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

NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*,	:	CASE NO. C2:06-0896
Plaintiffs,	:	JUDGE ALGENON MARBLEY
v.	:	MAGISTRATE TERENCE KEMP
JENNIFER BRUNNER, *et al.,*	:	
Defendants.	:	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

With the national election only three weeks away, Plaintiffs have suddenly re-launched their challenge to Ohio's Voter Identification Law. The Supplemental Complaint, which Plaintiffs have asked leave to file, seeks to amend two Counts (Counts 12 and 13) and add three new Counts (Counts 13, 14, and 15). Based on these new allegations, Plaintiffs are asking this Court to conduct a hearing and fundamentally change Ohio's election procedures less than two weeks before the presidential election.

The motion for preliminary injunction filed by the plaintiffs, Northeast Ohio Coalition for the Homeless ("NEOCH") and SEIU, seeks three categories of relief. First, the Plaintiffs ask this Court to impose "uniform standards and procedures" upon county boards of elections which would have to be followed when considering whether particular provisional ballots should be counted. However, Ohio already has imposed requirements by statute (making any order from this Court unnecessary), and the Help America Vote Act expressly reserves this subject for state regulation. To the extent Plaintiffs are asking this Court to create procedural mechanisms for

applying Ohio law, such a request would be not only contrary to HAVA but also the lesson of *Bush v. Gore*, 531 U.S. 98 (2000), which is that so long as the substantive rules are consistent throughout the state, uniformity of procedure (in terms of fact-finding and the like) is not constitutionally required.

Second, plaintiffs ask the Court to enjoin R.C. 3505.18, Ohio's Voter ID law, either on its face or as applied, because it operates as an unconstitutional poll tax. Alternatively, Plaintiffs ask the Court to enjoin the law on the theory that it requires homeless voters to purchase a State ID card, and therefore imposes "a severe and undue burden" on them. These arguments should be rejected because (1) they are contrary to law; (2) they are contrary to the prior rulings of this Court; and (3) Plaintiffs could have brought this challenge months if not years ago, and cannot justify waiting until the very eve of the election before seeking to upend established election procedures. For these reasons, Defendant, Jennifer Brunner, Ohio Secretary of State, respectfully asks that the Court deny the motion for leave to file a supplemental complaint, or in the alternative, deny the request for preliminary injunction.

I. Background

A. Ohio's Voter Identification Statute

In an effort to prevent vote fraud and promote confidence in the integrity of the electoral system, the Ohio General Assembly passed H.B.3 (effective May 2, 2006). As amended, R.C. 3505.18 contains provisions for verifying the identity of voters who appear at polling places on election day. Specifically, an elector who appears at a polling place seeking to vote must "provide proof of the elector's identity in the form of a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check,

paycheck, or other government document * * * that shows the name and current address of the elector." R.C. 3505.18(A). However, an elector who has none of those documents can still vote:

(1) If the elector has a social security number, he can cast a provisional ballot by providing the last four digits. R.C. 3505.18(A)(2).

(2) If the elector has no documents, has a social security number, but cannot recall the last four digits, he can cast a provisional ballot. R.C. 3505.18(A)(3).

(3) If the elector has no documents and has no social security number, he can still cast a provisional ballot by executing a sworn affirmation. The affirmation must include the elector's name and address, the current date, the elector' date of birth, the elector's signature, an affirmation that the elector has no documents or social security number, and a statement that the affirmation is made under penalty of election falsification. R.C. 3505.18(A)(4).

(4) Even if the elector refuses to sign the affirmation, he can still vote a provisional; ballot. R.C. 3505.18(A)(5).[1]

The question becomes, then, whether provisional ballots are constitutionally suspect, either because there are no guidelines for deciding when they are countable, or because as a matter of practice, Ohio county boards of elections are not applying correct or consistent standards.

