

Case No. 10-4481

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

TRACIE HUNTER, Committee to Elect Tracie M. Hunter for Judge,

Plaintiff-Appellee,

**NORTHEASTERN OHIO COALITION FOR THE HOMELESS;
OHIO DEMOCRATIC PARTY,**

Intervenors-Appellees,

v.

HAMILTON COUNTY BOARD OF ELECTIONS, et al.,

Defendants

and

JOHN WILLIAMS,

Intervenor-Appellant

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

**BRIEF OF INTERVENORS-APPELLEES
NORTHEAST OHIO COALITION FOR THE HOMELESS
AND OHIO DEMOCRATIC PARTY**

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6 Cir. R. 26.1, Intervenor-Appellee Northeast Ohio Coalition For The Homeless makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**
2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? **NO**

/s/ Caroline H. Gentry
Signature of Counsel

December 21, 2010
Date

Pursuant to 6 Cir. R. 26.1, Intervenor-Appellee Ohio Democratic Party makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**
2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? **NO**

/s/ Donald J. McTigue
Signature of Counsel

December 21, 2010
Date

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to 6 Cir. R. 34(a), Intervenors-Appellees request oral argument of this case due to the important nature of the issues raised herein.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the District Court acted within its sound discretion when it ordered Defendants to investigate whether 849 provisional ballots cast in the correct polling location but wrong precinct were improperly cast because of poll worker error, and so should be counted.
2. Whether the District Court acted within its sound discretion when it found that Plaintiff-Appellee has demonstrated a likelihood of success on her claim under the Equal Protection Clause.

STATEMENT OF THE CASE

This case arises in the context of an extremely close race for Hamilton County Juvenile Court Judge. After Defendant-Appellee Hamilton County Board of Elections (“Board”) counted certain provisional ballots, the Republican candidate, Intervenor-Appellant John Williams, had a slim 23-vote lead over his Democratic opponent, Plaintiff-Appellee Tracie Hunter. The issue in this case is whether Defendant Board should be required to determine whether the provisional ballots it rejected were deficient because of poll worker error and, if so, to count them.

Plaintiff-Appellee argues that such an examination is required by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. She argues that Defendant Board violated those provisions when it rejected 849 provisional ballots cast in the “wrong precinct” (as well as other provisional ballots that lack a printed name or signature) without determining whether the voter’s error was attributable to poll worker error, but counted other provisional ballots where the voter’s error was attributable to poll worker error—including 26 “wrong precinct” ballots cast at the Board’s offices. She further argues that Defendant Board failed to follow Secretary of State Directive 2010-74 by failing to examine and investigate these ballots for poll worker error.

On November 21, 2010, Plaintiff-Appellee filed suit in the District Court against Defendant Board and Board members Alex Triantafilou, Timothy Burke, Caleb Faux and Charles “Chip” Gerhardt, III. Plaintiff-Appellee asserted a single claim under 42 U.S.C. § 1983 for violation of her rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution.

The next day, Intervenors-Appellees Northeast Ohio Coalition for the Homeless (“NEOCH”) and Ohio Democratic Party (“ODP”) filed a motion to intervene based on their substantial legal interest in monitoring, interpreting and enforcing the provisions of a Consent Decree entered on April 19, 2010 in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-cv-896 (S.D. Ohio) (Marbley, J.), which provides the basis for Directive 2010-74. (R. No. 8). The District Court granted the motion to intervene. (R. No. 12).

The District Court granted Plaintiff-Appellee’s Motion for Temporary Restraining Order and Preliminary Injunction (R. No. 2) and ordered the Board to “immediately begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error.” (R. No. 13). This matter comes before this Court on Intervenor-Appellant Williams’ appeal from the District Court’s Order granting the preliminary injunction.

STATEMENT OF THE FACTS

The operative facts come largely from the transcript of Defendant Board's November 16, 2010 meeting. Those facts must, however, be viewed in the context of the legal framework that applies to the disputed provisional ballots. Therefore, this recitation will begin with the applicable law and then turn to that meeting.

