

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

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	Civil Action No. C2-06-896
	:	Judge Algenon L. Marbley
Plaintiffs,	:	Magistrate Judge Terence P. Kemp
vs.	:	
JENNIFER BRUNNER, in her official capacity as Secretary of State of Ohio,	:	COMBINED MEMORANDUM IN REPLY TO DEFENDANTS' MEMORANDA IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION
Defendant.	:	
_____	:	
THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	
	:	
Plaintiffs,	:	
vs.	:	
THE STATE OF OHIO,	:	
	:	
Intervenor-Defendant.	:	
	:	
_____	:	

Defendants raise a dizzying slew of arguments in opposition to Plaintiffs' Motion for a Preliminary Injunction, namely: (1) Ohio law provides an unambiguous and readily-applied standard for determining whether to count provisional ballots; (2) even if it does not, the Eleventh Amendment bars the Court from granting Plaintiffs any relief; (3) this case is not like *Bush v. Gore* because there is a clear state standard; (4) in any event, it is too late for the Court to issue an injunction with respect to the November 2008 Election; (5) homeless voters need not purchase a State ID Card because of the wide range of available identification; (6) even if they

have no other identification and so must purchase a State ID Card, they have no right to cast a regular ballot; (7) Plaintiffs cannot identify any voter who will be injured; (8) Plaintiffs unduly delayed filing their Motion; (9) the Court already decided Plaintiffs' poll tax claim; (10) the challenged laws do not place a severe or undue burden on Plaintiffs and their members; (11) the Supreme Court decided in *Crawford* that provisional ballots are an adequate substitute for regular ballots; and (12) the State of Ohio's \$8.50 fee for a State ID Card is not a poll tax.

For the reasons stated below, and based on evidence that is partly summarized in the Motion and in this Reply, and that will be presented at the hearing, none of these arguments is well-taken. Accordingly, Plaintiffs' Motion for a Preliminary Injunction should be granted.

A. The Evidence Shows That The Governing Ohio Statute Is Ambiguous And Provides Neither A Uniform Nor A "Readily Applied" Standard For Boards To Follow.

1. The statute is anything but clear.

The key statute is Revised Code Section 3505.183. Although the State of Ohio only cites *one* standard from Section 3505.183 (Doc. No. 128 at 5), it actually contains *five* standards—three of which are cited by Defendant Secretary. (Doc. No. 126 at 4-5). They are:

[First standard:]

(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 **[T]he 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.

[Second standard:]

(B)(2) *In addition* to the information required to be included in an affirmation under division (B)(1) of this section, in determining whether a provisional ballot is valid and entitled to be counted, *the board also shall examine any additional information for determining ballot validity provided* by the provisional voter *on the affirmation*, provided by the provisional voter *to an election official* under Section 3505.182 ..., *or provided to the board of elections during the ten days after the day of the election*

[Third standard:]

(B)(3) *If*, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, *the board determines that all of the following apply*, the provisional ballot envelope shall be opened, and *the ballot shall be* placed in a ballot box to be *counted*:

- (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 all of the information required under division (B)(1) of this section in the affirmation* that the individual executed at the time the individual cast the provisional ballot.
- (d) *If applicable, the individual provided any additional information required under division (B)(8) of Section 3505.181* of the Revised Code within ten days after the day of the election.¹

¹ Section 3505.181(B)(8) provides: “During the ten days after the day of an election, an individual who casts a provisional ballot pursuant to division (A)(3), (7), (12), or (13) of this section shall appear at the office of the board of elections and provide to the board any additional information necessary to determine the eligibility of the individual who cast the provisional ballot.” [(A)(3) applies to voters who have but are unable to provide the required ID and have but are unable to provide the last four digits of the Social Security numbers. (A)(7) applies to

- (e) ***If applicable, the hearing*** conducted under division (B) of Section 3503.24 of the Revised Code after the day of the election ***resulted in the individual's inclusion in the official registration list.***

[Fourth standard:]

(B)(4)(a) ***If***, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, ***the board determines that any of the following applies***, the provisional ballot envelope shall not be opened, and ***the ballot shall not be counted***:

