

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

THE NORTHEAST OHIO COALITION	:	Civil Action No. C2-06-896
FOR THE HOMELESS, et al.,	:	
Plaintiffs,	:	Judge Algenon L. Marbley
	:	
vs.	:	
	:	<b>PLAINTIFFS' MOTION FOR A</b>
JENNIFER BRUNNER, in her official	:	<b>PRELIMINARY INJUNCTION</b>
capacity as Secretary of State of Ohio,	:	
Defendant.	:	
<hr/>		
THE NORTHEAST OHIO COALITION	:	
FOR THE HOMELESS, et al.,	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
THE STATE OF OHIO,	:	
	:	
Intervenor-Defendant.	:	

Plaintiffs respectfully move this Court under Rule 65 for a preliminary injunction that enjoins the enforcement of Ohio's voter identification laws ("Voter ID Laws") both on their face and as applied to Plaintiff NEOCH's homeless members and similarly situated homeless voters in the State of Ohio. In addition, because Boards of Elections applied significantly different and unequal standards to the provisional ballots cast in the November 2006 Election, and will likely do so again in the November 2008 Election, Plaintiffs seek injunctive and declaratory relief with respect to the application of Ohio's provisional ballot laws ("Provisional Ballot Laws").

The grounds for this Motion are set forth in the attached Memorandum.

Respectfully submitted,

/s/ Caroline H. Gentry

Caroline H. Gentry, Trial Attorney (0066138)

Lindsay Sestile (0075618)

Paul G. Hallinan (0010462)

PORTER, WRIGHT, MORRIS & ARTHUR LLP

One South Main Street, Suite 1600

Dayton, OH 45402

Tel: (937) 449-6748

Fax: (937) 449-6820.

Email: [cgentry@porterwright.com](mailto:cgentry@porterwright.com)

and

Subodh Chandra (0069233)

THE CHANDRA LAW FIRM, LLC

1265 W. 6th Street, Suite 400

Cleveland, OH 44113-1326

Tel: (216) 578-1700

Fax: (216) 578-1800

Email: [Subodh.Chandra@StanfordAlumni.org](mailto:Subodh.Chandra@StanfordAlumni.org)

and

H. Ritchey Hollenbaugh (0001072)

CARLILE PATCHEN & MURPHY LLP

366 East Broad Street

Columbus, OH 43215

Tel: (614) 228-6135

Fax: (614) 221-0216

Email: [hrh@cpmlaw.com](mailto:hrh@cpmlaw.com)

Attorneys for Plaintiffs

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs request three categories of preliminary injunctive and declaratory relief.

First, the evidence shows that Ohio's eighty-eight Boards of Elections applied widely different and unequal standards to provisional ballots cast in the November 2006 Election. Plaintiffs seek an Order that requires Boards of Elections to apply uniform standards and procedures when determining whether to count provisional ballots cast in the November 2008 Election. The Order should identify those standards and procedures, provide a process to monitor compliance, and provide remedies for non-compliance. Plaintiffs will propose an Order after expedited discovery and at the conclusion of the hearing on this Motion.

Second, Plaintiffs seek to preliminarily enjoin the Voter ID Laws on their face, or, alternatively, as applied to Plaintiff NEOCH's homeless members and similarly situated homeless voters across the State of Ohio, because these laws impose an unconstitutional poll tax. Notably, the State of Ohio, unlike the State of Indiana, does not provide free ID cards.

Third, Plaintiffs seek to preliminarily enjoin the Voter ID Laws as applied to Plaintiff NEOCH's homeless members, and similarly situated homeless voters in Ohio, because these laws impose a severe and undue burden on them. Although the Voter ID Laws do allow a variety of identification to be used on Election Day, some of Plaintiff NEOCH's homeless members do not have any such identification. That fact is unsurprising since most permitted forms of identification require proof of a current address. By definition, homeless people do not have a current address. Homeless voters who lack the required identification, including some of Plaintiff NEOCH's homeless members, must purchase a State ID card and, possibly, a birth certificate, to avoid being required to vote by provisional ballot on Election Day and face the realistic danger of having their vote be denied, diluted or abridged.

**I. STATEMENT OF FACTS.**

The following facts are taken from prior filings and Orders, pertinent statutes, evidence available on government websites that can be judicially noticed by this Court,<sup>1</sup> and attached evidence that supports the new factual allegations in Plaintiffs' Supplemental Complaint. Where the evidence will be developed at the preliminary injunction hearing, Plaintiffs cite and rely on the allegations in their Supplemental Complaint.

