

**NO. 08-4585**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**State of Ohio ex rel., Dana Skaggs, et al.,**

**Relators-Appellants,**

**v.**

**Jennifer L. Brunner, Secretary of the State of Ohio, et al.,**

**Defendants-Appellees.**

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On Appeal from the United States District Court  
for the Southern District of Ohio, Eastern Division

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**BRIEF OF PROPOSED INTERVENOR-APPELLEE  
THE NORTHEAST OHIO COALITION FOR THE HOMELESS**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**STATE OF OHIO EX REL. DANA SKAGGS, et al.,**

**Relators-Appellants,**

**v.**

**JENNIFER L. BRUNNER,  
SECRETARY OF THE STATE OF OHIO, et al.,**

**Defendants-Appellees.**

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**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6 Cir. R. 26.1, Proposed Intervenor-Appellee The Northeast Ohio

Coalition For The Homeless (“NEOCH”) makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

**NO**

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? If Yes, list the identity of such corporation and the nature of the financial interest:

**NO**

\_\_\_\_/s Caroline H. Gentry\_\_\_\_\_  
*Signature of Counsel*

\_\_\_\_11/22/08\_\_\_\_\_  
*Date*

## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES.....  | ii          |
| STATEMENT WAIVING ORAL ARGUMENT .....  | 1           |
| STATEMENT OF THE ISSUES FOR REVIEW .....   | 2           |
| STATEMENT OF THE CASE .....  | 3           |
| STATEMENT OF THE FACTS .....   | 5           |
| SUMMARY OF ARGUMENT.....   | 11          |
| ARGUMENT .....   | 12          |
| I.    The District Court Properly Awarded Summary Judgment In Favor Of<br>Defendant-Appellee Brunner And Against Relators-Appellants .....   | 12          |
| A.    Standard of Review.....  | 12          |
| B.    Ohio Revised Code Sections 3505.181 & 3505.182 Require<br>Poll Workers To Verify That A Voter Has Both Executed<br>And Signed The Written Affirmation Before Permitting<br>That Voter To Cast A Provisional Ballot .....                           | 13          |
| C.    Because The Claimed Deficiencies In The Disputed Ballots<br>Are Due To The Poll Worker’s Failure to Fulfill His Duty To<br>Verify The Voter’s Execution Of And Signature On The<br>Written Affirmation, The Disputed Ballots Must Be Counted ..... | 14          |
| D.    Ohio Law Does Not Require The Voter To Include Both<br>His Printed Name And His Signature On The Written<br>Affirmation For That Ballot To Be Counted.....   | 16          |

|  |    |
|--|----|
| II. Relators-Appellants’ Claims Are Fatally Defective for Other<br>Reasons That Provide Additional Grounds for the District Court’s<br>Decision.....   | 19 |
| A. Standard of Review .....  | 19 |
| B. The District Court Could Have Reached The Same Result<br>By Relying On The Equal Protection Clause, As The<br>Claimed Deficiencies Result From A Form Used Only In<br>Franklin County ..... | 19 |
| C. The District Court Could Have Reached The Same Result<br>By Relying On 42 U.S.C. Section 1971, Which Prohibits<br>The Rejection Of Ballots Based On Immaterial Errors Or<br>Omissions.....  | 20 |
| CONCLUSION .....   | 21 |
| CERTIFICATE OF COMPLIANCE .....  | 22 |
| CERTIFICATE OF SERVICE.....  | 23 |
| ADDENDUM OF CITED STATUTES.....  | 24 |

**TABLE OF AUTHORITIES**

**CASES**

*Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970)..... 19

*Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 450 (6<sup>th</sup>  
Cir. 2005)..... 12

**STATUTES AND RULES**

Ohio Rev. Code § 3505.181 ..... 13-16

Ohio Rev. Code § 3505.182 ..... 13-15, 18

Ohio Rev. Code § 3505.183 ..... 16-18

42 U.S.C. § 1971 ..... 12, 20

Fed. R. Civ. P. 56 ..... 13

## **STATEMENT WAIVING ORAL ARGUMENT**

Pursuant to 6 Cir. R. 34(a), Proposed Intervenor-Defendant NEOCH waives oral argument of this case, despite the importance of the issues raised herein, due solely to its expedited nature.

## STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the district court properly held that Ohio's Election Code and its prior Court Orders in the *NEOCH v. Brunner* case required the denial of Relators-Appellants' motions for summary judgment, and the grant of Defendant-Appellee Brunner's motion for summary judgment.
2. Whether the district court properly held that Ohio's Election Code requires the poll worker to verify that a provisional voter has both executed and signed the provisional ballot affirmation statement, before that poll worker permits a voter to cast a provisional ballot.
3. Whether the district court properly held that the claimed deficiencies in the disputed ballots are due to poll worker error and that such ballots therefore must be counted under this Court's October 27 Order in the *NEOCH v. Brunner* case.
4. Whether the district court properly held that a voter's printed name and signature are not required by Ohio's Election Code.
5. Whether the district court could have awarded summary judgment to Defendant-Appellee Brunner on the additional ground that the form used by the FCBE is different from the form used in other counties and the rejection of ballots due to differences in those forms would violate the Equal Protection Clause.