- (i) The individual named on the affirmation is ***not qualified*** or is ***not properly registered*** to vote.
- (ii) The individual named on the affirmation is ***not eligible to cast a ballot in the precinct or for the election*** in which the individual cast the provisional ballot.
- (iii) ***The individual did not provide all of the information required under division (B)(1) of this section in the affirmation*** that the individual executed at the time the individual cast the provisional ballot.
- (iv) The individual has ***already cast a ballot*** for the election in which the individual cast the provisional ballot.
- (v) ***If applicable, the individual did not provide any additional information required under division (B)(8) of Section 3505.181*** of the Revised Code within ten days after the day of the election.
- (vi) ***If applicable, the hearing*** conducted under division (B) of Section 3503.24 of the Revised Code after the day of the

voters who are challenged. (A)(12) applies to voters who do not have the required identification, do not have a Social Security number, and decline to provide an affirmation. (A)(13) applies to voters who have but refuse to provide their identification, or who have but refuse to provide their Social Security number.]

Individuals who cast provisional ballots under divisions (A)(3), (12) or (13) must return to the Board office within ten days and provide either the required identification or the last four digits of their Social Security number or an affirmation permitted by Section 3505.18(A)(4). (R.C. 3505.181(B)(8)(a)).

Individuals who cast a provisional ballot under division (A)(7) must return to the Board office within ten days and “provide to the board of elections any identification or other documentation required to be provided by the applicable challenge questions asked of that individual under Section 3505.20 of the Revised Code.” (R.C. 3505.181(B)(8)(b)).

election *did not result in the individual's inclusion in the official registration list.*

- (vii) ***The individual failed to provide*** a current and valid photo ***identification***, a military identification, a copy of a current utility bill, bank statement, government check, paycheck, or other government document ... with the voter's name and current address, ***or the last four digits of the individual's social security number or to execute an affirmation*** under division (A) of Section 3505.18 or division (B) of Section 3505.181 of the Revised Code.²

[Fifth Standard:]

(B)(4)(b) ***If***, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, ***the board is unable to determine either of the following***, the provisional ballot envelope shall not be opened, and ***the ballot shall not be counted:***

- (i) Whether the individual named on the affirmation is ***qualified*** or ***properly registered*** to vote;
- (ii) Whether the individual named on the affirmation is ***eligible to cast a ballot in the precinct or for the election*** in which the individual cast the provisional ballot.

R.C. § 3505.183 (emphasis added).

To recap and summarize:

First Standard: Provisional ballots are “valid and entitled to be counted” if the Board’s records show that the voter is (1) registered and (2) eligible to vote, and (3) if the affirmation contains the voter’s name, signature and a statement that he is registered in that jurisdiction and eligible to vote in that election.

² Section 3505.18(A)(4) provides: “If an elector does not have any of the forms of identification ... and ... does not have a social security number, the elector may execute 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 elector’s social security number for those reasons. Upon signing the affirmation, the elector may cast a provisional ballot”

A Board that applies only the First Standard will count a provisional ballot if its records show that the voter is registered and eligible, and if the voter provided his name, signature and the required statement on the executed affirmation.

Second Standard: The Board must examine all of the information in the First Standard and any additional information provided on the affirmation form or provided to election officials either during or after the election.

A Board that applies the Second Standard will count a provisional ballot if the First Standard is met and if the Board's examination of any other information provided by the voter either on the affirmation form (e.g., date of birth or current address) or to election officials, leads the Board to conclude that it should count that ballot.

Third Standard: Provisional ballots shall be counted if the voter is (1) properly registered, (2) eligible to vote in that precinct and election, (3) provided all required information on the affirmation, (4) if applicable, returned in ten days with identification or a Social Security number or to execute an affirmation that he has neither, and (5) any hearing resulted in the person being registered.

A Board that applies the Third Standard will count a provisional ballot if the First Standard is met and if the voter, *if applicable*, returned to the Board within ten days either to provide his identification or Social Security number or to execute an affirmation that he has neither, and if any hearing resulted in the voter being registered.

Fourth Standard: Provisional ballots shall not be counted if the voter is (1) *not qualified*, (2) not properly registered, (3) not eligible to vote in that precinct and election, (4) did not provide all required information on the affirmation, (5) *already cast a ballot*, (6) if applicable, did not return in ten days with identification or a Social Security number or to execute an affirmation that he has neither, or (7) any hearing did not result in that person being registered.

A Board that applies the Fourth Standard will count a provisional ballot if the Third Standard is met and if the voter is found to be qualified, and if the voter did not already cast a ballot.

Fifth Standard: Provisional ballots shall not be counted if the Board *cannot determine* whether the voter is (1) qualified, (2) properly registered, or (3) eligible to vote in that precinct and election.

