

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

STATE EX REL. SKAGGS, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. C2:08CV-1077

Judge Algenon L. Marbley

**JOINT MOTION OF THE NORTHEAST OHIO COALITION FOR THE HOMELESS
AND THE OHIO DEMOCRATIC PARTY FOR SUMMARY JUDGMENT**

Proposed Intervenors, the Northeast Ohio Coalition for the Homeless (“NEOCH”) and the Ohio Democratic Party (“ODP”) (“Proposed Intervenors”), hereby move, pursuant to Fed. R. Civ. P. 56, for summary judgment in their favor and in favor of Defendant Secretary of State Jennifer Brunner and against the Plaintiffs. Proposed Intervenors adopt the arguments set forth in Defendant Secretary of State’s Motion for Summary Judgment and offer the following additional arguments.

ARGUMENT

Plaintiffs challenge as erroneous the advice of Defendant Secretary of State that (1) a provisional ballot that has the voter’s signature, but not the voter’s name written on the

provisional voter affirmation,¹ may be counted, and (2) a provisional ballot that has the voter's name, but not the voter's signature on the provisional voter affirmation, may be counted. As explained below, Plaintiffs' arguments fail because of this Court's prior ruling on poll worker error, the exceptions to the written affirmation requirement in Ohio law, the doctrine of substantial compliance, and the Equal Protection Clause.

I. WHEN AN ERROR IN A PROVISIONAL VOTER AFFIRMATION IS DUE IN PART TO POLL WORKER ERROR IN THE CONDUCT OF HIS OR HER DUTIES, THE PROVISIONAL BALLOT MAY NOT BE REJECTED ON THE BASIS OF THAT ERROR IF THE VOTER IS AN OTHERWISE QUALIFIED ELECTOR

On October 27, 2008, prior to the November 4, 2008 election, the Court issued an Order in the related case of *Northeast Ohio Coalition for the Homeless, et al v. Jennifer Brunner*, Case No. C2-06-896 (Doc. 143), that stated: "In addition, no provisional ballot cast by an eligible elector should be rejected because of a poll worker's failure to comply with duties mandated by R.C. 3505.181, which governs the procedure for casting a provisional ballot." In the Order, the Court ordered the Secretary of State to instruct the County boards of Elections that "provisional ballots may not be rejected for reasons that are attributable to a poll worker's 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." In compliance with the Court's Order, the Secretary issued Directive 2008-103 the following day, which was also before the election.

R.C. 3505.181(B) provides that "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: . . . (2)

¹ The provisional voter affirmation form at issue is set forth in R. C. 3505.182 and is not to be confused with a second affirmation require by R.C. 3505.18(A)(4), required of provisional voters who have (own) no identification acceptable for voting or a social security number.

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 . . .**” (Emphasis added). The content of the affirmation is prescribed by R.C. 3505.182, which provides that “[t]he form of the written affirmation shall be printed upon the face of the provisional ballot envelope and shall be **substantially** as follows,” and which requires 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. (“The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this . . . day of . . . (Month), . . . (Year).”)

Following the election, 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, where the voter was otherwise determined to be both registered and eligible to vote. 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 written name or of the signature of the voter is not fatal.

This advice is required by the Court’s October 27th Order that provisional ballots may not be rejected for any reason attributable to poll worker error, as a missing printed name or signature is reasonably attributable at least in part to poll worker error. R.C. 3505.181 requires the affirmation statement to be executed before a polling place official. R.C. 3505.182 further requires the polling place official to sign a statement that the voter affirmation was subscribed and affirmed before the official. If the voter did not complete the affirmation statement because he failed to print or sign his name, then he did not “execute” the affirmation before a polling place official.

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 clearly 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 must be counted.

Plaintiffs have argued that although poll workers must witness and then sign the affirmation—and although the statute requires that the voter “execute” the affirmation in front of the poll worker—the poll worker has no duty to verify that the affirmation has been completed. This argument is belied not only by the express language of R.C. 3505.181(B)(2), but also by the required verification statement which places a duty on the poll worker to verify that the voter has signed the affirmation. R.C. 3505.182.

Furthermore, it seems reasonable that the intent of the General Assembly's purpose in requiring that the form be executed "before" a polling place official was to ensure that the form was fully executed. With very few exceptions, no other election form, including voter registration forms, is required to be executed before an election official. So this added requirement must be for some purpose. It is reasonable to conclude that one such purpose—and perhaps the only purpose—is to help ensure that the voter is not disenfranchised due to a mistake or omission in completing the form. Although the statute and form require the voter to swear or affirm as to his qualifications and eligibility to vote in the election, the poll worker is not required to administer an oath for this purpose. Therefore, the requirement of executing the form before a poll worker must be for some purpose other than administering an oath.