B. Provisional Ballots: When Do They Count As Votes?

Congress, in the Help America Vote Act ("HAVA"), mandated the use of provisional ballots but expressly declined to create federal standards to govern the counting of provisional ballots. 42 U.S.C.S. 15482(a)(4). When it comes to the issue of whether a provisional ballot

[1] In the case of an elector who cannot recall his social security number or refuses to sign the affirmation, the provisional ballot will only be counted if the elector provides additional information to the board of elections within ten days. R.C. 3505.18.1(A)(3), (A)(12), and (B)(8).

will be counted as a valid ballot, HAVA leaves that determination to the states. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 577 (6th Cir. 2004).

The State of Ohio has adopted detailed guidelines for deciding whether a provisional ballot should be counted. The provisional ballot envelope shall be opened, and the ballot placed in a ballot box to be counted alongside all other ballots, if all of the following apply:

(1) The individual named on the affirmation is properly registered to vote;

(2) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the provisional ballot was cast;

(3) The individual provided all the required information in the affirmation or, where applicable, within ten days of casting the provisional ballot.

R.C. 3505.18.3(B)(3)(a)-(d).[2] On the other hand, the provisional ballot shall not be opened or counted if:

(1) The individual named on the affirmation is not qualified or is not properly registered to vote;

(2) 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;

(3) The individual did not provide all of the information required by law in the affirmation;

(4) The individual has already cast a ballot for the election in which the individual cast the provisional ballot;

(5) The applicant was required to provide additional information within ten days and failed to do so;

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[2] The provisional ballot must also be counted if a hearing was conducted pursuant to R.C. 3503.24(B), as a result of which the individual was included in the official registration list. R.C. 3505.18.3(B)(3)(e).

(6) A post-election hearing did not result in the individual's placement on the official registration list; or

(7) The individual failed to provide documentary proof of identity or the last four digits of the individual's social security number.

R.C. 3505.18.3(B)(4)(a). If the board of elections cannot determine one way or the other whether the individual was qualified or properly registered to vote, or cannot determine whether the provisional ballot was cast in the proper precinct, then the board must not count the provisional ballot. R.C. 3505.18.3(B)(4)(b).

Any insinuation that Ohio lacks standards for counting provisional ballots is clearly without foundation. Indeed, R.C. 3505.18.3 goes further, and provides additional "procedural" requirements (boards must compare the affidavits to their own records and any other available information; if additional information is required from the individual, boards cannot even begin to examine the provisional ballot until and unless the information is provided). This statutory scheme more than satisfies constitutional requirements.

III. Legal Argument

A. The Required Elements For A Preliminary Injunction

Injunctive relief is an "extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000), quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted). Before issuing a preliminary injunction, the Court must examine four factors:

(1) Whether the movant has a "strong" likelihood of success on the merits;

(2) Whether the movant would otherwise suffer irreparable injury;

(3) Whether issuance of a preliminary injunction would cause harm to others; and

(4) Whether the issuance of a preliminary injunction would serve the public interest.

McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *Cabot Corp. v. King*, 790 F. Supp 153, 155 (N.D. Ohio 1992).

These factors weigh heavily against granting the injunction. Plaintiffs cannot show a strong likelihood of success on the merits, or the likelihood of irreparable injury, because the Court has already ruled against them on most of their new claims. Moreover, the Supreme Court has cautioned courts against interfering with elections or changing the rules, especially where –as in this case – voting has already begun. Issuing an injunction this close to the election would be harmful to the public interest, and especially unfair to those voters who have already cast provisional ballots. Should this Court impose new rules, early voters will have no opportunity to take advantage of those rules. If, for example, this Court grants relief that allows a voter to cast a ballot merely upon an affirmation that he is homeless, voters who have already cast provisional ballots will have no opportunity to take advantage of the new, relaxed standard. An election in which otherwise similarly situated voters are treated differently based solely on when they cast their ballots is a result to be avoided at all costs.

