

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

THE NORTHEAST OHIO COALITION
FOR THE HOMELESS, et al.,

Plaintiffs,

and

OHIO DEMOCRATIC PARTY,

Intervenor-Plaintiff,

vs.

JENNIFER BRUNNER, in her official
capacity as Secretary of State of Ohio,

Defendant.

THE NORTHEAST OHIO COALITION
FOR THE HOMELESS, et al.,

Plaintiffs,

vs.

THE STATE OF OHIO,

Intervenor-Defendant.

OHIO REPUBLICAN PARTY, *et al.*,

Plaintiffs,

vs.

JENNIFER BRUNNER, in her official
capacity as Secretary of State of Ohio,

Defendant,

: Civil Action No. C2-06-896

: CONSOLIDATED WITH

: Civil Action Nos. C2-08-913 & C2-08-1077

:

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: Judge Algenon L. Marbley

: Magistrate Judge Terence P. Kemp

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: **MEMORANDUM OF *NEOCH***

: **PLAINTIFFS IN OPPOSITION TO**

: **MOTION OF SKAGGS PLAINTIFFS FOR**

: **A TEMPORARY RESTRAINING ORDER**

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and

VETERANS FOR AMERICA,

Intervenor-Defendant.

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

Plaintiffs,

vs.

JENNIFER BRUNNER, in her official
capacity as Secretary of State of Ohio,

Defendant.

A. Introduction.

For their memorandum in opposition to the *Skaggs* Plaintiffs’ motion for a temporary restraining order, the *NEOCH* Plaintiffs incorporate and adopt the well-reasoned arguments advanced by Defendant Brunner (Doc. No. 13 in Case No. C2-08-1077) and Intervenor-Plaintiff Ohio Democratic Party (Doc. No. 157). In addition, the *NEOCH* Plaintiffs submit an additional argument for this Court’s consideration.

B. The Disputed Ballots Are In Dispute Precisely Because Of Poll Worker Error.

The starting point for this Court’s analysis should be the text of its October 27, 2008 Order. In that Order, this Court held that “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.” (Doc. No. 143 at 2.)

Pursuant to this Court’s Order, Defendant Brunner promptly issued Directive 2008-103, which states: “[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.*” (first emphasis in original, second emphasis added).

The key question for this Court, therefore, is whether R.C. § 3505.181 requires poll workers to ensure that the voter provides her name and signature on the provisional ballot affirmation statement before being allowed to cast a provisional ballot. If that duty is mandated by the statute, then the voter may not be penalized—and her vote may not be discarded—merely because the poll worker failed to fulfill his duty.

On this point, the statute is clear. Section 3505.181 provides:

(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 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.

R.C. § 3505.181(B)(2) (emphasis added). In other words, voters should not be permitted to cast a provisional ballot until they execute the written affirmation in front of the poll worker.¹

The next question is whether the written affirmation requires the voter to write her name and signature. While the statute is silent on this point, the Franklin County Provisional Ballot Application is not. That application clearly requires the voter to both print their name and sign their name as part of the written affirmation. (See Exhibit A, first column). If either the printed name or the signature is missing, then the written affirmation has not been properly executed.

¹ The only exception in the statute is if the voter refuses to sign the affirmation. In that event, the election official is *required to write down the voter’s name* on the provisional ballot affirmation form. R.C. § 3505.181(B)(3) & (6). In either event, whether written by the voter or the election official, the voter’s name must be included on the form.

In sum, the statute requires the poll worker to obtain and witness an executed affirmation before giving the voter a provisional ballot, and the voter must sign and print her name to execute the affirmation. Therefore, if the voter either did not print her name, did not sign her name, or both—but was given a provisional ballot anyway—then the poll worker erred and failed to follow a duty mandated by R.C. § 3505.181. Accordingly, under the plain text of this Court’s October 27, 2008 Order, the disputed ballots must be counted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16th, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

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