6. Whether the district court could have awarded summary judgment to Defendant-Appellee Brunner on the additional ground that 42 U.S.C. Section 1971 prohibits the rejection of ballots based on immaterial errors or omissions.

### **STATEMENT OF THE CASE**

This dispute arose after the November 4, 2008 election in the context of a very close race in the 15<sup>th</sup> Congressional District, which includes a large part of Franklin County. Voters in Franklin County cast more than 27,000 provisional ballots. By law, each provisional ballot is contained in a sealed envelope that has a Provisional Ballot Application (“PBA”) on the outside. The PBA is filled out by both the voter and the poll worker and includes an affirmation statement.

This case concerns the fate of approximately 1,000 provisional ballots in Franklin County where the written affirmation contained on the PBA lacks the voter’s printed name, signature or both (“Disputed Ballots”). Each voter who cast one of the Disputed Ballots has been positively identified and has been determined by the Franklin County Board of Elections (“FCBE”) to be registered and eligible to vote under Ohio law. Relators-Appellants claim, however, that these votes must be discarded because neither the voter nor the poll worker printed the voter’s name, and/or the voter did not sign his name, on the written affirmation statement.

On November 13, 2008, Relators-Appellants filed suit against Defendant-Appellee Brunner and Defendant/Realigned Plaintiff-Appellant FCBE in the Ohio

Supreme Court. The Secretary of State promptly removed this case to the United States District Court for the Southern District of Ohio. [Rec. Entry 2.] The Secretary further sought to consolidate this matter with *NEOCH v. Brunner*, Case No. 2:06cv896, pending in the United States District Court for the Southern District of Ohio. [Rec. Entry 6.]

After removal, this case was initially assigned to Judge Frost. However, it was designated as a related case to the *NEOCH v. Brunner* case and transferred to Judge Marbley. [Rec. Entry 9.] Relators-Appellants have not appealed that order. [Rec. Entry 39.] After the instant case was transferred, Defendant-Appellee Brunner withdrew her motion to consolidate. [Rec. Entry 32.]

Relators-Appellants moved to remand this action. [Rec. Entries 10, 11.] Defendant-Appellee Brunner moved to realign the FCBE as a Plaintiff rather than a Defendant. [Rec. Entry 15.] The district court subsequently denied the motion to remand and granted the motion to realign the FCBE. [Rec. Entry 20 & oral order docketed on 11/17/08.]

Proposed Intervenor-Appellee NEOCH then filed a motion to intervene that was joined by Proposed Intervenor-Appellee Ohio Democratic Party (“ODP”) (collectively “Proposed Intervenors-Appellees”). [Rec. Entries 21 & 35.] The district court did not rule on the motion to intervene filed jointly by the Proposed Intervenors-Appellees before it entered final judgment. [Rec. Entry 42.]

Defendant-Appellee Brunner, Relators-Appellants and Defendant/Realigned Plaintiff-Appellant FCBE then filed cross motions for summary judgment. [Rec. Entries 31, 34, 37.] Proposed Intervenors-Appellees also filed a motion for summary judgment that adopted and incorporated arguments made by Defendant-Appellee Brunner, and made additional arguments. [Rec. Entry 38.]

The district court granted Defendant-Appellee Brunner's motion for summary judgment and denied the motions for summary judgment filed by Relators-Appellants and Defendant/Realigned Plaintiff-Appellant FCBE. [Rec. Entry 41.] The district court did not rule on the motion for summary judgment filed by Proposed Intervenors-Appellants. [Id.]

Relators-Appellants promptly appealed. [Rec. Entry 39.]

### **STATEMENT OF THE FACTS**

Although this case was not filed until a little over one week ago, the district court has spent more than two years considering the critical issue of whether provisional ballots cast in Ohio must be counted. Indeed, the claims raised by Relators-Appellants are squarely addressed and controlled by two Orders issued by the district court shortly before the November 4, 2008 election. Given the importance of those Orders to this case, the factual recitation below focuses on the events that led to those Orders.

Proposed Intervenor-Appellee NEOCH filed the related case of *NEOCH v. Brunner*, S.D. Ohio Case No. 2:06cv896 (referred to as the “NEOCH Case”) in October 2006. [NEOCH Case, Complaint, Rec. Entry 2.] Among other claims, NEOCH challenged the constitutionality of Ohio’s newly-enacted Provisional Ballot laws on the grounds that those laws were vague and ambiguous, would inevitably be applied unequally by Ohio’s 88 Boards of Elections, and would violate the rights guaranteed to NEOCH’s homeless members by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. [NEOCH Case, Rec. Entry 2, Complaint, ¶¶ 126-178, 220-229.]

Shortly before the November 2006 election, the parties to the NEOCH Case resolved NEOCH’s pending motion for a preliminary injunction by entering into a Consent Order. [NEOCH Case, Rec. Entry 51.] Among other things, that Consent Order clarified the rules that should apply when determining whether provisional ballots were eligible to be counted. [Id.]