B. Ohio Law Already Has Consistent Standards For Evaluating Provisional Ballots

As previously discussed, Ohio already tells county boards exactly what factors to apply, and how to apply them, when deciding whether a provisional ballot should be counted as a vote. There is no dispute that considerations of equal protection require county officials to use uniform standards for deciding what is a vote. *Bush v. Gore*, 531 U.S. 98 (2000). However, that requirement is satisfied when state law tells the county officials what standards to apply. See,

e.g. *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008) (Secretary of State's directive gave county officials adequate and consistent guidance).

To the extent Plaintiffs are asking this Court to impose substantive rules upon county boards for handling provisional ballots, the request should therefore be denied for two reasons. First, since Ohio already has substantive rules in place, an order from this Court would at best be redundant (if it merely ordered county officials to obey the law). To the extent this Court were to create additional rules for county boards to follow, the Court would be acting expressly contrary to HAVA's express language that provisional ballot procedures are matters of state law, not federal law.

Alternatively, what Plaintiffs may be asking the Court to do (the Motion is unclear) is to impose specific procedural steps the counties must follow when applying the substantive rules set forth in R.C. 3505.18.3. However, neither federal law nor state law requires states to follow specific procedures when applying the provisional ballot criteria. With respect to Ohio law, it is critical to note that R.C. 3505.18.3 does not prioritize the seven reasons for rejecting a provisional ballot; if the ballot fails on any score, it shall not be opened or counted. It necessarily follows that the county boards need not consider the factors in any particular order. County boards can first examine the poll books to check for duplicate voting, for example, and then move on to consider whether the individual provided the required information, or vice versa. So long as they evaluate all the requirements, the manner in which they do so is left to their discretion. (The one exception, previously noted, is that the local boards cannot open a provisional ballot where additional information should have been submitted until the information is in fact provided).

As a matter of federal law, the teaching of *Bush v. Gore* is that procedural mechanics need not be identical in all counties so long as substantive standards are uniform throughout the state. *Bush v. Gore* involved the standards by which Florida counties, when conducting a recount, determined whether ballots evinced an "intention" to vote for one candidate or another (or none at all). In its per curium opinion, the Supreme Court specifically stated that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Bush*, 531 U.S. at 109. Instead, the question in *Bush* was "whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Id.* at 105. The Supreme Court was troubled that "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to the other." *Id.* at 106. This conclusion came from a factual record which showed that three members of a single county canvassing board applied three different standards to define a legal vote, and that a second county changed its evaluation standards during the counting process. *Id.* Since two identically marked ballots cast in the same county and reviewed by the same team might be counted differently, the Court held that such a scenario violated the Equal Protection Clause. *Id.* at 103.[3]

But what is significant, for our purposes, is what did <u>not</u> trouble the Supreme Court: throughout the State of Florida, some counties used punch card ballots, others used central count optical scan ballots or precinct count optical scan ballots, or Direct Recording Electronic ("DRE") voting systems, or some combination thereof. The variation in voting systems did not create equal protection concerns, so long as the legal definition of a vote on any particular

[3] The Court noted that "Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy." *Bush*, 531 U.S. at 111.

balloting system remained consistent. The same logic applies here. So long as the test to determine a "countable" provisional ballot (in other words, the definition of a "vote") remains consistent throughout the state, the means by which local boards tabulate those votes is not of concern from an Equal Protection perspective.

The second flaw in Plaintiffs' critique of Ohio's provisional ballot system is their factual predicate: the evidence Plaintiffs have submitted does not support their thesis.[4] In December, 2007, the United States Election Assistance Commission published the "2006 Election Administration and Voting Survey," along with the raw supporting data. [Exhibit 1]. Plaintiffs' motion relies upon this data for its argument that Ohio counties are disallowing provisional ballots capriciously and inconsistently across counties. However, the data not only fails to support any such conclusion, it underscores why detailed procedural requirements are unnecessary.