Plaintiffs have argued that the duties of the voters and the poll workers are separate and distinct, but they can make this argument only by asserting that the poll worker's duty is perfunctory, i.e., to verify the affirmation without reviewing it. However, this argument is belied not only by the requirement that the form be executed before the official, but also by the additional and unusual step that the polling place official must sign a statement that the voter affirmation was subscribed and affirmed before the official. The poll worker must review the affirmation before he or she can verify that the voter "subscribed" or signed it.

Even if the voter bears some responsibility for failing to print and sign his name on the affirmation form, that does not eliminate the fact or significance of the poll worker's error. The role of the poll worker with respect to the voter's completion of the affirmation form is to serve as a failsafe, which is the entire concept supporting provisional voting in the first place. The law is not designed to create technical grounds for discarding ballots cast by registered and eligible electors. One of the roles of poll workers is to help voters with those requirements. Indeed, poll

workers are required by law to be trained in the requirements for casting provisional ballots. Voters are not.

II. OHIO LAW, AS ENACTED BY THE OHIO GENERAL ASSEMBLY, CLEARLY DOES NOT IN ALL CASES REQUIRE A PROVISIONAL VOTER TO SIGN THE AFFIRMATION STATEMENT IN ORDER FOR THE PROVISIONAL BALLOT TO BE COUNTED

Much has already been argued to the Court about what a provisional voter is required to do to cast a provisional ballot and about the duties of polling place officials in the process of the casting of provisional ballots under R.C. 3505.18, 3505.181 and 3505.182. However, the present case has been brought not in the context of casting of provisional ballots *per se*, but rather in the context of whether certain provisional ballots may be counted. The most enlightening statutory provision in this regard is R.C. 3505.183(B)(1), which provides the answer:

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.

The above governs the counting of all provisional ballots cast under R.C. 3505.181(B)(2), which lists all of the circumstances that entitle a person to cast a provisional ballot. It is clear from the above that the law provides for provisional ballots to be counted both when the voter has “executed” the affirmation and when the voter has “declined” to execute the affirmation.

Indeed, the above paragraph deals first with counting provisional ballots where the voter has declined to execute the affirmation and then, after the word “otherwise,” deals with counting provisional ballots where the individual has not declined to execute the affirmation.

It is important to observe that Ohio law does not limit the reasons that a provisional voter may have for declining to execute the affirmation. There are none specified in the law and the law does not even require a provisional voter to offer a reason.² The voter who declines to execute the affirmation is also not required to sign a written declination or even check mark a box to so indicate. The law is completely silent as to how a voter declines to execute the affirmation or what constitutes declining to execute. Thus, the Ohio law neither requires these provisional voters to sign the affirmation, nor a declination statement. As a result, the statute, as written by the Ohio General Assembly, has a built-in administrative problem for boards of elections: What constitutes declining to execute the affirmation, and how to distinguish between provisional voters who have declined to execute the affirmation and those who neglected to execute all or part of the affirmation.

The statute provides that when a voter declines to execute the affirmation, the voter’s name is to be written in the affirmation by either the voter or the polling place official. So it seems reasonable to conclude that if there is an affirmation with a provisional ballot that contains the name of the voter, but is not signed, that this falls into the category of provisional ballots where the voter declined to execute the affirmation. The presumption must be in favor of counting the ballot. Otherwise, election officials would be requiring more than the law requires given that the law does not require any specific indication of declination. The fact that other

² Thus, the discussion at the TRO hearing regarding declining to execute the affirmation due to religious objections is not relevant.

parts of the affirmation may be completed, such as the voter's address or the last four digits of the voter's social security number, is still a non-execution of the affirmation and does not resolve whether the voter chose to decline to fully execute the affirmation or neglected to do so.

It is true that there may be a difference between declining to complete the affirmation and neglecting to complete it, but Ohio law provides no means for distinguishing between the two categories of provisional voters. The one element in common for both groups of voters is that they did not sign the affirmation, i.e., they did not execute or fully execute the affirmation. With no way of distinguishing between the two groups, it is not even possible for a board to separate the ballots into different groups.³

Therefore, the only logical thing to do is to treat them the same based on their common characteristic, the absence of the voter's signature. The question then is whether to count all of them or not count all of them. Intervenors submit that this question must be resolved in favor of counting the ballots. Otherwise, the result is that ballots where the voter in fact declined to execute the affirmation will not be counted in direct violation of R.C. 3505.183.