Defendant-Appellee Brunner subsequently moved to dismiss NEOCH’s claims based on lack of standing. [NEOCH Case, Rec. Entry 99.] NEOCH opposed the motion. [NEOCH Case, Rec. Entry 102.] On September 30, 2008, the district court ruled that NEOCH lacked standing to pursue some claims but had standing to pursue other claims, including its claims challenging the Provisional Ballot laws. [NEOCH Case, Rec. Entry 108, Opinion and Order at 11.]

Two weeks later, NEOCH filed a proposed Supplemental Complaint and a Motion for Preliminary Injunction. [NEOCH Case, Rec. Entries 110, 111.] In those filings, NEOCH argued that Ohio's Voter Identification laws imposed an unconstitutional poll tax on all Ohio voters, as well as an undue burden on NEOCH's homeless members, because Ohio does not provide free identification. NEOCH further argued that data from the November 2006 election showed that Ohio's 88 Boards of Elections applied the Provisional Ballot laws unequally, in violation of the Due Process and Equal Protection Clauses. NEOCH sought expedited discovery in support of its Motion. [NEOCH Case, Rec. Entry 112.]

The following week, NEOCH subpoenaed documents and deposed officials from twenty (20) Ohio Boards of Elections, as well as a designated representative from Defendant-Appellee Brunner's office. [NEOCH Case, Rec. Entries 135, 139.] Key portions of the deponents' testimony were summarized on charts submitted in support of NEOCH's Motion. [NEOCH Case, Rec. Entry 141.]

The undisputed evidence established that in numerous respects, Ohio's Boards of Elections planned to apply different and unequal standards when determining whether to count provisional ballots cast in the November 2008 Election. [NEOCH Case, Rec. Entries 135, 139, 141.] For example:

- Belmont County has previously rejected provisional ballots where the poll worker failed to sign the PBA, but was unsure what it would do

this year. Butler County planned to contact the poll worker to find out why he did not sign the form, i.e., whether he simply forgot or was challenging the voter. Greene County has tended to accept such ballots. Clermont, Coschocton and Logan Counties were not sure what they would do. Clark, Cuyahoga and Hamilton Counties planned to count these provisional ballots.

- Clermont and Lorain Counties were improperly planning to reject any provisional ballot that did not contain the voter's date of birth, even though Ohio law does not require a date of birth. Greene County planned to reject such ballots but only after attempting to contact the voter to get a date of birth. Belmont County has previously rejected provisional ballots on this ground but was unsure if it would do so this year. Coshocton and Seneca Counties might have rejected the ballot unless the voter provided a date of birth within 10 days after the election. Butler, Hamilton, Logan and Madison Counties would consider counting the ballot if they could otherwise verify the voter's identify. Clark, Cuyahoga, Franklin and Summit Counties properly planned to count these provisional ballots.
- Clark County was improperly planning to reject provisional ballots that contained the last four digits of a Social Security Number, but did

not contain one of the listed forms of required identification. Miami County was unsure whether it would reject these ballots. Other Boards properly planned to count these provisional ballots.

- Cuyahoga County was improperly planning to reject provisional ballots that did not list the address of a building, even though Ohio law allows homeless voters to vote using the location of the shelter “or other location” where they regularly reside. Coshocton and Logan Counties said that they might count the ballot if they could verify the address. Butler County planned to “do further research” into the voter on a case-by-case basis. Belmont, Miami and Summit Counties were unsure whether they would count these ballots or not. At least seven Boards properly planned to count these provisional ballots.
- At least seven Boards were planning to contact voters to ask for additional information or clarification that might help the Board to decide to count the provisional ballots. Five other Boards were not planning to contact the voter. Logan County planned to contact the voter only if there were something that “really throws them off” to the point where the Board could not decide one way or the other.

- Ohio Revised Code § 3505.183 sets forth a five-factor test and a seven-factor test that apply when determining whether to count a provisional ballot. At least six counties planned to use both tests. However, Cuyahoga and Montgomery Counties planned to use only the five-factor test; Hamilton County said that it depends; Logan County did not know; and Clark County did not plan to use either one.

These are just some of the startling discrepancies that NEOCH's abbreviated discovery uncovered when it attempted to learn whether Ohio's Boards of Elections intended to apply uniform standards when determining whether to count provisional ballots cast in the November 2008 election.

The district court scheduled a hearing for October 23, 2008, to take evidence relating to NEOCH's Motion for Preliminary Injunction. On that day and the next day, however, the parties and the Court negotiated two Orders that provided for the uniform treatment of provisional ballots. In exchange, NEOCH agreed to defer the portion of its Motion that challenged the constitutionality of the Voter ID laws.

The first Order was entered on October 24, 2008 and incorporated Directive 2008-101, which Defendant-Appellee Brunner issued "as a means to settle" the NEOCH case. [NEOCH Case, Rec. Entry 142.] Directive 2008-101 set forth uniform rules that apply when determining whether to count provisional ballots.

The second Order was entered the following Monday, on October 27, 2008. [NEOCH Case, Rec. Entry 143.] It resolved two issues left unaddressed by Directive 2008-101, namely, whether provisional ballots cast by a voter who does not live in a building should be counted, and whether provisional ballots that are deficient because of poll worker error should be counted. With the parties' agreement, the Court entered an Order requiring both of these categories of ballots to be counted.

