



June 2, 2006

Honorable Kenneth J. Blackwell
Ohio Secretary of State
Attn: Legal Services – 16th Floor
180 East Broad Street
Columbus, Ohio 43215

Re: Comments on Rules 111-12-01 through 111-12-06

Dear Secretary Blackwell:

We write on behalf of the Brennan Center for Justice at New York University School of Law to comment on the proposed rules implementing portions of the newly enacted Ohio voter registration laws contained in Amended Substitute House Bill 3 of the 126th General Assembly (hereinafter “H.B. 3”). The Brennan Center is a non-partisan, not-for-profit legal think tank and public interest law center that pursues a vision of inclusive and effective democracy. In part, we provide legal and policy assistance to state and federal officials and advocates to ensure that changes to the voter registration process do not unduly and unconstitutionally burden efforts by voter-registration groups to increase political engagement or interfere with the right to vote.

The proposed rules, as written and read in conjunction with the newly enacted laws, create confusion about the interpretation of Ohio Rev. Code § 3599.11. As such, they are obstructing voter registration efforts intended to help all Ohioans—and especially traditionally disenfranchised citizens like those with low-incomes and people of color—to register to vote and to exercise their fundamental right to the franchise. In particular, the Secretary of State has failed to adopt a rule guiding coordinated voter registration campaigns as to how to collectively submit completed voter registration cards in compliance with the above-reference sections of the Ohio Revised Code. In addition, the Secretary of State has proposed a rule that, due to its ambiguity, creates further confusion as to whether voter registration cards may be “returned” by mail. Coordinated voter registration drives have already been forced to halt or substantially cut back on their efforts because of this omission and ambiguity, respectively, in the proposed rules. We therefore urge the Secretary of State to take the corrective action outlined below as quickly as possible.

I. Adopting a Rule to Clarify O.R.C. § 3599.11

Subsections 3599.11(B)(2)(b) and (C)(2) of the Ohio Revised Code, as amended by H.B. 3, provide that no person who helps another person register to vote “shall knowingly return any registration form entrusted to that person to any location other than any board of elections or the

office of the secretary of state.” As outlined below, § 3599.11 is aimed at ensuring that third parties (including voter registration groups) return the voter registration applications they collect to the Secretary of State or to any board of elections—rather than to the broader range of government offices, including schools, libraries, county treasurers, and other designated agencies, to which individual voter registrants may ordinarily return their own applications.¹ But the Secretary of State has issued a training manual and affirmation form that strongly imply a different—and improper—interpretation of this statute, with disastrous effects. Thus, it is imperative that the Secretary of State adopt a rule providing proper guidance as to what the legislature intended to prescribe by the amended § 3599.11, and must amend the training manual and affirmation form available on its website accordingly.

A. The Proper Interpretation of § 3599.11

The language of § 3599.11 and its context in H.B. 3 suggest that it was intended to limit the locations to which third parties can turn in voter registration applications. Section 3599.11 is part of the penalties chapter of the elections code. It should be read together with the corresponding section from the voter registration chapter, which provides the rules for violations upon which these penalties are based. *See* Ohio Rev. Code § 3503.19(B)(2)(a)-(c).

Prior to H.B. 3, Ohio law allowed for voter registration applications to be returned to a wide variety of locations, directly or through a third party:

Registration forms may be returned in person *or through another person* to any state or local office of a designated agency, to a public high school or vocational school, to a public library, or to the office of a county treasurer, or in person, through another person, or by mail to the office of the secretary of state or the office of a board of elections.

Ohio Rev. Code § 3503.19(B)(2)(a) (2005) (emphasis added). H.B. 3 revised this subsection, limiting its application to only those persons who are returning their own completed voter registration forms:

(a) An applicant may return the applicant’s completed registration forms ~~may be returned form~~ in person ~~or through another person or by mail~~ to any state or local office of a designated agency, to a public high school or vocational school, to a public library, or to the office of a county treasurer, or ~~in person, through another person, or by mail~~ to the office of the secretary of state, or to the office of a board of elections.

2006 Ohio Legis. Serv. 65 (West) (codified at Ohio Rev. Code § 3503.19 (2006)). Under the revised election code, third parties may no longer return other persons’ voter registration applications to the broader range of government office locations listed in § 3503.19(B)(2)(a) – *i.e.*, schools, libraries, county treasurers, and other designated agencies. Instead, the new

¹ This letter does not address the legality of § 3599.11 itself under the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq.*

provisions added by H.B. 3 specify just two government office locations to which a third party may now “return” another person’s voter registration form:

(b) . . . [A]n applicant may return the applicant’s completed registration form through another person to any board of elections or the office of the secretary of state.

(c) A person who receives compensation for registering a voter shall return any registration form entrusted to that person by an applicant to any board of elections or the office of the secretary of state.

Id. § 3503.19(B)(2)(b)-(c). These two locations—boards of elections and the office of the Secretary of State—are the same locations referenced in § 3599.11’s corresponding penalty provisions. *See id.* § 3599.11 (C)(2) (forbidding return to “any location other than any board of elections or the office of the secretary of state.”).

