



*An Initiative of
America's Families United*

PROPOSED VOTER PROTECTION RECOUNT STANDARDS

Having extensively monitored and reviewed the Ohio voter registration process and Ohio's implementation of the provisional ballot procedure, the Voter Protection Project of America's Families United and Advancement Project submit the following recommended procedures to state officials, County Boards of Elections, and other election officials in Ohio. We believe that adoption of the following procedures for counting provisional ballots during the upcoming recount in Ohio will help restore public confidence in the integrity of the election results from Ohio. These procedures should be applied uniformly and consistently across the State, in all 88 counties.

Our work in Ohio over the last year revealed that county election officials were faced with unprecedented registration activity and were manifestly uncertain as to significant legal requirements. As a result, registration applications were not always processed properly. Large numbers of voters who should have been registered were not on the rolls on November 2. Additionally, many voters were not informed of their correct precinct and thus submitted provisional ballots in a neighboring precinct rather than the precinct associated with his or her address. The recount procedure provides an opportunity to correct registration errors and to make the process of counting provisional ballots uniform across the state.

America's Families United, a non-partisan voter registration organization, was created to support the registration of over 1.5 million new voters across the country in the past year. Its Voter Protection Project (VPP) spent the past six months monitoring the voter registration process and directly engaging with local election officials to ensure that every reasonable effort would be made to enfranchise all citizens attempting to vote.

The Advancement Project, a legal and policy action group, launched an initiative that addresses a bedrock racial justice issue: expanding the active electorate. In the wake of the blatant and widespread irregularities of the 2000 election, Advancement Project expanded its Power and Democracy program by creating the "*Clearing the Path for a Just Democracy*" project.

It focuses on increasing democratic participation in low-income and minority communities by investigating obstacles to voter participation and providing mechanisms for removing those obstacles, generating reform efforts that seek to expand opportunities for democratic participation, building support for a more transformational solution for re-enfranchising formerly incarcerated people, and facilitating alliances among multi-racial groups. Advancement Project also participated as counsel in *League of Women Voters of Ohio, et al. v. Blackwell*, 3:04-cv-07622, which challenged rules regarding provisional ballots.

The Voter Protection Project and the Advancement Project submit this memorandum to county election officials in all of Ohio's counties and urge that its proposed standards be adopted by the counties in the forthcoming statewide recount of the Ohio election.

I. Introduction

Over the past six months, VPP repeatedly acquired county voter rolls in at least 8 Ohio counties, matched them against databases provided by voter registration groups, and, in conjunction with Advancement Project and organizations involved in voter registration efforts, attempted follow-up with all registrants who failed to appear on the official voter lists. In this effort, we utilized paid staff members and several volunteer attorneys, who researched records, contacted voters, and sometimes negotiated with county election officials on their behalf.

During the course of this process, it became clear that county policies for acceptance or rejection of applications were idiosyncratic and varied widely across county lines. In one county, unsigned forms were considered void, but in another a signature could be supplied later. In yet another county, 4-digit identification numbers could not be supplied at the polling place, but in a fourth, they could. Even recordkeeping procedures were not uniform. In some counties, an "incomplete" registration card was mailed back to the voter, and, we were told, no record of a failed registration was retained by the county at all. During the month of September, statewide policies were promulgated and then reversed over a period of days. It should not be surprising that many poll workers were unclear about the rules.

We are aware of pending litigation, *State of Ohio ex rel. Mackey v. Blackwell*, which raises many related points with regard to the counting of provisional ballots, and we urge a full consideration of the serious allegations contained in the complaint. The following discussion focuses more sharply on registration-related issues bearing on the casting and counting of provisional ballots, as these are the issues that comprise the mission and expertise of VPP.

We believe that the implementation of consistent procedures and a transparent process are necessary to ensure voters' confidence in the integrity of our electoral system. Provisional ballots in particular, numbering over 155,000 across the state of Ohio, should be subject to carefully considered and legally sound rules. Since provisional ballots represent the only potential for any of these 155,000 votes to count, it is incumbent upon our public officials to institutionalize procedures that are equitable and respectful of the right to vote. Our recommendations are founded on principles of fundamental fairness. Moreover, the United States Constitution may further require that minimum procedural due process protections be

afforded any citizen whose right to vote hangs in the balance. These protections include notice, a hearing, and a neutral decisionmaker. (*See, e.g., Bd. of Regents v. Roth, 408 U.S. 56 (1972); Goss v. Lopez, 419 U.S. 565 (1975); Ward v. Village of Monroeville, 409 U.S. 57(1972)*)

II. Proposed Standards and Discussion

As a preliminary procedural matter, the name and other identifying information of any provisional voter whose ballot was rejected should be made public immediately so that individuals and organizations, such as the Voter Protection Project, Advancement Project, and others, can conduct further inquiry as to the voter's eligibility. (We note that the Secretary of State's directive, cited more fully below, includes a provision that the minutes of the certification meetings "must identify each ballot that was not counted and why each was not counted." In order for this information to be relevant and timely for the recount process, it must be provided now.) Once this information is made public, VPP and Advancement Project, for example, will research as many of the rejected provisional ballots as possible, to ascertain whether and under what circumstances the voter attempted to register, whether there was any communication between the registrant and election officials prior to Election Day, and what, if any, representations were made as to how registration could be completed in order to qualify to vote. The results of this research will then be supplied to local election board members and other election officials so that a fully informed determination of the registrant's eligibility to have his provisional ballot counted can be made.