As noted, Ohio law lists seven separate reasons for rejecting a provisional ballot, any of which, standing alone, is sufficient. There is no requirement in Ohio law – and no constitutional imperative – to consider the seven factors in any particular order. Consider two of the rules cited as part of Plaintiffs' data: a provisional ballot must be rejected if the individual is not properly registered to vote, and a provisional ballot must be rejected where the individual was required to submit additional information (for example, the last four digits of his social security number) but failed to do so. One county might start examining the provisional ballots by matching the names on the provisional ballots against the lists of registered voters. If a mismatch were found, the ballot would be rejected, *and the board would never reach the question of whether the additional*

[4] The Court has already indicated that it will not be considering evidence of 2006 practices when deciding whether to issue an injunction for 2008. However, since the argument is part of Plaintiffs' motion, the Secretary must respond to the allegations concerning the 2006 data.

information submitted by the individual was adequate.[5] Thus, that county's data would undercount the number of provisional voters who failed to provide information, as compared to another county which looked first at the additional information, and only secondarily moved on to check the registration rolls. That hypothetical second county would present the inverse situation: its data might reflect fewer provisional ballots rejected for non-registration, simply because so many "rejectable" ballots had already been thrown out on other grounds.

The point here is that discrepancies in the reported reasons for rejecting provisional ballots tell us nothing about whether counties are failing to follow the Revised Code. A provisional ballot may be defective for more than one reason; all the data tells us is that some counties are recording one reason more than another. That conclusion does not in any way suggest the county boards are applying erroneous standards, rejecting valid provisional ballots, or accepting improper provisional ballots. Indeed, the only conclusion we can safely draw is that the data itself is unreliable: as Plaintiffs themselves point out, the breakdowns for Summit and Miami Counties do not add up to the total number of provisional ballots reported. Given these discrepancies, the 2006 Election Administration and Voting Survey data cannot tell us anything about whether county boards are correctly following the law.

C. <u>Ohio's Voter ID Law Does Not Impose A Severe Or Undue Burden</u>

Every election law or regulation imposes some burden upon the voter. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). This is true if the regulation at issue concerns registration, the qualifications of electors, the selection of candidates, or the voting process itself. *Id. citing Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Subjecting every election regulation to strict scrutiny "would tie the hands of the States seeking to assure that elections are operated equitably

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[5] The individual must have submitted *some* information, or else the provisional ballot could not even be evaluated, but that does not automatically equate with providing sufficient information.

and efficiently." *Id.* Therefore, a State election regulation that creates some barriers to the election process does not automatically trigger a strict scrutiny approach. *Id.* at 433-34 *citing Bullock v. Carter*, 405 U.S. 134, 143 (1972). Instead, the Supreme Court has found that a flexible standard must apply in cases challenging State election laws. The court

> must weight 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

Id. at 434 (*quoting Anderson*, 460 U.S. at 789). Based upon this standard, if a State law or regulation "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id. quoting Anderson*, 460 U.S. at 788.

The United States Supreme Court has endorsed provisional ballots as a constitutional alternative to presenting identification documents. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008). *Crawford* upheld the constitutionality of Indiana's voter ID requirement. Plaintiffs seek to distinguish *Crawford* on the grounds that Indiana, unlike Ohio, provided state ID cards free of charge. This detail, while accurate, misses a crucial point: the availability of free ID cards was not the only reason the Indiana voter ID provisions were constitutional. They were also affirmed because they, like Ohio's law, provided ready access to the provisional ballot for those without photo IDs.

Under Indiana law, voters who lacked the necessary ID could cast a provisional ballot that would be counted only if, within 10 days following the election, they appeared before the circuit court clerk and executed an affidavit that they were in fact the person who cast the vote and that they were indigent. Ind. Code 3-11.7-5-2.5(c). In his majority opinion, Justice Stevens

wrote that the availability of the provisional ballot "mitigated" any burden placed on voters by the photo ID requirement. *Crawford*, supra, 128 S. Ct. at 1621. Moreover, the requirement of a trip to the clerk's office to make the provisional ballot count was "unlikely [to] pose a constitutional problem unless it is wholly unjustified." *Id.* Indiana's law imposed a potentially greater burden on provisional ballot voters than does Ohio's, and yet the majority viewed it as evidence that the law was constitutional.