The next day, Defendant-Appellee Brunner issued Directive 2008-103, titled "Issued Pursuant to Court Order." That Directive provided, in relevant part:

[P]ursuant to the court order, I hereby instruct the boards of elections **that provisional ballots may not be rejected for reasons that are attributable to poll worker error**, including a poll worker's failure to sign a provisional ballot envelope *or failure to comply with any duty mandated by R.C. 3505.181*.

[Rec. Entry 13, Directive 2008-103, attached as Exhibit C, at 1 (first emphasis in original, second emphasis added).]

## SUMMARY OF ARGUMENT

The district court properly concluded that both Ohio's Election Code and its Orders in the NEOCH Case required it to deny Relators-Appellants' motions for summary judgment, and to grant Defendant-Appellee Brunner's motion for summary judgment. Specifically, the district court correctly held that: (1) Ohio

law requires poll workers to verify that a provisional voter has executed and signed the written affirmation on the PBA; (2) the claimed deficiencies are therefore due to poll worker error and must be counted under the district court's October 27 Order; and (3) Ohio law does not require a provisional voter to both print his name and write his signature for his provisional ballot to be counted.

In addition, two alternative grounds would have allowed the district court to reach the same result: (1) the form used by the FCBE is unlike the form prescribed by Defendant-Appellee Brunner, and it would violate the Equal Protection Clause to reject ballots where the claimed deficiencies result from the differences between those forms, and (2) 42 U.S.C. Section 1971 prohibits the rejection of ballots based on immaterial errors or omissions.

For these reasons, and as further explained below, this Court should affirm the judgment of the district court.

## **ARGUMENT**

### **I. The District Court Properly Awarded Summary Judgment In Favor Of Defendant-Appellee Brunner And Against Relators-Appellants.**

#### **A. Standard of Review.**

When reviewing a lower court's grant or denial of a motion for summary judgment, this Court applies a de novo standard of review. *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 450 (6<sup>th</sup> Cir. 2005). Summary judgment

is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

**B. Ohio Revised Code Sections 3505.181 & 3505.182 Require Poll Workers To Verify That A Voter Has Both Executed And Signed The Written Affirmation Before Permitting That Voter To Cast A Provisional Ballot.**

Read separately and together, Ohio Revised Code Sections 3505.181 and 3505.182 require poll workers to confirm and verify that the provisional voter has both executed and signed the written affirmation on the PBA. Only after the poll worker verifies that the voter has executed and signed the affirmation can he or she lawfully permit the voter to cast a provisional ballot.

Specifically, R.C. 3505.181(B)(2) provides that if a voter is eligible to cast a provisional ballot, that “individual *shall be permitted* to cast a provisional ballot at that polling place *upon the execution of a written affirmation* by the individual before an election official at the polling place . . .” (Emphasis added).

Moreover, the content of the written affirmation is prescribed by R.C. 3505.182, which provides that it “shall be *substantially* as follows” and has a space for the voter’s printed name and signature. (Emphasis added). The affirmation must be completed by the voter and signed and witnessed by a polling place official. *Id.* Specifically, the poll worker must sign a statement that reads: “The

Provisional Ballot Affirmation printed above was subscribed and affirmed before me this . . . day of . . . (Month), . . . (Year).” Id.

Relators-Appellants have strenuously argued that despite the requirement that the poll worker must first witness the voter’s execution of the affirmation—and then sign a statement verifying that the voter signed and affirmed the written affirmation—the poll worker has no duty to verify that the affirmation has been completed. This argument is belied by both the express language of R.C. 3505.181(B)(2) and the verification statement required by R.C. 3505.182, which places a duty on the poll worker to verify that the voter has signed the affirmation.

**C. Because The Claimed Deficiencies In The Disputed Ballots Are Due To The Poll Worker’s Failure To Fulfill His Duty To Verify The Voter’s Execution Of And Signature On The Written Affirmation, The Disputed Ballots Must Be Counted.**

As explained above, the district court’s October 27 Order in the NEOCH Case requires Boards of Elections to count provisional ballots that are deficient because of poll worker error. That Order has not been challenged by the parties. Accordingly, if the Court finds that the Disputed Ballots are in dispute because of poll worker error, then it should affirm the district court’s judgment.

After questions arose at the Franklin County Board of Elections regarding whether a provisional ballot affirmation that did not include both the name and the signature of the voter could be counted, the Secretary of State’s office advised the Board that if it is otherwise possible from the Board’s records to establish the

identity and eligibility of the voter to vote in the election, then the absence on the provisional ballot affirmation of the voter's printed name or signature is not fatal.

This guidance is required by the Court's October 27<sup>th</sup> Order that provisional ballots may not be rejected for any reason attributable to poll worker error. Except in the circumstance where the voter expressly declined to sign the affirmation statement—in which event the ballot must be counted (see below)—a missing printed name or signature is reasonably attributable to poll worker error. As stated above, R.C. 3505.181 requires the voter to execute the affirmation statement before a poll worker *before being permitted* to cast a provisional ballot. R.C. 3505.182 further requires the poll worker to sign a statement that the voter affirmation was signed and affirmed before the official. If the voter failed to print or sign his name, then he did not “execute” or “subscribe” the affirmation before a poll worker.

