Skaggs v. Brunner*, Case No. 2:08 cv 1077 (S.D. Ohio) to the contrary.

Sincerely,



Jennifer Brunner