Next are the provisional ballots that contain a voter's signature in the affirmation, but not separately the voter's name. Assuming that the signature is legible, it clearly is also the voter's name and this fulfills the statutory requirement. R.C. 3505.183(B)(1) does not specifically or necessarily require that a provisional voter print and sign his or her name. It would serve no additional purpose to require a voter to write his or her name a second time if the signature is

³ Instructions for poll workers provided by the Secretary of State and boards of elections calls for poll workers to note when a voter declines to execute the provisional ballot affirmation, but there is no specific place for making such notation on the affirmation statement or anywhere else. It is also not a statutory requirement. And there is the possibility that a poll worker may neglect to make the notation. Finally, as will be discussed herein, the counting of one group of ballots with a non-executed affirmation and not counting another group of ballots for the very same reason raises serious equal protection concerns.

legible so that the identity of the voter may be determined. 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. If the voter’s signed name is legible, then there is no reason to require a separate printed name.

While the answers to the questions presented may be resolved by looking to R.C. 3505.183(B)(1), it should be noted that this division also provides that the board of elections is to examine all of its records to determine if a provisional voter is eligible to vote. Thus, only those provisional voters who are determined to be duly registered and qualified as to age, residence and citizenship will have their ballots counted in the election.

III. SUBSTANTIAL COMPLIANCE

There has also been argument before the Court on the issue of substantial compliance. The Ohio Supreme Court in *State ex rel Myles v. Brunner*, 2008 Ohio 5097 (October 2, 2008), recently affirmed that “Absolute compliance with every technicality should not be required in order to constitute substantial compliance, unless such complete and absolute conformance to each technical requirement of the printed form serves a public interest and a public purpose.” (Emphasis added). R.C. 3505.182, which sets forth the content for the affirmation provides that the form “shall be substantially as follows.” This permits application of the rule of substantial compliance both with respect to the content of the form and the completion of the form. Ohio case law discussing the rule of substantial compliance is always about whether a candidate or voter has substantially complied with the law in completing the form.

In the present case, the rule of substantial compliance supports counting provisional ballots where the affirmation contains a legible signature, even though the voter did not also print

his name. If the signature is legible, then the identity of the voter can be established, as well as his qualifications as an elector and his eligibility to vote in the election.

IV. EQUAL PROTECTION

Plaintiffs' arguments also fail because their refusal to count these challenged ballots violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This Court has already noted that Franklin County uses its own provisional ballot affirmation form (Exhibit A), whereas Union and Madison Counties—which are also part of the Fifteenth Congressional District—use the form prescribed by the Secretary (Exhibit B). A key difference between these forms is that the Secretary's form requires the voter's name to be printed by the poll worker, but the Franklin County form does not. That omission in the Franklin County form eliminates a protection for voters who do not themselves print their name on the form. As a result, provisional voters in Franklin County are treated differently and unequally—and are more likely to have their vote be discarded—than voters in Union and Madison Counties. The Equal Protection Clause, therefore, also requires that the disputed ballots be counted.

V. SAFEGUARDS AGAINST FRAUDULENT VOTING

Plaintiffs have raised the specter that if a signature is not required on the provisional voter affirmation, elections will be wide open for people to vote fraudulently because they will not be able to be prosecuted for the crime of election falsification under R.C. 3599.36. What they do not tell the Court is that there is a panoply of statutory provisions, each carrying criminal consequences, that is available. *See, e.g.*, R.C. §§ 3599.11 (pertaining to false registration, a fifth degree felony), 3599.12 (pertaining to illegal voting, a fourth degree felony), 3599.20

(prohibiting a forged or false endorsement on a ballot, a fifth degree felony), 3599.28 (pertaining to providing a false signature, a fifth degree felony), 3599.29 (pertaining to providing false records, a fifth degree felony).

Further, R.C. 3505.183 provides that an individual may decline to execute the affirmation. That provision further shows that the provisional ballot affirmation is but one of a number of safeguards in place to prevent the inclusion of an invalid or fraudulently-cast ballot.

CONCLUSION

For the reasons set forth above, Proposed Intervenors respectfully move the Court for summary judgment in their favor and in favor of Defendant Ohio Secretary of State Jennifer Brunner and against Plaintiffs.

Respectfully submitted,

s/ Caroline Gentry

Caroline Gentry, Trial Counsel
PORTER WRIGHT MORRIS & ARTHUR
One Dayton Centre
One South Main Street
Dayton, OH 45402
Tel: (937) 449-6748
cgentry@porterwright.com

*Counsel for Proposed Intervenor
Northeast Ohio Coalition for the Homeless*

s/ Donald J. McTigue

Donald J. McTigue (OH 0022849), Trial Counsel
Mark A. McGinnis (OH 0076275)
MCTIGUE LAW GROUP
550 East Walnut Street

Columbus, OH 43215
Tel: (614) 263-7000
Fax: (614) 263-7078
mctiguelaw@rrohio.com

Counsel for Proposed Intervenor
Ohio Democratic Party

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 18th day of November, 2008.

/s Mark A. McGinnis
Mark A. McGinnis (OH 0076275)
Attorney at Law