A. Ohio Statutory Law Regarding "Wrong Precinct" Ballots.

R.C. Section 3505.181 governs the casting of provisional ballots. Section 3505.181(A) lists thirteen categories of voters who "shall be permitted to cast a provisional ballot at an election." R.C. Section 3505.181(A)(1) grants a right to cast a provisional ballot to voters who are registered in the precinct but are not in the poll book or appear to be ineligible to vote. R.C. Section 3505.181(B) sets forth the procedures for casting a provisional ballot and applies to any "individual who is eligible to cast a provisional ballot under division (A) of this section."

R.C. Sections 3505.181(C)(2)(a) and 3505.183(B)(4)(a)(ii) provide that provisional ballots cast in an incorrect precinct shall not be counted. But these sections do not necessarily apply to every provisional voter who is determined by election officials to be registered in another precinct. Instead a separate part of R.C. Section 3505.181 applies to such voters. R.C. Section 3505.181(C) states that these "wrong precinct" voters shall only be permitted to cast a provisional ballot in the wrong precinct *if* the voter refuses to travel to the correct precinct after the

election official has directed him to the correct precinct and explained that a vote cast in the wrong precinct will not count:

(C)(1) If an individual declares that the individual is eligible to vote in a jurisdiction¹ other than the jurisdiction in which the individual desires to vote, or if, upon review of the precinct voting location guide² 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....

Thus, Ohio law places special duties on poll workers who are confronted with a voter who either states that he is registered in another precinct or appears,

¹ “Jurisdiction” means the precinct in which a person is a legally qualified elector. R.C. § 3505.181(E)(1).

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.” R.C. § 3505.181(E)(2).

based on the precinct guide, to be in the wrong precinct. The poll worker shall only allow such a voter to cast a provisional ballot if he refuses to travel to his correct precinct or the Board of Elections after the poll worker has (1) directed him to the correct precinct, (2) advised him that his provisional ballot will not count if it is cast in that precinct, and (3) given him the telephone number of the Board of Elections. R.C. § 3505.181(C)(1) & (2).

The statute provides that provisional ballots cast in the wrong precinct shall not be counted. R.C. §§ 3505.181(C)(2) & 3505.183(B)(4)(a)(ii). The Ohio Election Code does not address what should happen if a provisional voter casts a provisional ballot in the wrong precinct after the poll worker has either failed to fulfill his or her statutory duties of directing the voter to his correct precinct and/or advising him that his provisional ballot would not count, in violation of R.C. Section 3505.181(C), and/or has given a provisional ballot to a voter registered in another precinct who has not refused to travel to the correct precinct or the office of the Board of Elections to vote.

B. Ohio Statutory Law Regarding Incomplete Affirmations.

Some of the provisional ballots at issue in this case were rejected because the voter failed to sign the affirmation or print his or her full name. R.C. Section 3501.181(B)(2) provides that the provisional voter “shall be permitted to cast a provisional ballot ... upon the execution of a written affirmation by the individual

before an election official” An example of that affirmation is in the Hamilton County Poll Worker Comprehensive Manual. (R. No. 20-5 at 8). The manual states that the voter must fill out the form, “must print” his name on line 1 and “must sign” on the front at the bottom. (*Id.* at 9). The provisional judge then must sign as a witness directly under the line where the voter has signed. (*Id.* at 8-9). Only then does the poll worker issue a provisional ballot to the voter. (*Id.* at 10).

Thus, it is readily apparent that a poll worker should not give a voter a provisional ballot until the voter completes the affirmation statement, including by printing and signing his name. The failure to comply with these requirements constitutes poll worker error.

C. The Ohio Supreme Court’s Decision In *State ex rel. Skaggs v. Brunner*.

The Ohio Supreme Court did not address the wrong precinct issue in *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 2008-Ohio-6333. But it did suggest that evidence of poll worker error might be considered when determining whether to count provisional ballots.