**A. Provisional Ballots**

**1. After filing this lawsuit in 2006, Plaintiffs obtained a Consent Order that sought to assure the uniform treatment of provisional ballots.**

Plaintiffs NEOCH and SEIU filed this lawsuit in October 2006. Among other claims, Plaintiffs contended that the Provisional Ballot Laws were too vague and ambiguous to be uniformly applied by Ohio's Boards of Elections.<sup>2</sup> The lawsuit resulted in a Consent Order that, among other things, sought to harmonize an inconsistency in the Provisional Ballot Laws (i.e., the five-factor test versus the eight-factor test).<sup>3</sup> The understanding was that all provisional ballots cast by registered and eligible voters, including homeless voters, would be counted.

**2. Boards of Elections did not apply uniform standards and procedures to provisional ballots in the November 2006 Election.**

The U.S. Election Assistance Commission (EAC) is a bipartisan commission established by the Help America Vote Act ("HAVA"). After the November 2006 Election, the EAC surveyed Ohio and other states on a wide range of election issues, including provisional voting. The EAC released the results of its survey in December 2007.<sup>4</sup>

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<sup>1</sup> Information from government websites is self-authenticating and may be judicially noticed. *Paralyzed Veterans of America v. McPherson*, Case No. 06-4670 SBA, 2008 U.S. Dist. LEXIS 69542, at \*16-23 (N.D. Cal. Sept. 9, 2008).

<sup>2</sup> Complaint, Doc. No. 2, ¶¶ 126-78.

<sup>3</sup> Doc. No. 51.

<sup>4</sup> See <http://www.eac.gov/program-areas/research-resources-and-reports/completed-research-and-reports/election-day-survey-results>.

A copy of the EAC's Election Administration and Voting Survey is attached as Exhibit A.<sup>5</sup> Question 36 asked for the total number of provisional ballots that had been rejected, both statewide and by county.<sup>6</sup> Question 37 asked how many provisional ballots had been rejected, both statewide and by county, for each of these reasons: (1) already voted, (2) ballot not timely received (absentee), (3) deceased, (4) elector challenged, (5) incomplete ballot form, (6) ineligible to vote, (7) missing ballot, (8) multiple ballots in one envelope, (9) no identification provided, (10) no signature, (11) non-matching signature, (12) not registered, (13) registration purged, (14) wrong jurisdiction, (15) wrong precinct, or (16) other.<sup>7</sup>

Each Ohio county reported data in response to these two questions (the "2006 Ohio Provisional Ballot Data"). The raw data are available in text format from the EAC website.<sup>8</sup> Because the raw data are voluminous and unwieldy, the relevant data appear in an Excel file (Exhibit B), with headings added for clarity. The data are summarized and analyzed in the attached chart (Exhibit C).

The 2006 Ohio Provisional Ballot Data reveal startling and disturbing discrepancies:

(1) Rejection rates

- (a) The average rejection rate, i.e., the rejection rate for all provisional ballots cast in Ohio, was 18.1%.
- (b) Counties varied widely from this average rejection rate, from a high of 43.1% (Belmont County) to a low of 0.85% (Coshocton County).
- (c) Five Boards of Elections had a rejection rate of more than 30%.
- (d) Six Boards of Elections had a rejection rate of less than 5%.

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<sup>5</sup> Exhibit A is available at this government website address: [http://www.eac.gov/program-areas/research-resources-and-reports/copy\\_of\\_docs/eds-2006/2006-eds-appendix-c.pdf/attachment\\_download/file](http://www.eac.gov/program-areas/research-resources-and-reports/copy_of_docs/eds-2006/2006-eds-appendix-c.pdf/attachment_download/file).

<sup>6</sup> Ex. A at 84.

<sup>7</sup> Id. at 85.

<sup>8</sup> The data reported in the EAC's 2006 Election Administration and Voting Survey is available from this government website address: [http://www.eac.gov/program-areas/research-resources-and-reports/copy\\_of\\_docs/eds-2006/data-files-and-survey-chapters](http://www.eac.gov/program-areas/research-resources-and-reports/copy_of_docs/eds-2006/data-files-and-survey-chapters).

- (2) Rejections because the voter already voted
- (a) Twenty-five Boards of Elections rejected 163 provisional ballots because the voter had already voted.
  - (b) Most of these rejected ballots were in Franklin (63), Lucas (21) and Hamilton (17) Counties.
  - (c) Sixty-three Boards of Elections did not reject even a single provisional ballot on this basis.
- (3) Rejections because the voter was ineligible
- (a) Twenty-six Boards of Elections rejected 459 provisional ballots because the voter was determined to be ineligible.
  - (b) The majority of these rejected ballots were in Summit (128), Greene (78) and Belmont (66) Counties.
  - (c) The Belmont County Board of Elections rejected an astounding 12.4% of its provisional ballots on this basis, which was a far higher percentage than in any other county.
  - (d) Sixty-two Boards of Elections—including those in counties with some of the highest number of provisional ballots, i.e., Hamilton (12,569), Lucas (4,910), Montgomery (6,630) and Stark (4,069) Counties—did not reject even a single provisional ballot on this basis.
- (4) Rejections because the ballots were allegedly missing
- (a) Thirteen Boards of Elections rejected 181 provisional ballots because the ballots were allegedly missing.
  - (b) Most of these rejected ballots were in Warren (62), Clark (30) and Clermont (18) Counties.
  - (c) The Morgan County Board of Elections rejected an astonishing 7.0% of its provisional ballots on this basis, which was a far higher percentage than in any other county.
  - (d) Seventy-five Boards of Elections—including Butler (5,150), Cuyahoga (15,917), Franklin (20,322), Hamilton (12,569), Lorain (2,979), Stark (4,069) and Summit (4,891) Counties—did not reject even a single provisional ballot on this basis.