In such an instance, the poll worker may have made two errors. The first error was to sign the required statement that verified that “[t]he Provisional Ballot Affirmation printed above was *subscribed* and affirmed before me ....” R.C. 3505.182 (emphasis added). *The word “subscribed” means “to sign one’s name to a document.”* Webster’s II New Riverside Dictionary (Rev. Ed.). If the poll worker verified that the voter had signed his name—and he did not—then the poll worker clearly erred by signing the verification statement. Based on this error

alone, all ballots that lack a voter's signature must be counted, because the poll worker clearly erred by signing the verification statement.

The second error made by the poll worker was to give the voter a provisional ballot. The statute provides that voters are only permitted to cast a provisional ballot if they have executed the affirmation statement. R.C. 3505.181(B)(2) (“The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place ....”). If the voter did not execute the written affirmation—which requires both a printed name and signature—then he or she *should not have been permitted* to cast a provisional ballot. This error pertains to all ballots that lack a printed name, signature, or both, and requires that those ballots be counted.

**D. Ohio Law Does Not Require The Voter To Include Both His Printed Name And His Signature On The Written Affirmation For That Ballot To Be Counted.**

Despite the repeated protestations by Relators-Appellants to the contrary, Ohio law does not require either a printed name or a signature on the PBA for a provisional ballot to be counted. Taking the last point first, Ohio Revised Code Section R.C. 3505.183(B)(1) expressly allows provisional voters to decline to sign the affirmation and still have their vote be counted:

To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the

information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; otherwise, the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted: (a) The individual's name and signature; (b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted; (c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

This statute clearly provides that provisional ballots should be counted both when the voter has “executed” the affirmation and when the voter has “declined” to execute the affirmation. Notably, the statute fails to describe or limit the circumstances under which a voter may decline to execute the affirmation and still have her vote be counted. Nor does the statute require such a voter to follow any particular procedure, mark any particular box, or sign a declination statement. The law is completely silent as to when a voter can decline to execute the affirmation, how he should do it, and how such a declination is evidenced.

Given this gaping hole in the statute, it is both reasonable and necessary to conclude that where a written affirmation on a PBA is missing a signature, the voter declined to execute the affirmation. There is no basis for determining whether the voter intentionally or unintentionally declined to sign the affirmation. The only fact that can be determined is that the voter, in fact, failed to sign it. Her

intent cannot be determined. Accordingly, there is no basis for distinguishing between ballots where the voter “declined” or “neglected” to sign. All such ballots must either be counted or rejected. Since rejection of this entire category of ballots would violate the express terms of R.C. 3505.183, these ballots must be counted.

The same conclusion must be reached with respect to ballots that contain a signature but no name, although for a different reason. Relators-Appellants insist that Ohio law requires both a printed name and a signature. However, those terms are not found in the relevant statutes. Instead, R.C. 3505.183 provides only that the written affirmation must contain “the individual’s name and signature” to be counted. That is not the same as “the individual’s *printed* name and signature.”

Although Relators-Appellants contend that the name and signature must be separately written, that requirement does not appear in the statute. The simple fact is that a person’s signature is a written representation of his name. While it is true that some signatures are more legible than others, that does not prevent a person’s signature from being his name. Moreover, although R.C. 3505.182 contemplates that the voter will print and sign his name, that statute requires only that the affirmation completed by the voter be “substantially” the same as the statute.

For these reasons, Ohio law does not require that a provisional voter include both his printed name and his signature on the affirmation form for his or her vote

to be counted, where he or she is otherwise determined to be registered and eligible to vote.

## **II. Relators-Appellants' Claims Are Fatally Defective for Other Reasons That Provide Additional Grounds for the District Court's Decision.**

### **A. Standard of Review.**

Relators-Appellants' claims are fatally flawed in at least two other ways, either one of which could have formed the basis of the district court's decision. *See Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.").

### **B. The District Court Could Have Reached The Same Result By Relying On The Equal Protection Clause, As The Claimed Deficiencies Result From A Form Used Only In Franklin County.**

The district court also could have ruled the same way on the grounds that because the FCBE uses a different form than the form used in other counties—and because a key difference in those forms likely led to the claimed deficiencies—a refusal to count these challenged ballots would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Defendant-Appellee Brunner has prescribed a provisional ballot affirmation form that is used by many counties. [Rec. Entry 38-3, Form 12-B.] On the second page of the Secretary of State's prescribed form, the poll worker is required to print

the name of the voter. *No such requirement is imposed by Franklin County's form.* [Rec. Entry 38-2.]

That omission in the Franklin County form eliminates a protection for voters who do not themselves print their name on the form. If that voter had cast his vote in a county that used the Secretary of State's Form 12-B, then the poll worker would have printed his name and that issue would have been eliminated. As a result, provisional voters in Franklin County are subjected to different and unequal standards—and are more likely to have their vote be discarded—than voters in other counties. The Equal Protection Clause, therefore, also requires that the Disputed Ballots be counted.