But Justice Stevens' comfort with the constitutionality of provisional ballots was slight compared to the view articulated by Justice Scalia in his concurring opinion (signed by two other Justices). Justice Scalia described provisional balloting as "an indulgence" permitted by the state to "accommodate" voters, "not a constitutional imperative." *Crawford*, supra, 128 S. Ct. at 1627.

This Court, in *this very case*, has already reached the same conclusion concerning Plaintiffs' constitutional challenge to the Voter ID law. Count 11 of Plaintiffs' original Complaint asserted that Ohio's voter ID law was an unconstitutional poll tax because it required voters who lacked ID to purchase state ID cards. (In other words, Count 11 was identical to new Counts 13, 14, and 15). Counts 5, 6, and 7 expanded on this theme, arguing that it violated Due Process and Equal Protection to require ID of registered voters who have social security numbers. This Court dismissed all four counts.

> Plaintiffs have demonstrated that they had members who had only Social Security numbers and, therefore, argued those members faced imminent and inevitable injury when they attempted to vote.
>
> 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. The Voter ID Law even permitted people who lacked other identification *and* could not produce their Social Security numbers to cast a provisional ballot. *A provisional ballot would be counted with the same weight as any other once the identity of the voter was verified. R.C. 3505.183.* Therefore, Plaintiffs' members with only a Social Security number faced

> no risk of imminent injury of being denied the opportunity to cast their vote.

[Decision, pp. 13-14 (emphasis added) (citations omitted)]. Because provisional ballots provide a reasonable alternative to purchasing state ID cards, NEOCH's members could not claim any constitutional injury.

The analysis still applies. The 21 "Declarations" attached as Exhibit H to the new Motion for Preliminary Injunction all come from homeless declarants who indicate they have social security numbers.[6] Thus, all of the declarants can obtain provisional ballots, which will be counted equally with other ballots, without purchasing a state ID or birth certificate. They face no potential constitutional injury.

D. Ohio's Voter ID Law Does Not Impose A Poll Tax

Plaintiffs' "poll tax" argument fails for the same reason. Poll taxes have been such a pernicious tool for disenfranchising voters, particularly African-American voters, that the 24th Amendment was added to the Constitution to end the practice. However, a regulation that may cause some voters to incur an expense is far different from a "poll tax," which is by definition a fee that must be paid to the state as a precondition to voting.

A "poll tax" is defined as "a fixed tax levied on each person within a jurisdiction." *Coronado v. Napolitano*, 2008 U.S. Dist. LEXIS 4909 (D. Az.), quoting Black's Law Dictionary 1498 (8th ed. 2004). "Poll taxes are laid upon persons . . . to raise money for the support of government or some more specific end." *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937, overruled on other grounds by *Harper v. Virginia v. State Board of Elections*, 383 U.S. 663

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[6] Line 8 of the Declaration states "I have a Social Security Number." Most of the declarants wrote "yes" or marked the line with a circle or check-mark to signify "yes." A few of the forms have no markings on Line 8. How can we be certain the absence of any mark means an affirmative response? Apart from the fact that Line 8 is written as a declaration (which requires no response) not a question, the people who put no mark on Line 8 also left Line 7 untouched. Line 7 states "I am a United States citizen." If we infer a negative response from the lack of a mark, then those declarants are plainly not eligible voters to begin with.

(1966). The prohibition on poll taxes means a state may not make "the affluence of the voter or payment of any fee an electoral standard." *Harper*, 383 U.S. at 666, 668.

A poll "tax" is exactly what it sounds like: a fee imposed as a prerequisite to voting. For example, at one time the State of Virginia required the payment of a $1.50 annual poll tax, which potential voters could avoid by filing a certificate of residency each election year. While the residency certification process was viewed as cumbersome, it was the imposition of a fee on the voter that made the scheme an unconstitutional poll tax. *Harman v. Forssenius*, 380 U.S. 528 (1965). Likewise, Ohio once required voters who were challenged at the polls and were unable to produce their certificates of naturalization to pay a $200 replacement fee before they could vote. The District Court struck the law as a poll tax, observing that "[p]utting a price on the right to vote cannot survive strict scrutiny, since it bears no relation to voting qualifications and burdens a fundamental right of the citizenry." *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 826 (N.D. Ohio 2006).