It is unclear when a Board would be *unable to determine* whether a voter is qualified, registered or eligible. Nevertheless, Boards that apply the Fifth Standard will examine those three criteria.

To summarize further:

- Five standards require the Board to determine that the voter is registered.
- Five standards require the Board to determine that the voter is eligible.
- Four standards require the Board to determine that the voter provided his name, signature and a statement of proper registration and eligibility.
- Two standards require the Board to determine that the voter, *if required*, returned within ten days of the election to provide identification or a Social Security number, or to execute an affirmation that he has neither.
- Two standards require the Board to determine that the voter successfully was registered following a hearing challenging his registration.
- Two standards require the Board to determine that the voter is qualified.
- One standard requires the Board to determine that the voter has not already cast a ballot.
- One standard requires the Boards to examine not only its records *but also any information voluntarily provided by the voter*, either on the affirmation or to election officials. The statute is silent regarding how rigorous the examination must be. Nor does the statute say what the Board should do with the information, or how significant any discrepancy must be to cause a ballot to be rejected.

2. Boards apply different portions of the statute.

The State will no doubt argue that the awkward wording and organization of the statute is irrelevant because the Boards will apply all of the foregoing standards. But the testimony shows otherwise.³ The Belmont, Butler and Greene County Boards will apply both the Third and the Fourth Standards. (Ex. A at 10.) But the Cuyahoga County Board will not reach the Fourth Standard if the Third Standard is met, and the Hamilton County Board also may not reach it on a case-by-case basis. (Id.) The Logan County Board is unsure. (Id.) The Clark County Board does not refer to the statute. (Id.)

3. The critical terms “eligible” and “qualified” are undefined.

Even if all of the Boards were to consider and give effect to all of the provisions of the statute, the law still fails to specify the applicable standards. Boards must determine whether a voter is “eligible” (in five standards) and “qualified” (in two standards), but *neither term is defined*. See R.C. § 3501.01 (definitional section that does not include the terms “eligible” or “qualified”). It is currently up to the Boards to determine the meaning of those terms.

The Boards do not agree about their meaning, to the extent they have considered the issue. The Belmont and Butler County Boards do not know of a difference between the terms “eligible” and “qualified.” (Ex. A at 12.) The Butler County Board believes that a voter is both “qualified” and “eligible” if he is registered and in the correct precinct. (Id.) However, the Cuyahoga County Board draws this distinction: “Eligible means you’re eligible to vote in that precinct. Qualified just means you’re a registered voter.” (Id.) Without agreement on what these terms mean, there can be no uniformity in the Boards’ application of these standards.

³ The testimony is summarized in the chart attached as Exhibit A. This memorandum cites the chart rather than the depositions. All of the cited depositions either have been or will be filed with the Court.

4. The statute is silent, and Boards disagree, on numerous fundamental issues that constitute potential roadblocks for provisional voters.

The Boards' testimony to date shows that they disagree on fundamental standards that bear directly on whether provisional ballots will or will not be counted. So far, these conflicts seem to fall into roughly two categories, with a twist.

The first category consists of information that some Boards insist on, but others do not:

- Some Boards require dates of birth, and others do not (Ex. A. at 2). So if a voter fails to write down his date of birth on the affirmation form:
 - The Clermont County Board will reject the ballot.
 - The Coschocton County Board will reject the ballot unless the voter provides a date of birth within the ten days following the election.
 - The Greene County Board will reject the ballot but only after attempting to contact the voter to get a date of birth.
 - The Belmont County Board has rejected ballots for this reason in the past and may do so again, but will consult the Secretary of State for guidance.
 - The Butler, Hamilton and Logan County Boards may or may not reject the ballot, depending on what other information is provided and/or whether they have another means to verify the voter's identity.
 - The Clark, Cuyahoga and Franklin County Boards will not reject the ballot merely because the voter does not provide a date of birth.
- Some Boards will count provisional ballots even if the poll worker failed to sign the affirmation form, and others are unsure. (Ex. A at 4-5.)
 - The Clark, Cuyahoga and Hamilton County Boards will not reject the ballot merely because the poll worker failed to sign the form.
 - The Butler County Board will contact the poll worker to find out why he or she did not sign the form. If the poll worker merely forgot to sign it, then the ballot will be counted. If the poll worker is challenging the voter, then the Board will "go from there."
 - The Greene County Board has "tended" to accept such ballots.