- (5) Rejections because the voter did not provide identification
- (a) Sixty-four Boards of Elections rejected 2,726 provisional ballots because the voter did not provide the required identification.
  - (b) The highest numbers of rejected ballots were in Lorain (383), Summit (349) and Lucas (330) Counties.
  - (c) The Putnam County Board of Elections rejected an incredible 38.0% of its provisional ballots on this basis, far higher than in any other county.
  - (d) Twenty-four Boards of Elections—including Franklin (20,322) and Stark (4,069) Counties—did not reject even one provisional ballot on this basis.
- (6) Rejections because of non-matching signatures
- (a) Five Boards of Elections rejected 14 provisional ballots because of non-matching signatures.
  - (b) Nine of these ballots were rejected in Lucas County.
  - (c) Eighty-three Boards of Elections—including Butler (5,150), Cuyahoga (15,917), Franklin (20,322), Hamilton (12,569), Lorain (2,979), Montgomery (6,630), Stark (4,069) and Summit (4,891) Counties—did not reject even a single provisional ballot on this basis.
- (7) Rejections because the voter was not registered
- (a) Eighty-four Boards of Elections rejected provisional ballots because the voters who cast them were not registered.
  - (b) The highest rejection rates were in Belmont (12.4%), Preble (12.0%), Lorain (11.9%), Carroll (10.6%), Union (10.5%), Wyandot (10.4%) and Warren (10.0%) Counties.
  - (c) Boards of Elections with higher numbers of provisional ballots had significantly lower rejection rates, namely Franklin (3.4%), Butler (3.7%), Stark (4.5%), Summit (5.7%) and Hamilton (6.2%) Counties.<sup>9</sup>

Furthermore, nineteen Boards of Elections reported inconsistent data. For example, the Summit County Board of Elections reported a total of 4,891 provisional ballots, but also reported counting 4,511 and rejecting 1,525 provisional ballots. Those two numbers total 6,036, which is

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<sup>9</sup> Ex. B & C.

1,145 more than the reported total of 4,891.<sup>10</sup> At the opposite end is the Miami County Board of Elections, which reported a total of 897 provisional ballots but also reported counting 713 and rejecting 162, yielding a combined total of 875, which is 22 less than the reported total of 897. There is no explanation for these and similar discrepancies in the data.

The above examples demonstrate that Ohio's Boards of Elections applied unequal, arbitrary and non-uniform standards when determining whether provisional ballots should be counted. Indeed, this very conclusion was suggested by the authors of a report issued by the highly-regarded Election Law @ Moritz at The Ohio State University Moritz College Of Law.<sup>11</sup> Plaintiffs seek expedited discovery to obtain additional information regarding the extent, nature and causes of these significant and troubling variances among the Boards of Elections.

**3. There is a realistic danger that Boards of Elections will not apply uniform standards and procedures when determining whether to count provisional ballots in the November 2008 Election.**

As shown above, Boards of Elections applied significantly different and unequal standards and procedures to provisional ballots cast in the November 2006 Election. There is every reason to believe that they will subject provisional ballots to the same arbitrary and unequal treatment in the November 2008 Election. At a minimum, there is a realistic danger that voters who cast provisional ballots in the upcoming election will be subjected to non-uniform and arbitrary treatment that will deny, dilute or abridge their fundamental right to vote.

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<sup>10</sup> Id.

<sup>11</sup> S. Huefner et al., From Registration to Recounts: The Election Ecosystems of Five Midwestern States (2007) (excerpts attached as Exhibit D). The report is available at <http://moritzlaw.osu.edu/electionlaw/joyce/index.php>.