The Court addressed a category of provisional ballots that had printed names but no signatures. *Id.*, ¶¶ 36-55. The relevant statute required provisional ballots to be signed unless the voter declined to execute the affirmation. *Id.*, ¶¶ 36-41. The poll worker is statutorily required to record such declinations. *Id.*, ¶ 43. Secretary Brunner ordered that all such ballots be counted because it was possible that the

voter declined to execute the affirmation but the poll worker erroneously failed to record the declination, as required by law. *Id.*

The Ohio Supreme Court reversed, holding that it would not presume poll worker error. *Id.*, ¶ 46. But the Court also suggested that poll worker error *could* provide a basis for counting these ballots if there were evidence of such error:

If we were presented with evidence that the election officials had [not] performed any of their statutorily required actions or evidence that they had affirmatively failed to do so because they were improperly trained or improperly instructed regarding their duties in these circumstances, *we may have been persuaded that declinations could be presumed.* *Id.*, ¶ 53 (emphasis added).³

D. The Consent Decree and Secretary Of State Directive 2010-74.

On April 19, 2010, the United States District Court for the Southern District of Ohio entered a Consent Decree in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-cv-896 (S.D. Ohio) (Marbley, J.) (“Decree”). (R. No. 8-1). Because the Decree provides the basis for Secretary of State Directive 2010-74, its provisions will be briefly described here.

The *NEOCH* plaintiffs include Intervenors-Appellees ODP and NEOCH. (R. No. 8-1 at 1). They asserted claims under the Equal Protection and Due

³ *Accord State of Ohio ex rel. Skaggs v. Brunner*, ___ F.3d ___, 2010 WL 5110213, at *1 (6th Cir. Dec. 16, 2010) (noting that one of the legal issues was whether Ohio provisional ballots lacking a name and/or signature “should ... be counted because Ohio law has an exemption for mistakes allegedly attributable to poll workers.”).

Process Clauses of the Fourteenth Amendment to the United States Constitution.

(*Id.*) The defendants are the Secretary of State and the State of Ohio. (*Id.* at 1).

The Decree is “binding upon the Defendants and their employees, agents and representatives.” (*Id.* at 3). Defendants-Appellees are representatives of the Secretary of State and, therefore, are bound by the Decree. R.C. § 3501.06.

The purposes of the Decree are to ensure that registered and qualified voters who lack the identification necessary to cast a regular ballot, including indigent and homeless voters: (1) will have their votes counted even if they cast provisional ballots, (2) will not be deprived of their fundamental right to vote by differing interpretations of Ohio’s provisional ballot laws by Ohio’s 88 Boards of Elections, and (3) “will not be deprived of their fundamental right to vote because of failures by poll workers to follow Ohio law.” (R. No. 8-1 at 2).

On the latter point, the Decree provides, in relevant part:

b. Boards of Elections may not reject a provisional ballot cast by a voter, who uses only the last four digits of his or her social security number as identification, for any of the following reasons:

v. The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error.

vi. The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll worker error. (R. No. 8-1 at 4).

In Directive 2010-74, Secretary of State Brunner reiterated these provisions of the Decree and addressed specific types of poll worker error, including unsigned provisional ballot affirmations and provisional ballots cast in the wrong precinct:

A. One example of the type of poll worker error contemplated under the *NEOCH* consent decree occurs when a voter fails to sign the provisional ballot affirmation statement portion of SOS Form 12-B, but the poll worker completes and signs the verification statement portion of SOS Form 12-B indicating that the voter **has** completed the affirmation and without indicating that the voter declined to complete the affirmation. If this occurs, the board of elections should, either in writing, with written response from the poll worker, or at a public meeting of the board, question the poll workers in that precinct to determine whether they followed the board's instructions for completing the verification statement, both as to the specific ballot in question and in general on Election Day. Where a poll worker's response indicates that he or she did not properly complete the verification statement, that response and the completed poll worker verification statement provide objective evidence that the poll worker did not ensure that the voter had completed the affirmation before the poll worker filled out the verification statement portion of SOS Form 12-B.

B. Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker's duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. Similarly, if a board of elections finds multiple provisional ballots voted in the correct polling location

but wrong precinct, it should, either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct.

(R. No. 1-2 at 11-12) (emphasis in original).