- It is unclear what the Clermont, Coshocton and Logan County Boards will do in this circumstance. If the Clermont County Board “feels” that it was a mere oversight, then it would not be a reason to reject the ballot. The Logan County Board might look at these “in a different aspect.” The Coshocton County Board will decide.
- The Belmont County Board has rejected ballots on this basis in the past but does not know what standards it will apply this year. It will contact the Secretary of State for guidance.
- Some Boards will count provisional ballots that provide a Social Security number but no other identification, and others will not.
 - The Clark County Board will reject ballots that have a Social Security number but no other identification.
 - The Franklin County Board will not reject ballots merely because they have a Social Security number but no other identification.
 - The Butler County Board will not reject such ballots if identification is not required by a code that is marked on the affirmation form by the voter.
 - The Clermont County Board will not reject such ballots if the Social Security number matches one provided on the voter’s registration form.

The second category consists of information that some Boards will attempt to “match” or otherwise verify by consulting a number of different records:

- Some Boards match the voter’s signature against any signatures on file, using what is best described as a subjective, “you know it when you see it” approach.
 - The Belmont County Board staff will check the signature against an old registration. If they are unsure, they will submit the question to the Board. They may contact the voter if they have questions.
 - The staff at the Butler County Board look for curly-cues and other identifiable characteristics to determine if the signature matches.
 - The clerks at the Clark County Board match signatures by comparing capital letters, although they admit that signatures do change over time.
 - The Cuyahoga County Board trains its staff to match up the signature on the registration form with the signature on the affirmation, although they are not signature experts. Possible mismatches are reported to the

supervisor, who may either reject the ballot himself or send it to the Board for a final determination.

- The Greene County Board matches the signature against the registration card by “eyeballing it” because they “are not handwriting experts.”
- Some Boards reject any provisional ballot that does not have a “valid” or “legitimate” address, i.e., a house or dwelling—even though homeless voters can lawfully register with such addresses. (See R.C. 3503.02(I)).
 - The Cuyahoga County Board will reject ballots with “street exceptions,” that is, addresses of alleys, intersections or park benches. The address must be a building. Homeless voters must register and vote using one of three shelters as an address, or their vote will not be counted. The Board does not know if homeless voters have been informed of this requirement.
 - The Clark, Greene and Hamilton County Boards will count such ballots.
 - The Coshocton County Board may count the ballot if the intersection or other address appears in their precinct finder.
 - Similarly, the Logan County Board will count the ballot if the location of the park bench or other address can be identified.
 - The Belmont County Board does not know what standard it will apply, and would consult the Secretary of State for guidance.
 - The Butler County Board will use a case-by-case approach and would need to “do further research” into the voter.
- Some Boards match the voter’s driver’s license number against license numbers in their records. One Board will call the BMV for further information if one or two digits do not match, as it is likely a typographical error, but will reject the ballot if more digits do not match.

The “twist” is that some Boards will contact the voter to obtain additional information that would allow the ballot to be counted, whereas other Boards will not. (Ex. A at 8-9.)

5. The statute does not say who should decide whether a provisional ballot should be counted, and Boards take different approaches.

The statute is silent on the issue of who makes the crucial decision whether to count or reject the provisional ballots. Again, Boards have taken different approaches. (Ex. A at 1.) In

most of the counties deposed so far, staff makes the initial determination but the Board makes the ultimate decision. However, in Clark County the decision is made by the Deputy Director and Director. And in Franklin County most of the decisions are made by 42 full-time clerks and 150 seasonal workers. The only ballots that are submitted to the Franklin County Board for review are those as to which there is a question remaining following staff review.

B. Rather Than Provide Guidance On These Issues, Defendant Brunner Has Directed The Boards To Create And Apply Their Own Standards.

Incredibly, notwithstanding the garbled statutory language and the resulting confusion and disparate approaches, Defendant Brunner has chosen not to provide guidance but, instead, told Board officials this past summer that they should develop and apply their own standards.

Her office reiterated that advice on a bulletin board accessible to elections officials:

[A]ll that is *required* of a voter who casts a provisional ballot is that the voter affirm certain things by signing an affirmation statement. This affirmation statement should be preprinted on the provisional ballot envelope, so all a voter should *have* to do is sign it.