**B. The Impact On Homeless Voters**

**1. The Voter ID laws require Election-Day voters to provide one of the required forms of identification or else cast a provisional ballot.**

The Voter ID Laws require a registered voter who appears in a polling place to vote (i.e., an Election-Day voter) to provide documentary proof of his or her identity

in the form of a current and valid photo identification, a military identification,<sup>12</sup> or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, under 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.<sup>13</sup>

A photo identification can show the voter's current or former address.<sup>14</sup>

The Voter ID Laws divide voters into two groups. Voters who have a photo ID (i.e., a driver's license, State ID card or U.S. passport) or a military ID need not provide proof of their current address. However, voters who provide a utility bill, bank statement, government check, paycheck or other government document must provide proof of their current address.

Election-Day voters must provide one of the above-described forms of identification to cast a so-called "regular" ballot, that is, a ballot that will automatically be counted.<sup>15</sup> Voters who cannot provide such identification must cast provisional ballots.<sup>16</sup> Provisional ballots will only be counted if the Board of Elections decides affirmatively to count them.<sup>17</sup>

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<sup>12</sup> The prior version of the law required the military identification to show "the voter's name and current address." The law was amended effective September 24, 2008 to strike those words from the statute.

<sup>13</sup> R.C. § 3505.18(A)(1).

<sup>14</sup> R.C. § 3501.01(AA).

<sup>15</sup> R.C. § 3505.18(B).

<sup>16</sup> R.C. §§ 3505.18(A), 3505.181(A).

<sup>17</sup> R.C. § 3505.183.

**2. Homeless voters can register to vote using their shelter address and do not need to provide one of the required forms of identification.**

House Bill 3 amended the Ohio Election Laws to include the challenged Voter ID Laws. It also added a provision that allows homeless persons to register to vote by using the address of their shelter or “other location” at which they habitually reside.<sup>18</sup> Therefore, Ohio law expressly provides a means for homeless voters to register to vote even though they lack a current address.

In Ohio, eligible voters do not need to provide any of the required forms of identification when they register to vote. They can provide their driver’s license number or the last four digits of their Social Security number in lieu of one the required forms of identification.<sup>19</sup> Because homeless people can register to vote by providing the last four digits of their Social Security number, they do not need to provide any of the required identification when registering to vote.

**3. Some of Plaintiff NEOCH’s homeless members, and a substantial number of other homeless voters in Ohio, do not have any of the required forms of identification.**

Some of Plaintiff NEOCH’s members intended to vote and did vote in the November 2006 Election.<sup>20</sup> Some of Plaintiff NEOCH’s members also declared their intent to vote in the elections that follow, including the November 2008 Election.

Some of Plaintiff NEOCH’s homeless voters will be unable to cast regular ballots on Election Day because they lack the required identification. By definition, homeless voters do not have a current address and so cannot provide a utility bill or any other identification that contains their current address.<sup>21</sup> Although some homeless voters have an unexpired driver’s license,

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<sup>18</sup> R.C. § 3503.02(I) (“If a person does not have a fixed place of habitation, but has a shelter or other location at which the person has been a consistent or regular inhabitant and to which the person has the intention of returning, that shelter or other location shall be deemed the person’s residence for the purpose of registering to vote.”).

<sup>19</sup> R.C. § 3503.14.

<sup>20</sup> September 30, 2008 Opinion and Order, Doc. No. 108, at 11 (“Plaintiffs have demonstrated that NEOCH had members who intended to and actually did vote on election day.”)

<sup>21</sup> Id. ¶ 58.

unexpired U.S. passport, or military identification card, many do not.<sup>22</sup> Many homeless voters can only obtain a required form of identification by purchasing a State ID card.

**4. Some of Plaintiff NEOCH's homeless members, and a substantial number of other homeless voters in Ohio, face severe burdens when attempting to obtain a State ID card.**

Unlike the State of Indiana, where the voter identification laws were upheld, the State of Ohio does not provide free State ID cards.<sup>23</sup> Instead, State ID Cards cost \$8.50.<sup>24</sup> That sum is unaffordable for some homeless voters, including Plaintiff NEOCH's homeless members.<sup>25</sup>

Moreover, many homeless voters must purchase an original or certified copy of their birth certificate before they can purchase a State ID Card.<sup>26</sup> In Ohio, birth certificates cost between \$16.50 and \$23.00. Additional costs can be imposed by travel, postage or other incidental expenses, particularly if the voter was born outside of Ohio.<sup>27</sup> It is also difficult for homeless voters to keep track of their important papers, including birth certificates.<sup>28</sup>

For these reasons, the Voter ID Laws impose severe burdens upon some of Plaintiff NEOCH's homeless members and a substantial number of other homeless voters in Ohio.<sup>29</sup> Voters who cannot overcome these burdens must cast provisional ballots on Election Day and face the realistic danger of having their fundamental right to vote be denied, diluted or abridged.

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<sup>22</sup> Id. ¶ 60.

<sup>23</sup> Id. ¶ 69.

<sup>24</sup> See BMV website document attached as Exhibit F.

<sup>25</sup> Id. ¶¶ 70-71.