**C. The District Court Could Have Reached The Same Result By Relying On 42 U.S.C. Section 1971, Which Prohibits The Rejection Of Ballots Based On Immaterial Errors Or Omissions.**

In an amicus curiae brief, the ACLU of Ohio and ACLU Voting Rights Project (collectively "ACLU") argued that the claims advanced by Relators-Appellants fail because the Civil Rights Act of 1964, 42 U.S.C. § 1971, prohibits the FCBE from rejecting the Disputed Ballots since the claimed deficiencies are not material to the voter's qualifications. [Rec. Entry 36 at 2-10.] Proposed Intervenor-Appellee NEOCH adopts the arguments advanced by the ACLU and incorporates them by reference here. This statute provides an alternative ground on which the district court could have relied to reach the same result.

## CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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November 22<sup>nd</sup>, 2008

**CERTIFICATE OF COMPLIANCE WITH  
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          s/ Caroline H. Gentry            
Caroline H. Gentry (0066138)  
Attorney for Proposed Intervenor-  
Appellee Northeast Ohio Coalition  
for the Homeless

Dated: November 22<sup>nd</sup>, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on November 22<sup>nd</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 matter.

s/ Caroline H. Gentry  
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ATTORNEYS FOR DEFENDANT

## ADDENDUM OF CITED STATUTES

### Ohio Rev. Code Section 3505.181

#### § 3505.181. Eligibility to cast provisional ballot

(A) All of the following individuals shall be permitted to cast a provisional ballot at an election:

(1) An individual who declares that the individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote;

(2) An individual who has a social security number and provides to the election officials the last four digits of the individual's social security number as permitted by division (A)(2) of section 3505.18 of the Revised Code;

(3) An individual who has but is unable to provide to the election officials any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code and who has a social security number but is unable to provide the last four digits of the individual's social security number as permitted under division (A)(2) of that section;

(4) An individual who does not have any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code, who cannot provide the last four digits of the individual's social security number under division (A)(2) of that section because the individual does not have a social security number, and who has executed an affirmation as permitted under division (A)(4) of that section;

(5) An individual whose name in the poll list or signature pollbook has been marked under section 3509.09 or 3511.13 of the Revised Code as having requested an absent voter's ballot or an armed service absent voter's ballot for that election and who appears to vote at the polling place;

(6) An individual whose notification of registration has been returned

undelivered to the board of elections and whose name in the official registration list and in the poll list or signature pollbook has been marked under division (C)(2) of section 3503.19 of the Revised Code;

(7) An individual who is challenged under section 3505.20 of the Revised Code and the election officials determine that the person is ineligible to vote or are unable to determine the person's eligibility to vote;

(8) An individual whose application or challenge hearing has been postponed until after the day of the election under division (D)(1) of section 3503.24 of the Revised Code;

(9) An individual who changes the individual's name and remains within the precinct, moves from one precinct to another within a county, moves from one precinct to another and changes the individual's name, or moves from one county to another within the state, and completes and signs the required forms and statements under division (B) or (C) of section 3503.16 of the Revised Code;

(10) An individual whose signature, in the opinion of the precinct officers under section 3505.22 of the Revised Code, is not that of the person who signed that name in the registration forms;

(11) An individual who is challenged under section 3513.20 of the Revised Code who refuses to make the statement required under that section, who a majority of the precinct officials find lacks any of the qualifications to make the individual a qualified elector, or who a majority of the precinct officials find is not affiliated with or a member of the political party whose ballot the individual desires to vote;

(12) An individual who does not have any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code, who cannot provide the last four digits of the individual's social security number under division (A)(2) of that section because the person does not have a social security number, and who declines to execute an affirmation as permitted under division (A)(4) of that section;

(13) An individual who has but declines to provide to the precinct election officials any of the forms of identification required under division (A)(1) of section 3501.18 of the Revised Code or who has a social security number but declines to provide to the precinct election officials the last four digits of the individual's social security number.

(B) An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is both of the following:

(a) A registered voter in the jurisdiction in which the individual desires to vote;

(b) Eligible to vote in that election.

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

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

(5) (a) At the time that an individual casts a provisional ballot, the appropriate local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under division (B)(5)(b) of this section whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(b) The appropriate state or local election official shall establish a free access system, in the form of a toll-free telephone number, that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted. The free access system established under this division also shall provide to an individual whose provisional ballot was not counted information explaining how that individual may contact the board of elections to register to vote or to resolve

problems with the individual's voter registration.

The appropriate state or local election official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under this division. Access to information about an individual ballot shall be restricted to the individual who cast the ballot.

(6) If, at the time that an individual casts a provisional ballot, the individual provides identification 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, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address, or provides the last four digits of the individual's social security number, or executes an affirmation that the elector does not have any of those forms of identification or the last four digits of the individual's social security number because the individual does not have a social security number, or declines to execute such an affirmation, the appropriate local election official shall record the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section.

(7) If an individual casts a provisional ballot pursuant to division (A)(3), (7), (8), (12), or (13) of this section, the election official shall indicate, on the provisional ballot verification statement required under section 3505.182 [3505.18.2] of the Revised Code, that the individual is required to provide additional information to the board of elections or that an application or challenge hearing has been postponed with respect to the individual, such that additional information is required for the board of elections to determine the eligibility of the individual who cast the provisional ballot.