In addition, as part of the recount procedure, each county should contact every provisional voter whose ballot was rejected during the initial tabulation and afford the voter the opportunity to come forward and submit evidence supportive of his right to vote. This is not to suggest that the burden is on the voter to establish his eligibility to vote, but rather that the opportunity should be given the voter to provide additional facts.

It is noteworthy that the only standards promulgated by the state of Ohio with respect to the counting of provisional ballots are found in Directive 2004-48, issued by Secretary of State J. Kenneth Blackwell on October 29, 2004. It provides that provisional ballots should be counted if the voter:

1. was registered to vote somewhere in Ohio during the 30 days before the election,
2. did not vote from a former address or by absentee ballot,
3. voted in the correct precinct,
4. completed and signed all required affirmation statements [on the provisional ballot form], and
5. in the case of a voter who did not provide HAVA required identification information when registering, has provided an acceptable proof of the applicant's identity by the close of polls on election day at either the polling location or the board of elections.

While these policies are broadly articulated as general principles, a number of specific cases can easily be anticipated and must be addressed. Further, it is essential that all procedures to guide county officials in the recount be accessible and applicable statewide. We propose the following:

Voting Location Issues

a. Where a provisional ballot was cast (and presumably not counted) because the voter was at the wrong precinct, an inquiry should be made as to whether the voter was properly instructed by a poll worker as to how to vote in the correct precinct. (Although the undersigned organizations have challenged this “precinct-specific” rule and continue to believe that it is against public policy, we do not raise that issue here.) According to Secretary of State Blackwell, as quoted in the Court’s opinion in *Sandusky County Democratic Party v. Blackwell*, 386 F. 3d 315 (6th Cir. 2004), “No voter should be turned away from the polling place without being given an opportunity to cast a vote; however, all efforts should be made to direct the voter to the proper precinct, . . . , in order for his or her vote to be counted.” 2004 U.S. Dist. LEXIS 20928 at 15. (See also, *Hawkins v. Blunt*, where an analogous Missouri procedure was upheld on the express condition that “ . . . if the election official can determine the voter’s correct polling place, the voter *will be directed* [emphasis added] to the correct polling place. . . .” 2004 U.S. Dist. LEXIS 21512 at 30) It has been reported anecdotally that such guidance to voters was not given consistently, and that, in fact, some were misled into believing that their provisional ballots would be counted irrespective of the polling place. In the absence of the poll worker’s sworn affidavit that the voter was directed to the proper precinct, the provisional ballot should be counted for all electoral contests in the voter’s actual precinct, regardless of where it was cast.

Voter Registration Issues

In all cases where a provisional ballot was cast because the voter was not found on the rolls at all, the county must conduct research to determine whether he *attempted* to register to vote and on what ground he was rejected. The original registration forms (which are the official records of the Board of Elections: Ohio Revised Code § 3503.13(A)), as well as computerized records, must be scrutinized to determine eligibility. The following scenarios are frequently recurring grounds on which registration applications were rejected. This is not an exhaustive list, and all rejected forms submitted by provisional voters must be examined to ascertain whether they were wrongly rejected.

b. Where the voter’s registration form was rejected on the ground that it was completed in pencil rather than pen, the provisional ballot should be counted. There is no requirement in Ohio law, nor have we found any Directive from the Secretary of State, that the form be completed in pen, and the counties’ imposition of this requirement is arbitrary and detrimental to the right to vote.

c. Where the voter’s registration form was rejected because it was on paper of the wrong weight, the provisional ballot should be counted. The original rule regarding paper weight was superseded by Directive 2004-06. All rejected registrations of this type should have been reversed automatically when the Directive was issued, and the voter should not have been required to vote provisionally. However, any oversights should be immediately remedied.

d. Where the form was rejected because of the registrant’s failure to check the “citizenship box,” or the “age box,” those requirements were also superseded by Directive 2004-31. Those “incomplete” forms should have been deemed complete and the voters permitted to vote by regular ballot. To the extent that this did not happen automatically, any errors should now be corrected and the voter’s provisional ballot counted.

e. Where there is no record that the county has received a registration application from the voter, the Election Board should ascertain whether any forms were returned to the voter or otherwise discarded, without a record being kept of these forms. If so, the voter should be given an opportunity to submit a sworn declaration to the effect that he or she submitted a registration application before the registration deadline. If the voter is otherwise eligible to register and vote, the provisional ballot should be counted.

f. Where the voter cast a provisional ballot because his registration form did not include HAVA-required identification and he therefore was not on the voter roll, the poll worker was required to inform him of his opportunity to provide identification any time prior to the poll closing on November 2nd. In the absence of the poll worker's affidavit that the voter was notified of this opportunity, the provisional ballot should be counted

g. Where the registration form had an insufficient address and was therefore deemed incomplete, the county should attempt to verify the address before any provisional ballot is rejected. A voter who comes to the polling place to vote and attempts to clarify any discrepancies in his registration is entitled to a process reasonably designed to make that vote count.

III. Conclusion

It is essential that the 88 counties of Ohio take the opportunity afforded by a recount to examine carefully each ballot cast and give every favorable inference to the voter. Because of the unprecedented number of new voters and the unusually high voter turnout this year, the election system was stressed and overburdened. It is inevitable that some voters were given short shrift. Now is the time to redress these inequities. The Supreme Court has emphasized that "any unjustified discrimination" in determining who may vote "undermines the legitimacy of representative government" and violates the Constitution. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969). As this country has clearly witnessed in recent years, it is not merely "who may vote" that is at issue. The right to vote includes the right to have that vote counted, and the state's commitment to a full examination of each voter's claim is what our democracy demands. The citizens of Ohio should accept nothing less.

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