Section 3599.11 establishes penalties for violating § 3503.19, which, as discussed, has been amended by H.B. 3 to limit the locations to which a third party may “return” voter registration applications to the state. Taken in context, therefore, Section 3599.11 is aimed at ensuring that third party voter registration groups return applications they receive to the Secretary of State or to any board of elections—rather than to the broader range of government offices, including schools, libraries, or county treasurers, and other designated agencies, to which individual voter registrants may return their own applications.

B. Impact of the Improper Interpretation of § 3599.11

The proposed rules offer no interpretation of the “return” provisions in §3503.19 or § 3599.11. Nevertheless, the Secretary of State has issued two documents—a training manual and an affirmation form—that improperly interpret § 3599.11. The training manual provides the following guidance:

If you have been entrusted with a completed voter registration form, you must return the applicant’s voter registration form directly to the office of a county board of elections or the Secretary of State. You shall not, under penalty of law, return the completed form to any other person, group, organization, office or entity. R.C. 3599.11(C).

Ohio Sec’y of State, Compensated Registrars Training 1, *available at* <http://www.sos.state.oh.us/sos/electionsvoter/cvrTraining.pdf> (last visited June 1, 2006). *See also id.* at 2 (“Submission Deadline of Completed Form”). Similarly, each compensated voter registration worker must sign an affirmation form that certifies: “I will return any [voter registration application form] to a county board of elections or to the secretary of state’s office, and not to any other person, group, organization, or entity.” Ohio Sec’y of State, Affirmation of Person Who Will Receive, or Expects to Receive, Compensation for Assisting Any Other Person to Register to Vote, *available at* <http://www.sos.state.oh.us/sos/electionsvoter/cvrRegAffirm.pdf> (last visited June 1, 2006).

These interpretations continue to be vague, since the term “return” implies that only delivery to the end destination (*i.e.*, the Secretary of State or board of elections) is regulated. But they also suggest that § 3599.11(C) effectively prohibits compensated employees of coordinated voter registration campaigns from giving their completed voter registration applications to their supervisors to be returned in batches to the state. As outlined above, the latter interpretation is incorrect, especially when § 3599.11 is read in the broader context of Ohio law.

By incorrectly interpreting this law in the training manual and affirmation form, the Secretary of State has substantially halted coordinated voter registration efforts by groups like Ohio ACORN, which were previously registering thousands of voters each month. As such, this interpretation unconstitutionally burdens core political speech protected by the First Amendment of both voters and third parties registering voters, and also the free association rights of the latter to do so on a collective basis. It violates provisions of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq.*, intended to promote voter registration drives by non-governmental organizations, as well.

C. The Secretary of State’s Duty to Issue a New Proposed Rule

Given that the present guidance on this rule provided in the training manual and affirmation form is both incorrect and unconstitutional, the Secretary of State has both the authority and indeed the duty to issue a new rule that reflects the proper interpretation of § 3599.11. Ohio Rev. Code § 3501.05 (2006). By doing so, the Secretary of State can stop the abridgement of the fundamental rights of both groups committed to helping register voters and would-be voters who seek to register.

Specifically, we urge the Secretary of State adopt a rule clarifying the proper interpretation of § 3599.11—that any person or group of persons helping an applicant complete a voter registration form outside an official registration place must submit that form or ensure that the form is submitted to the appropriate state government office.

II. Clarifying Proposed Rule 111-12-02(D)

The Secretary of State should also revise Proposed Rule 111-12-02(D), which again defines “returning” in a way that is ambiguous. It currently states:

- (D) “Returning” a voter registration form does not include any service or act of the U.S. postal service or employees of the U.S. postal service or a common carrier acting in an official capacity.

Proposed Rule 111-12-02(D). It is not clear what this definition is intended to accomplish.

If this definition is meant to prohibit persons who help applicants complete voter registration forms from returning them by mail on the applicant’s behalf, it is both unsupported by Ohio statutes and illegal under federal law. Nowhere does Ohio law require that voter registration forms be hand delivered to the Secretary of State or Board of Elections, even if by a

third party. *See* Ohio Rev. Code § 3503.19(A) (providing for return of voter registration forms by mail). Moreover, Ohio law could not permissibly prohibit voter registration cards from being returned by mail, since the federal National Voter Registration Act (NVRA) requires states to accept voter registration cards that are returned by mail. 42 U.S.C.S. § 1973gg-4(a)(1). *See also* *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005).

Perhaps this definition was intended to exempt forms that are mis-delivered by the U.S. Postal Service from the prohibition against “knowingly returning” voter registration forms to the wrong locations. Or perhaps the Secretary of State intended to reaffirm that voter registration applications may be returned to the Secretary of State or board of elections offices by mail. Until this matter is clarified, though, voter registration organizations are being chilled from returning forms by mail for fear of an alternative (if improper) interpretation of this proposed rule. As such, we suggest the rule be clarified to reaffirm that returning a voter registration form “may be accomplished by hand delivery or by mail,” and that the postmark date should be considered the date of return. *See* Ohio Rev. Code § 3503.19(A) (2006).

Thank you for the opportunity to submit our comments on these proposed rules. We hope that you will enact our suggestions promptly so that important voter registration activity can resume. Please feel free to contact Raj Nayak at 212-992-8639 or Wendy Weiser at 212-998-6130 to discuss our comments at more length.

Sincerely,



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