(8) 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) For a provisional ballot cast pursuant to division (A)(3), (12), or (13) of this section to be eligible to be counted, the individual who cast that ballot, within ten days after the day of the election, shall do any of the following:

(i) Provide to the board of elections proof of the individual'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, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address;

(ii) Provide to the board of elections the last four digits of the individual's social security number;

(iii) In the case of a provisional ballot executed pursuant to division (A)(12) of this section, execute an affirmation as permitted under division (A)(4) of section 3505.18 of the Revised Code.

(b) For a provisional ballot cast pursuant to division (A)(7) of this section to be eligible to be counted, the individual who cast that ballot, within ten days after the day of that election, shall 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.

(C) (1) If an individual declares that the individual is eligible to vote in a jurisdiction other than the jurisdiction in which the individual desires to vote, or if, upon review of the precinct voting location guide using the residential street address provided by the individual, an election official at the polling place at which the individual desires to vote determines that the individual is not eligible to vote in that jurisdiction, the election official shall direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote, explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct, and provide the telephone number of the board of elections in case the individual has additional questions.

(2) If the individual refuses to travel to the polling place for the correct jurisdiction or to the office of the board of elections to cast a ballot, the individual shall be permitted to vote a provisional ballot at that jurisdiction in accordance with division (B) of this section. If any of the following apply, the provisional ballot cast by that individual shall not be opened or counted:

(a) The individual is not properly registered in that jurisdiction.

(b) The individual is not eligible to vote in that election in that jurisdiction.

(c) The individual's eligibility to vote in that jurisdiction in that election cannot be established upon examination of the records on file with the board of elections.

(D) The appropriate local election official shall cause voting information to be publicly posted at each polling place on the day of each election.

(E) As used in this section and sections 3505.182 [3505.18.2] and 3505.183 [3505.18.3] of the Revised Code:

(1) "Jurisdiction" means the precinct in which a person is a legally qualified elector.

(2) "Precinct voting location guide" means either of the following:

(a) An electronic or paper record that lists the correct jurisdiction and polling place for either each specific residential street address in the county or the range of residential street addresses located in each neighborhood block in the county;

(b) Any other method that a board of elections creates that allows a precinct election official or any elector who is at a polling place in that county to determine the correct jurisdiction and polling place of any qualified elector who resides in the county.

(3) "Voting information" means all of the following:

(a) A sample version of the ballot that will be used for that election;

(b) Information regarding the date of the election and the hours during which polling places will be open;

(c) Instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;

(d) Instructions for mail-in registrants and first-time voters under applicable federal and state laws;

(e) General information on voting rights under applicable federal and state laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated;

(f) General information on federal and state laws regarding prohibitions against acts of fraud and misrepresentation.

### **Ohio Rev. Code Section 3505.182**

#### § 3505.182. Provisional Ballot Affirmation form

Each individual who casts a provisional ballot under section 3505.181 [3505.18.1] of the Revised Code shall execute a written affirmation. The form of the written affirmation shall be printed upon the face of the provisional ballot envelope and shall be substantially as follows:

#### "Provisional Ballot Affirmation

#### STATE OF OHIO

I, ..... (Name of provisional voter), solemnly swear or affirm that I am a registered voter in the jurisdiction in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot.

I understand that, if the above-provided information is not fully completed and correct, if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, or if the board of elections determines that I have already voted in this election, my provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution.

I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief.

.....

(Signature of Voter)

.....

(Voter's date of birth)

.....

The last four digits of the voter's social security number

(To be provided if the voter is unable to provide a current and valid photo identification, a military identification, or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the voter's name and current address but is able to provide these last four digits)

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

Additional Information For Determining Ballot Validity

(May be completed at voter's discretion)

Voter's current address:

Voter's former address if photo identification does not contain voter's current address

Voter's driver's license number or, if not provided above, the last four digits of voter's social security number

(Please circle number type)

(Voter may attach a copy of any of the following for identification purposes: a current and valid photo identification, a military identification, or a current utility bill, bank statement, government check, paycheck, or

other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the voter's name and current address.)

Reason for voting provisional ballot

(Check one):

.... Requested, but did not receive, absent voter's ballot

.... Other

#### Verification Statement

(To be completed by election official)

The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this ..... day of ..... (Month), ..... (Year).

(If applicable, the election official must check the following true statement concerning additional information needed to determine the eligibility of the provisional voter.)

.... The provisional voter is required to provide additional information to the board of elections.

.... An application or challenge hearing regarding this voter has been postponed until after the election.

(The election official must check the following true statement concerning identification provided by the provisional voter, if any.)

.... The provisional voter provided a current and valid photo identification.

.... The provisional voter provided a current valid photo identification, other than a driver's license or a state identification card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.

.... The provisional voter provided a military identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address.

.... The provisional voter provided the last four digits of the voter's social security number.

.... The provisional voter is not able to provide 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, other than a notice of an election mailed by a board of elections

under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does not have one of these forms of identification. The provisional voter must provide one of the foregoing items of identification to the board of elections within ten days after the election.