<sup>26</sup> Id. ¶¶ 72-74; see BMV website document attached as Exhibit G.

<sup>27</sup> Id. ¶¶ 76.

<sup>28</sup> Id. ¶ 81.

<sup>29</sup> See Declarations of Other Homeless Individuals attached as Exhibit H.

**5. Significant obstacles prevent some of Plaintiff NEOCH's homeless members from voting by absentee ballot.**

Beginning in 2005, Ohio has allowed any registered voter to vote by absentee ballot.<sup>30</sup>

Absentee voters can provide the last four digits of their Social Security number in lieu of providing one of the required forms of identification.<sup>31</sup>

While this may appear to be a promising alternative for homeless voters, substantial obstacles effectively prevent many of them from voting by absentee ballot. Voting by mail is burdensome because they must rely on the mail system at their shelter address or other current address (if there is one), such mail systems are often unreliable, and they must pay for postage.<sup>32</sup> Voting early in person is burdensome because they must travel to the County Board of Elections, and many of them lack cars and do not have access to a public transportation system.<sup>33</sup> As a practical matter, therefore, many homeless voters—including some of Plaintiff NEOCH's homeless members—cannot vote by absentee ballot without assistance.<sup>34</sup>

Absentee ballots are also an imperfect substitute for voting on Election Day because, unlike regular ballots, they are not automatically counted. Instead, there are a number of reasons why a Board of Elections may later decide not to count an absentee ballot.<sup>35</sup> The unreliability of the procedure provides another reason why homeless voters should not be required or expected to vote by absentee ballot in lieu of voting by regular ballot on Election Day.

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<sup>30</sup> R.C. § 3509.02(A).

<sup>31</sup> R.C. § 3509.03.

<sup>32</sup> Supp. Compl. at ¶ 61.

<sup>33</sup> Id. at ¶ 62.

<sup>34</sup> Id. at ¶ 63.

<sup>35</sup> R.C. §§ 3509.06 & 3509.07.

**C. The State's Interests**

The State of Ohio has identified only one legitimate and important interest when defending its Voter ID Laws, namely, the interest in deterring voter fraud. However, there is virtually no evidence of in-person impersonation fraud in Ohio, much less fraud by homeless voters.<sup>36</sup> Moreover, the State of Ohio has substantial criminal penalties that are available.<sup>37</sup>

There are also less burdensome means that would serve to effectuate this interest, such as providing identification letters to homeless voters, allowing homeless voters to provide the last four digits of their Social Security Number to prove their identity, or providing free State of Ohio ID Cards to homeless voters as well as financial assistance to obtain their birth certificates.

**D. Standing**

**1. Counts Twelve and Thirteen (Provisional Ballot Laws)**

This Court recently held that Plaintiff NEOCH has standing to bring claims challenging the Provisional Ballot Laws (Counts Twelve and Thirteen) on behalf of its members.<sup>38</sup> Plaintiff NEOCH also has standing to bring these claims on its own behalf because it has devoted, and is continuing to devote, substantial resources to counteracting the unlawful effects of the Voter ID Laws, would not be devoting those resources but for the Defendants' enforcement of those laws, and would otherwise be using those resources for other projects.<sup>39</sup>

Plaintiff SEIU has standing to sue on behalf of its members because some of its thousands of members will inevitably be required to cast a provisional ballot on Election Day.<sup>40</sup>

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<sup>36</sup> See June 14, 2005 Joint Report on Election Reform Activities Issued By COHHIO and The League of Women Voters Of Ohio (attached as Exhibit E).

<sup>37</sup> See Complaint, Doc. No. 2, at ¶¶ 86-88.

<sup>38</sup> Doc. No. 108, Opinion and Order, at 11-12.

<sup>39</sup> Supp. Compl. at ¶¶ 3-5.

<sup>40</sup> Id. at ¶ 2.

2. **New Counts Fourteen and Fifteen (Voter ID Laws: Severe Burden)**

Because Plaintiff NEOCH has members who must cast provisional ballots because they do not have the required identification,<sup>41</sup> it has standing to bring claims challenging the Voter ID Laws on behalf of its members who are severely burdened by those laws. These new claims are brought under the framework set forth by the United States Supreme Court in *Crawford v. Marion County*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1610 (2008).

Plaintiff NEOCH also has standing to bring these new claims on its own behalf because it has devoted, and is continuing to devote, substantial resources to counteracting the unlawful effects of the Voter ID Laws, would not be devoting those resources but for the Defendants' enforcement of those laws, and would otherwise be using those resources for other projects.<sup>42</sup>

3. **New Count Sixteen (Voter ID Laws: Poll Tax)**

For the same reasons, Plaintiff NEOCH has standing to challenge the Voter ID Laws as imposing an unconstitutional poll tax, both on its own behalf and on behalf of its members.