However, before counting the ballot, additional information may be needed for the BOE to verify the voter's identity and qualifications to vote—which is why we encourage election officials to ask the voter to complete the rest of the info requested in our office's prescribed affirmation statement for provisional ballot envelopes. If—**based on the information provided by the voter**—the BOE can verify the voter's identity and qualifications, the BOE may count the provisional vote. **The process a BOE uses to verify the voter's ID and qualifications is up to the Board—and there should be a policy in place regarding this.**

Document produced by Miami County at MIA 43 (attached as Exhibit B) (last emphasis added).

The Secretary's approach has led to chaos, not uniformity (Ex. A at 10-14):

- The Butler, Clark, Cuyahoga, Greene and Logan County Boards have developed written standards.

- The Clermont and Coshocton County Boards have not developed standards. The Coshocton County Board knows the standards to apply when determining whether to count provisional ballots because “that’s the way it’s always been done.”
- The Belmont County Board will rely on guidance from the Secretary of State.

For all of these reasons, the evidence at the preliminary injunction hearing will show that (1) the statute is not clear, and (2) Boards are not going to apply uniform standards when determining whether to count or reject provisional ballots cast in the November 2008 Election.

C. The Eleventh Amendment Does Not Bar The Requested Relief.

This argument merits only brief attention. Contrary to the State’s representations, Plaintiffs: (1) have sued a state official in her official capacity, (2) have not sued any Boards of Elections, (3) have based their claims on rights guaranteed to them by the United States Constitution, and (4) are not relying on state-law claims. Accordingly, the Eleventh Amendment does not bar this lawsuit. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 96, 104 S. Ct. 900 (1984) (noting that the Eleventh Amendment “did not bar a federal court from granting prospective injunctive relief against state officials on the basis of federal claims”) (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

D. This Case Is Eerily Reminiscent Of *Bush v. Gore*.

Defendants argue that this case is not like *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000). Unfortunately, it is all too similar.

The Supreme Court held in *Bush v. Gore* that the application of varying standards by Florida counties during that State’s recount process violated the Equal Protection Clause of the Fourteenth Amendment. Numerous aspects of the Court’s decision are eerily reminiscent here, particularly when the word “eligibility” is substituted for the word “intent”:

- The “fundamental nature” of the right to vote “lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” (Id. at 104.)
- Once the State grants someone the right to vote, it “may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” (Id. at 104-05).
- Florida’s statutes require Boards to determine whether to count the ballot by considering the intent [*eligibility*] of the voter. Although this standard is “unobjectionable as an abstract proposition and a starting principle,” the “problem inheres in the absence of specific standards to ensure its equal application.” (Id. at 106).
- “The formulation of uniform rules to determine intent [*eligibility*] based on these recurring circumstances is practicable and, we conclude, necessary. (Id.)
- “The want of those rules here has led to unequal evaluation of ballots in various respects.” (Id.)
- “An early case in our one person, one vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963). The Court found a constitutional violation.” (Id. at 107.)
- “Each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes” (Id.)

This case presents a factual situation that is uncomfortably close to *Bush v. Gore*. As in *Bush v. Gore*, this case presents the issue of an ambiguous statewide standard—the eligibility (rather than the intent) of the voter—that is being implemented in startlingly disparate ways by different Boards of Elections. As in *Bush v. Gore*, those differences exist because of the absence of a uniform set of rules. As in *Bush v. Gore*, counties will use varying standards with some more strict and some more generous than others, which will cause fewer and more provisional ballots to be counted, respectively. Finally, as in *Bush v. Gore*, the Plaintiffs’ fundamental right to vote and to have their vote be counted is at stake. Indeed, the Supreme Court’s recognition of the “equal weight” of the vote and the “equal dignity” accorded to each voter is especially poignant given the second- or third-class status that many homeless voters face everyday.

A crucial respect in which this case is not like *Bush v. Gore* is the timing: Plaintiffs have brought their claims and are seeking relief *before*, not after, a closely-contested Presidential election. It is not too late to get it right. That is precisely why Plaintiffs have filed their Motion.

E. It Is Not Too Late To Get It Right.

Defendants' primary argument is, astonishingly, that it is too late to change the rules. The argument is a surprising one because, as shown above, the problem is that there are no rules. Nevertheless, this argument merits a brief response.

Factually it is not too late for this Court to award injunctive relief that would prevent the constitutional harms that Plaintiffs face. Plaintiffs' challenge regarding the provisional ballots solely involves the rules that apply when they are processed *after* Election Day. Although Defendants' counsel attempted to develop testimony that it would be too late to retrain poll workers, the fact is that poll workers do not determine whether to count ballots after Election Day. The Board staff and members make that determination, and they are surely savvy and knowledgeable enough to understand and appreciate a concrete set of rules to follow.