.... The provisional voter is not able to provide 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, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does not have one of these forms of identification. Additionally, the provisional voter does not have a social security number but is not able to provide the last four digits of the voter's social security number before voting. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

.... The provisional voter does not have 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 a social security number, but has executed an affirmation.

.... The provisional voter does not have 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 a social security number, and has declined to execute an affirmation.

.... The provisional voter declined 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 voter's social security number but does not have one of these forms of identification or a social security number. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

(Signature of Election Official)"

In addition to any information required to be included on the written affirmation, an individual casting a provisional ballot may provide additional

information to the election official to assist the board of elections in determining the individual's eligibility to vote in that election, including the date and location at which the individual registered to vote, if known.

If the individual declines to execute the affirmation, an appropriate local election official shall comply with division (B)(6) of section 3505.181 [3505.18.1] of the Revised Code.

### **Ohio Rev. Code Section 3505.183**

§ 3505.183. Determination whether provisional ballot is eligible to be counted; record-keeping

(A) When the ballot boxes are delivered to the board of elections from the precincts, the board shall separate the provisional ballot envelopes from the rest of the ballots. Teams of employees of the board consisting of one member of each major political party shall place the sealed provisional ballot envelopes in a secure location within the office of the board. The sealed provisional ballot envelopes shall remain in that secure location until the validity of those ballots is determined under division (B) of this section. While the provisional ballot is stored in that secure location, and prior to the counting of the provisional ballots, if the board receives information regarding the validity of a specific provisional ballot under division (B) of this section, the board may note, on the sealed provisional ballot envelope for that ballot, whether the ballot is valid and entitled to be counted.

(B) (1) To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 [3505.18.1] of the Revised Code. If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; otherwise, the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

(a) The individual's name and signature;

(b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted;

(c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

(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 of the Revised Code, or provided to the board of elections during the ten days after the day of the election under division (B)(8) of section 3505.181 [3505.18.1] of the Revised Code, to assist the board in determining the individual's eligibility to vote.

(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 [3505.18.1] of the Revised Code within ten days after the day of the election.

(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.

(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 [3505.18.1] 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 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, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, 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 [3505.18.1] of the Revised Code.

(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.

(C) (1) For each provisional ballot rejected under division (B)(4) of this section, the board shall record the name of the provisional voter who cast the ballot, the identification number of the provisional ballot envelope, the names of the election officials who determined the validity of that ballot, the date and time that the determination was made, and the reason that the ballot was not counted.

(2) Provisional ballots that are rejected under division (B)(4) of this section shall not be counted but shall be preserved in their provisional ballot envelopes unopened until the time provided by section 3505.31 of the Revised Code for the destruction of all other ballots used at the election for which ballots were provided, at which time they shall be destroyed.

(D) Provisional ballots that the board determines are eligible to be counted under division (B)(3) of this section shall be counted in the same manner as provided for other ballots under section 3505.27 of the Revised Code. No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election. Observers, as provided in section 3505.21 of the Revised Code, may be present at all times that the board is determining the eligibility of provisional ballots to be counted and counting those provisional ballots determined to be eligible. No person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot.

(E) (1) Except as otherwise provided in division (E)(2) of this section, nothing in this section shall prevent a board of elections from examining provisional ballot affirmations and additional information under divisions (B)(1) and (2) of this section to determine the eligibility of provisional ballots to be counted during the ten days after the day of an election.

(2) A board of elections shall not examine the provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section of any provisional ballot for which an election official has indicated under division (B)(7) of section 3505.181 [3505.18.1] of the Revised Code that additional information is

required for the board of elections to determine the eligibility of the individual who cast that provisional ballot until the individual provides any information required under division (B)(8) of section 3505.181 [3505.18.1] of the Revised Code, until any hearing required to be conducted under section 3503.24 of the Revised Code with regard to the provisional voter is held, or until the eleventh day after the day of the election, whichever is earlier.

## 42 U.S.C. § 1971

### § 1971. Voting rights

(a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions.

(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall--

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

(C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 (42 U. S. C. 1974-74e; 74 Stat. 88) [42 USCS §§ 1974 et seq.]: *Provided, however,* That the

Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

(3) For purposes of this subsection--

(A) the term "vote" shall have the same meaning as in subsection (e) of this section;

(B) the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.

(b) Intimidation, threats, or coercion. No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) Preventive relief; injunction; rebuttable literacy presumption; liability of United States for costs; State as party defendant. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice

shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

(d) Jurisdiction; exhaustion of other remedies. The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions. In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote, to vote at an appropriate election shall constitute contempt of court.

An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled

to vote.

The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; (5 U.S.C. 16) [5 USCS § 3331] to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard *ex parte* at such times and places as the court shall direct. His statement under oath shall be *prima facie* evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

The court, or at its direction the voting referee, shall issue to each applicant so

declared qualified a certificate identifying the holder thereof as a person so qualified.

Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure [USCS Federal Rules of Civil Procedure, Rule 53(c)]. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: *Provided, however,* That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provisions for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

When used in the subsection, the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

(f) Contempt; assignment of counsel; witnesses. Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel

learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

(g) Three-judge district court: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action. In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceedings authorized by this subsection, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or, in his absence, the acting chief judge) who shall

then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.