II. **PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS OF THE CLAIMS AT ISSUE IN THIS MOTION.**

A. **The Court Should Order Boards Of Elections To Apply Uniform Standards And Procedures When Determining Whether Provisional Ballots Should Be Counted And, Further, Should Provide For Monitoring Of Compliance And Remedies For Non-Compliance, Because The Provisional Ballot Laws Are Unlawfully Vague And Ambiguous And, As A Result, Have Been And Will Be Applied Unequally By Boards Of Elections (Counts 3, 4, 12 & 13).**

Evidence described in and attached to this Motion, and evidence that will be adduced at the preliminary injunction hearing, establishes that Ohio's eighty-eight Boards of Elections have applied, and are likely to apply, unconstitutionally unequal, disparate and arbitrary standards

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<sup>41</sup> See September 30, 2008 Opinion and Order, Doc. No. 108, at 11-12.

<sup>42</sup> Supp. Compl. at ¶¶ 3-5.

when determining whether provisional ballots are eligible to be counted. *See Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000) (per curiam); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002). Plaintiffs request the opportunity to brief these claims, and to propose the requested relief, at the conclusion of the preliminary injunction hearing.

**B. The Court Should Enjoin The Voter ID Laws In Their Entirety Or, In The Alternative, As Applied To Plaintiff NEOCH's Homeless Members And Similarly Situated Homeless Voters In Ohio, Because They Impose Both An Unlawful Poll Tax And Unlawful Wealth Restrictions (Count 16).**

The Lead Opinion in *Crawford v. Marion County*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1610 (2008) asserts that if States require voters to pay a tax or fee to obtain the identification required to vote, then the voter identification laws are unconstitutional.<sup>43</sup> Although Defendants will argue that Ohio's Voter ID Laws do not impose a poll tax because they allow for a variety of identification, most of that identification requires a current address and so is unavailable for homeless people. Instead, the Voter ID Laws require some of Plaintiff NEOCH's members to purchase a State of Ohio ID Card and, possibly, a birth certificate to cast a regular ballot on Election Day.

Accordingly, the Voter ID Laws impose a poll tax and are facially unconstitutional. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966); *Harman v. Forssenius*, 380 U.S. 528, 85 S. Ct. 1177 (1965). In addition, the Voter ID Laws are unconstitutional and should be invalidated because they draw impermissible distinctions based on wealth. *Hill v. Stone*, 421 U.S. 289, 95 S. Ct. 1637 (1975); *Lubin v. Panish*, 415 U.S. 709, 94 S. Ct. 1315 (1974); *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849 (1972); *McDonald v. Bd. of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404 (1969).

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<sup>43</sup> Lead Op., 128 S. Ct. at 1620-21 (“The fact that most voters already possess a valid driver’s license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification.”)

For these reasons, Plaintiffs request that the Voter ID Laws be enjoined in their entirety. In the alternative, Plaintiffs request that they be enjoined with respect to Plaintiff NEOCH's homeless members and similarly situated homeless voters across the State of Ohio.

**C. The Court Should Enjoin The Voter ID Laws As Applied To Plaintiff NEOCH's Homeless Members And Similarly Situated Homeless Voters Across The State Of Ohio, Because These Laws Impose A Severe Burden On Their Fundamental Right To Vote (Count 14).**

**1. The standard announced in *Crawford* is controlling.**

In *Crawford v. Marion County*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1610 (2008), six Justices voted to uphold Indiana's Voter ID Law. The standard articulated in the Lead Opinion requires courts to "measure[e] the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear ... it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"<sup>44</sup>

Justice Stevens, joined by Justice Kennedy and Chief Justice Roberts, posed four questions when applying this standard. First, are the identified State interests legitimate and important?<sup>45</sup> Second, does the law place a somewhat heavier burden on a limited group of voters?<sup>46</sup> Third, what is the magnitude of the burden imposed on this narrow class of voters?<sup>47</sup> And finally, what portion of the burden imposed on them is fully justified?<sup>48</sup>

In his Concurring Opinion, Justice Scalia disagreed with this standard and urged the Court to "reserve[e] strict scrutiny for laws that severely restrict the right to vote."<sup>49</sup> In his view, "a deferential 'important regulatory interest' standard" should apply because the law imposed

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<sup>44</sup> Id. at 1616 (citation omitted).

<sup>45</sup> Id. at 1616-20.

<sup>46</sup> Id. at 1620-21.

<sup>47</sup> Id. at 1622.

<sup>48</sup> Id.