Furthermore, Plaintiffs' challenge to the Voter ID law does not affect ballots cast before Election Day. Homeless voters who cast absentee ballots are permitted to provide the last four digits of their Social Security number in lieu of the required identification. And although an injunction would need to be communicated to poll workers, Boards can and do have processes in place to do that. For example, the Butler County Board will mail an "emergency folder" guide to poll workers that contains any last-minute changes in the law. The Belmont and Coshocton County Boards also stated that it would be feasible to retrain poll workers.

Moreover, there is no support in the case law for drawing an invisible line one week, or two weeks, or some other time period before an election, after which time courts are deprived of their ability to remedy harms or prevent constitutional deprivations. *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5 (2006) does not require such a result. As discussed at length in Plaintiffs' Reply Memorandum in Support of their Motion for Expedited Discovery, the *Purcell* case did not even involve such a scenario. (Doc. No. 112 at 12-13.)

Indeed, federal courts in this Circuit have routinely awarded injunctive relief in the weeks before an election—including the November 2008 Election.⁴ There is no basis for finding that the Court lacks the authority or ability to do so in this case.

F. Many Homeless Voters Cannot Avail Themselves Of The Wide Range Of Permissible Identification Because Most Of It Requires A Current Address.

The State argues that homeless people do not need to purchase a State ID Card to have the identification necessary to vote, because the law allows for a wide range of identification. But this argument conveniently ignores the fact that most of that identification—a utility bill, paycheck, other government document, and so forth—requires a current address. Homeless people do not have current addresses. The only identification that do not require a current address are a military ID card, a current and valid driver's license, a current and valid State ID

⁴ *Ohio Republican Party v. Brunner*, 2008 U.S. App. LEXIS 21573 (6th Cir. Oct. 14, 2008), *rev'd on other grounds* (awarding injunctive relief requiring Defendant Secretary to address mismatches in the voter registration database before the November 2008 Election); *Miller v. Blackwell*, 388 F.3d 546 (6th Cir. Oct. 29, 2004) (denying Franklin County Board's motion to stay a TRO enjoining it from conducting hearings on pre-election challenges despite "the practical difficulty" caused by the possible compression of thousands of hearings between October 29 and Election Day, as the district court should first determine the motion for preliminary injunction); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. Oct. 26, 2004) (holding that provisional ballots cast in the November 2004 Election, and subsequent elections, must be cast in the proper precinct to be counted); *United States Student Ass'n Foundation v. Land*, 2008 U.S. Dist. LEXIS 80704 (E.D. Mich. Oct. 13, 2008) (granting plaintiffs' motion for a preliminary injunction that enjoined Michigan's cancellation of voter registrations merely because of undeliverable mail); *Project Vote v. Madison Cty. Bd. of Elections*, 2008 U.S. Dist. LEXIS 74016 (N.D. Ohio Sept. 29, 2008) (granting motion for preliminary injunction requiring the Madison County Board to accept same-day voter registrations and absentee votes); *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio Oct. 26, 2006) (granting motion for preliminary injunction enjoining enforcement of naturalized citizen portion of the Voter ID laws).

card, or a current and valid U.S. passport. The evidence at the hearing will show that many homeless people do not own cars or travel outside of the country, and so have no need for a license or passport. The evidence will further show that many homeless people must purchase a State ID card to have the identification necessary to cast a regular ballot on Election Day.

G. Plaintiffs Have A Fundamental Right To Have Their Vote Be Counted, And Will Be Injured If They Must Cast A Provisional Rather Than A Regular Ballot.

For all the reasons stated above, Plaintiffs have stated a cognizable claim and have shown that they will suffer immediate and irreparable injury if the requested relief is not granted. They and their members do not have the identification required to cast a regular ballot on Election Day. They have a fundamental right to vote and have their votes be counted. That right will be denied, impaired, diluted or abridged by the application of arbitrary and disparate standards to their provisional ballots. The deprivation of their right to vote, and of the equal protection of the laws, will cause them to be injured. Plaintiffs have a right to seek relief from this Court.