The fact that an otherwise valid election law may impose a cost on a voter (a cost not necessarily payable to the State since other entities issue photo IDs) does not transform that law into a poll tax. Plaintiffs' "poll tax" argument has no obvious stopping point: as *Burdick* observed, every election law or regulation imposes some burden upon the voter, and that burden can always be recast as a financial cost. Plaintiffs' own pleadings refer to the cost of stamps to mail absentee ballots and bus fare to show up for early voting (as if the same expense would not be incurred to appear on November 4). No election law, however neutral on its face or even-handed in its application, could ever survive constitutional scrutiny under Plaintiffs' analysis.

E. **Plaintiffs Should Be Denied Relief Because They Have Delayed Bringing Their Claims**

At the eleventh hour, Plaintiffs are attacking the manner in which the county boards of elections administer and evaluate provisional ballots. Plaintiffs' criticisms are entirely based on their interpretation of data from the 2006 election, compiled and reported by the United States Election Assistance Commission. But the report upon which Plaintiffs rely was published in December, 2007, more than ten months ago. [Exhibit 1].

In their Reply Brief in Support of Expedited Discovery, Plaintiffs attempt to blame the Secretary of State for their own lack of diligence. Their argument is that after settlement talks proved fruitless in January of 2008, they were deterred from seeking any relief by the fact that the Secretary filed a Motion to Dismiss. However, the Motion to Dismiss did nothing to preclude Plaintiffs from filing these pleadings at any time during calendar year 2008.

Plaintiffs correctly cite *Purcell v. Gonzalez*, 549 U.S. 1 (2006) for the proposition that where there is inadequate time to resolve factual disputes before an election, the federal courts should refrain from entering injunctions that will interfere with the election. They argue that *Purcell* does not apply because there are no facts in dispute, yet then make enormous requests for document production and demand more than 30 hours of pre-hearing depositions. The allegation that the 88 county boards of elections applied different standards when deciding whether to count provisional ballots is entirely a factual claim, and a hotly contested one at that. The hearing on this matter is currently set for October 23, less than two weeks before the November 4 election. Plaintiffs have identified 21 witnesses they want to depose and thus may call to testify. This is a classic *Purcell* situation: there is not enough time to develop a factual record, seek appellate review, and retrain poll workers (if necessary) ahead of the election.

To argue (as Plaintiffs do) that their injunction request will not interfere with voting is to ignore the substance of their own claims. Their proposed Supplemental Complaint is not merely seeking formal guidelines for counting provisional ballots; such rules already exist. Their claim is that provisional ballots are constitutionally inadequate, and that the members they represent should be permitted to cast regular ballots, thereby avoiding the safeguards built into provisional balloting to detect fraud. It cannot be emphasized enough that balloting in Ohio has already begun. Poll workers have been extensively trained on the proper use of provisional ballots. And now, one week before the general election, Plaintiffs want this Court to summarily change the rules, without time for reflection or review. Entering an injunction would be harmful to the public because it would potentially create chaos and confusion at the polls.

The information from the U.S. Election Assistance Commission was available almost a year ago, yet Plaintiffs took no action. These tight deadlines should not be imposed on the Court or the Secretary, when it was within Plaintiffs' power to avoid this situation by pressing their claims in a timely fashion. The motion to "supplement" their complaint should be denied.

IV. <u>Conclusion</u>

For the reasons set forth herein, Defendant, Jennifer Brunner, the Ohio Secretary of State, respectfully asks the Court to deny the motion for leave to supplement the complaint, or in the alternative, to deny the motion for preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on this 20th day of October, 2008. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Damian W. Sikora
DAMIAN W. SIKORA