<sup>49</sup> Id. at 1624.

only nonsevere, nondiscriminatory burdens on the right to vote.<sup>50</sup> That is, “[t]o vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free.”<sup>51</sup>

Justice Souter, joined by Justice Ginsburg, wrote a Dissenting Opinion that advocated a fact-based, “sliding-scale balanced analysis” between the right to vote and the Government’s right to regulate elections.<sup>52</sup> Under Justice Souter’s approach, the level of scrutiny depends upon “[1] the extent to which a challenged regulation burdens First and Fourteenth Amendment rights, [2] an assessment of the ‘character and magnitude of the asserted [threatened] injury,’ and [3] an estimate of the number of voters likely to be affected.”<sup>53</sup> Justice Souter concluded that Indiana’s law is unconstitutional because it burdens the right to vote and Indiana did not make the necessary factual showing that would justify the burden.<sup>54</sup>

Finally, Justice Breyer wrote a Dissenting Opinion that applied this standard: “Whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).”<sup>55</sup> He concluded that the Indiana law is unconstitutional because it imposes a disproportionate burden on eligible voters who lack a Photo ID.

## **2. The holding in *Crawford* is not controlling.**

Defendants assert that *Crawford* requires the dismissal of the Plaintiffs’ claims. This assertion fails because the cases are materially different in four ways. First, unlike Ohio, Indiana provides its voters with free ID, a fact repeatedly noted by the Justices who voted to uphold the law.<sup>56</sup> Second, unlike this case, there was no evidence that Indiana had applied its provisional

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<sup>50</sup> Id.

<sup>51</sup> Id. at 1625.

<sup>52</sup> Id. at 1627-28.

<sup>53</sup> Id. at 1628.

<sup>54</sup> Id. at 1627.

<sup>55</sup> Id. at 1643 (internal quotations and citation omitted).

<sup>56</sup> Lead Op. at 1620-21, Concurring Op. at 1625, 1627.

ballot laws unequally. Indeed, the Lead Opinion noted its assumption that provisional ballots would be counted.<sup>57</sup> Third, the *Crawford* plaintiffs were largely unsuccessful because of a lack of evidence sufficient to show the existence of a severe burden,<sup>58</sup> and Plaintiffs will provide that evidence. Fourth, unlike this case, the *Crawford* plaintiffs did not bring an as-applied challenge.

In addition, the *Crawford* decision expressly left open the possibility that severely burdened voters—such as Plaintiff NEOCH’s homeless members—could bring a successful as-applied challenge. Justice Stevens concluded that “[b]oth evidence in the record and facts of which we may take judicial notice ... indicate that a somewhat heavier burden may be placed on a limited number of persons.... [including] homeless persons,” and that the laws “may have imposed a special burden on their right to vote.”<sup>59</sup> This is just such a case.

For all of these reasons, the Court should enjoin the Voter ID Laws as applied to Plaintiff NEOCH’s homeless members and similarly situated voters across the State of Ohio. Plaintiffs request the opportunity to more fully brief these points after the preliminary injunction hearing.

**D. The Court Should Enjoin The Voter ID Laws As Applied To Plaintiff NEOCH’s Homeless Members And Similarly Situated Voters In Ohio Because They Violate Their Right To Substantive Due Process (Count 15).**

The Voter ID Laws violate the substantive due process rights of some of Plaintiff NEOCH’s homeless members because the laws subject these voters to an unequal and second-class system of voting that is likely to deprive, dilute and abridge their fundamental right to vote. *See Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002). The Voter ID Laws further violate their rights to substantive due process because they contain wealth restrictions. *See Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971). Plaintiffs request the opportunity to more fully brief these arguments after the preliminary injunction hearing.

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<sup>57</sup> Lead Op. at 1620-21.

<sup>58</sup> Lead Op. at 1622.

<sup>59</sup> Id. at 1621.

### **III. THE REMAINING FACTORS WEIGH IN FAVOR OF GRANTING THE REQUESTED RELIEF.**

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.<sup>60</sup> “In general, the likelihood of success that need be shown ... will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.”<sup>61</sup>

For the foregoing reasons, and as will be shown by evidence adduced at the preliminary injunction hearing, Plaintiffs have established a strong likelihood of success on the merits of the claims at issue in this Motion. The remaining factors also weigh in favor of granting the Motion.

#### **A. Some Of Plaintiff NEOCH’s Homeless Members Will Suffer Irreparable Harm If This Court Does Not Grant The Relief.**

Plaintiff NEOCH’s homeless members who lack the required identification have three options: (1) purchase a State ID Card and, possibly, a birth certificate, so that they can cast a regular ballot on Election Day, (2) cast a provisional ballot on Election Day and face the realistic danger of arbitrary and disparate treatment by Ohio’s Boards of Elections, or (3) overcome severe obstacles to cast an absentee ballot before Election Day. Each of these scenarios denies, dilutes and abridges their fundamental right to vote. Such deprivation cannot be remedied by any subsequent or monetary relief. Only the requested injunctive relief can prevent these voters from suffering irreparable harm.