H. Plaintiffs Did Not Wait Too Long To Seek Relief.

This issue is discussed in Plaintiffs' Reply Memorandum in Support of Motion of Plaintiffs for Expedited Discovery (Doc. No. 114) and that lengthy rebuttal will not be repeated here. Suffice it to say that Defendants first sought to delay and stay the case, then engaged in protracted settlement negotiations, and did not move to dismiss Plaintiffs' claims for lack of standing until earlier this year. The Court denied Defendants' motion to dismiss in part on September 30, 2008. That decision allowed Plaintiffs to go forward with their claims.

I. The Court Has Not Ruled On Plaintiffs' Poll Tax Claim.

The State contends that Plaintiffs cannot bring a poll tax claim because the Court has already dismissed it. A brief review of the Court's Order (Doc. No. 108) belies that contention.

In its decision, the Court construed Count Eleven of Plaintiff's Complaint as a "Social Security Number" claim, not a poll tax claim:

Plaintiffs have not established member injury-in-fact relating to Counts Five, Six, Seven, and Eleven of their Complaint ("Social Security Number Counts"). The Social Security Number Counts are based on provisions of the Voter ID Laws that Plaintiffs claim prevented voters with no form of required ID other than a Social Security number from casting any type of ballot.... Defendants correctly point out, however, that under the Voter ID Law voters who had no form of required identification could cast a provisional ballot by providing the last four digits of their Social Security number.... Plaintiffs have not demonstrated that their members were suffering an injury in fact relating to the Voter ID Law provisions challenged in Counts One, Two, Five, Six, Seven and Eleven, therefore, they do not have standing to raise those claims.

Doc. No. 108 at 14.

The claim asserted in Count Sixteen of the Supplemental Complaint is not a Social Security Number claim. Instead, it is a poll tax claim based on the Twenty-Fourth Amendment and the Supreme Court's decisions in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966) and *Harman v. Forssenius*, 380 U.S. 528, 85 S. Ct. 1177 (1965), among others. This Court has not ruled on either the merits of that claim or the Plaintiffs' standing to bring it. Accordingly, the State's argument is not well-taken.

J. Plaintiffs Will Provide Evidence Of A Severe And Undue Burden At The Hearing.

Defendants breezily argue that being required to cast a provisional ballot, or to avoid such a fate by spending \$8.50 to purchase a State ID card, does not impose a severe or undue burden on Plaintiffs or their members. The evidence presented at the hearing, including but not limited to the evidence discussed above, will prove otherwise.

K. The Supreme Court Has Not Held That Provisional Ballots Are Perfectly Adequate.

As discussed at length in Plaintiffs' Motion for Preliminary Injunction, while the standard in *Crawford* applies here, its conclusion does not, for several reasons. One reason is that in that case, there was no evidence that Indiana was not fairly, equally and constitutionally applying its provisional ballot laws. That is not the case here.

L. The Voter ID Laws Do Impose An Impermissible Poll Tax.

Finally, Defendants argue that the Voter ID Laws do not impose a poll tax because they do not require the payment of a fee in exchange for voting, nor do they require everyone to pay a tax because many voters already have the required identification.

Defendants' overly technical interpretation of the term "poll tax" ignores the case law cited in Plaintiffs' Motion. The Supreme Court has made it clear that the Constitution is offended not only by classic poll taxes, but also by any other wealth restrictions on the right to vote. *E.g.*, *Crawford*, 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 fee to obtain a new photo identification."); *Hill v. Stone*, 421 U.S. 289, 95 S. Ct. 1637 (1975) (striking down a requirement that voters must render property to the State to be eligible to vote, even though all property owners automatically render their property); *Lubin v. Panish*, 415 U.S. 709, 94 S. Ct. 1315 (1974) (striking down filing fee requirement to appear on the ballot); *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849 (1972) (same); *McDonald v. Bd. of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404 (1969) ("Lines drawn on the basis of wealth or race ... would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.").

The Supreme Court eloquently stated these fundamental principles in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966), when it struck down a \$1.50 poll tax:

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 no relation to wealth nor to paying or not paying this or any other tax....

The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay....

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....

[T]o repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

Plaintiffs cannot improve upon these noble statements, nor better articulate the deep-seated principles they reflect. Plaintiffs can do nothing more than invoke these powerful and simple words, and the principles that they vindicate, as they ask this Court to protect, once again, one of the few precious and equal rights that our Constitution bestows on our homeless citizens.

M. Conclusion.

For the reasons stated, and based on the evidence that will be presented at the hearing, Plaintiffs request that their Motion for Preliminary Injunction be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22nd, 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.

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