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<sup>60</sup> *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6<sup>th</sup> Cir. 1999).

<sup>61</sup> *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6<sup>th</sup> Cir. 1982) (internal quotations and citation omitted).

**B. Granting The Requested Relief Will Not Harm Others.**

An order granting the requested injunctive relief will not cause substantial harm to others. While the State of Ohio does have an interest in deterring and detecting voter fraud, that interest will be adequately served by the existing onerous criminal penalties that apply to voters who commit election fraud. There is no basis for assuming otherwise. *Cf. Ohio Republican Party v. Brunner*, \_\_\_ F.3d \_\_\_, Case No. 08-4322, Slip Op. at 10 (6<sup>th</sup> Cir. Oct. 10, 2008) (“[T]he district court, citing two newspaper articles, merely assumed that there will be wide-spread voter fraud absent the issuing of a TRO. Given the shaky ground on which this voter-fraud determination rests, we believe that this unsubstantiated fear does not warrant the district court’s intrusion into the established state practice.”). Granting the requested relief will not cause substantial harm.

**C. The Public Interest Will Be Served By Granting The Requested Relief.**

Instead, the public interest will be served by granting the requested relief. “[I]t is hard to imagine a public interest more compelling than safeguarding the legitimacy of the election of the President of the United States.” *Ohio Republican Party v. Brunner*, Case No. 2:08-cv-913, 2008 U.S. Dist. LEXIS 79484, at \*23 (S.D. Ohio Oct. 9, 2008), *vacated on other grounds by* \_\_\_ F.3d \_\_\_, Case No. 08-4322, Slip Op. at 10 (6<sup>th</sup> Cir. Oct. 10, 2008). Allowing Boards of Elections to apply arbitrary and disparate standards to provisional ballots cast in the November 2008 Election will cause serious damage to this public interest. Moreover, requiring homeless voters to pay a poll tax simply to avoid being subjected to this unconstitutional procedure is also not in the public interest. Instead, voter confidence will be safeguarded by granting the requested relief.

**IV. PLAINTIFFS REQUEST EXPEDITED DISCOVERY FOLLOWED BY AN EXPEDITED HEARING.**

As described in a Motion for Expedited Discovery filed concurrently with this Motion, Plaintiffs seek expedited discovery from Defendant Brunner and twenty (20) Boards of

Elections, including documents and depositions, in advance of an expedited hearing. Plaintiffs propose that: (1) the limited categories of requested documents be produced by noon on Friday October 17, (2) a designee from each Board of Elections be deposed by telephone for one-and-one half hours on Monday, October 20 and Tuesday, October 21 (double-tracking 5 depositions per day), and (3) a designated representative from Defendant Brunner's office—preferably Defendant Brunner herself—be deposed on Wednesday, October 22.

Plaintiffs propose that a preliminary injunction hearing be set for Thursday, October 23 and Friday, October 24, and that the parties submit supplemental briefs by Sunday, October 26. This schedule will allow the Court to issue its decision before the November 2008 Election.

**V. CONCLUSION**

For the reasons stated, as well as evidence and argument that will be offered at the preliminary injunction hearing and subsequent briefing, Plaintiffs' Motion should be granted.

Respectfully submitted,

/s/ Caroline H. Gentry  
Caroline H. Gentry, Trial Attorney (0066138)  
Lindsay Sestile (0075618)  
Paul G. Hallinan (0010462)  
PORTER, WRIGHT, MORRIS & ARTHUR LLP  
One South Main Street, Suite 1600  
Dayton, OH 45402  
Tel: (937) 449-6748  
Fax: (937) 449-6820  
Email: cgentry@porterwright.com

and

Subodh Chandra (0069233)  
THE CHANDRA LAW FIRM, LLC  
1265 W. 6th Street, Suite 400  
Cleveland, OH 44113-1326  
Tel: (216) 578-1700  
Fax: (216) 578-1800  
Email: Subodh.Chandra@StanfordAlumni.org

and

H. Ritchey Hollenbaugh (0001072)  
CARLILE PATCHEN & MURPHY LLP  
366 East Broad Street  
Columbus, OH 43215  
Tel: (614) 228-6135  
Fax: (614) 221-0216  
Email: [hrh@cpmlaw.com](mailto:hrh@cpmlaw.com)

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14<sup>th</sup>, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

/s Caroline H. Gentry  
Caroline H. Gentry (0066138)  
Attorney for Plaintiffs  
PORTER, WRIGHT, MORRIS & ARTHUR LLP  
One South Main Street, Suite 1600  
Dayton, Ohio 45402  
(937) 449-6748 / (937) 449-6820 Fax  
[cgentry@porterwright.com](mailto:cgentry@porterwright.com)