E. Defendant Board Counted Five Categories Of Provisional Ballots That Were Deficient Because Of Poll Worker Error.

At the November 16, 2010 meeting, Defendants-Appellees unanimously voted to count *five categories* of provisional ballots that were technically deficient after concluding that the deficiencies were caused by poll worker error:

- Defendant Board counted 686 provisional ballots (P-8257 thru P-8942) that were deficient because the poll worker had noted on the envelope that further information was required and no information was provided, after concluding that the poll workers erred because valid identifications were provided. (R. No. 1-3 at 23-33).
- Defendant Board counted 27 provisional ballots (P-10222 thru P-10248) that were deficient because they were cast in the wrong

precinct during early voting at the Board office, after concluding that poll workers erroneously provided the wrong ballots. (*Id.* at 40-45).⁴

- Defendant Board counted one provisional ballot (P-10309) that was deficient because the affirmation had only a partial name, after concluding that the poll worker wrongly required a voter who moved within the same precinct to cast a provisional ballot. (*Id.* at 57-58).
- Defendant Board counted one provisional ballot (P-10310) that was deficient because there was no printed name in the affirmation, after concluding that the poll worker wrongly required the voter to cast a provisional ballot due to lack of identification where the envelope contained a driver's license number. (*Id.* at 58-61).
- Defendant Board counted 11 provisional ballots (P-10364 thru P-10374) that were deficient because the voter did not sign them, after concluding that the poll workers wrongly required those voters to cast provisional ballots. (*Id.* at 71-72).

⁴ Defendant Board did not make any finding that the voters who cast these 27 provisional ballots used their Social Security number as a means of identification, as would be necessary to find that the limited exception contained in the Decree required these ballots to be counted.

F. Defendant Board Rejected Four Categories Of Provisional Ballots Without Considering Whether They Were Deficient Because Of Poll Worker Error.

At the same meeting, Defendants-Appellees voted to reject four categories of provisional ballots that were technically deficient without considering whether the deficiencies were caused by poll worker error. Notably, *all* of these categories fell within the provisions of the Decree and Directive 2010-74, which required Defendant Board to count ballots cast using a Social Security number if there was evidence of poll worker error:

- Defendant Board unanimously rejected 851 provisional ballots (P-9382 thru P-10221, P-10495, P-10497, P-10500, P-10502, P-10504, P-10506, P-10508, P-10510, P-10512 & P-10516) that were deficient because they were cast in the wrong precinct, including some cast in the correct polling location, without considering whether they were deficient because of poll worker error or whether they should be counted under Directive 2010-74. (R. No. 1-3 at 34-40).⁵

⁵ Although Board staff informed the Board members that this group of 851 provisional ballots did *not* include wrong precinct ballots cast by voters at the correct polling place using their Social Security number (which are governed by the Decree), and further stated that they would “be taking those up” later (R. No. 1-3 at 35), no such ballots were considered during the meeting. Moreover, Board Operations Administrator Poland subsequently testified that this group of provisional ballots *did* include provisional ballots cast at the correct polling place using Social Security numbers, and that no poll worker error was found. (R. No. 18 at 98-101).

- Defendant Board unanimously rejected 53 provisional ballots (P-10249 thru P-10300 & P-10312) that were deficient because there was no printed name in the affirmation, without considering whether they were deficient because of poll worker error or whether they should be counted under Directive 2010-74. (*Id.* at 49-50 & 62-63).
- By a 3-1 vote, Defendant Board rejected 9 provisional ballots (P-10301 thru P-10308 & P-10311) that were deficient because the affirmation had only a partial name, without considering whether they were deficient because of poll worker error or whether they should be counted under Directive 2010-74. (*Id.* at 50-57 & 61-62).
- Defendant Board unanimously rejected 74 provisional ballots (P-10319 thru P-10383 & P-10375 thru P-10383) that were deficient because the voter did not sign them, without considering whether they were deficient because of poll worker error or whether they should be counted under Directive 2010-74. (*Id.* at 69-72).

G. Board Operations Administrator Poland And Board Member Burke Testified About Their Handling Of Certain Categories Of Provisional Ballots.

1. The 851 “wrong precinct” ballots.

With regard to the 851 “wrong precinct” ballots, Operations Administrator Poland testified that the staff first segregated the subset of ballots that used a Social

Security number and then identified which of those ballots were cast in the correct polling location. (R. No. 18 at 90-92). For those ballots, the staff looked for poll worker error by reviewing the provisional ballot envelopes and the notes pages of the signature poll books. (*Id.* at 92-93). The staff found no evidence of poll worker error. (*Id.* at 97, 100-01).

Board staff also looked for poll worker error on the remaining ballots in this group of ballots but only examined the provisional ballot envelopes. (R. No. 18 at 93). Administrator Poland testified that none of these ballots had poll worker error that was demonstrated on the envelope. (*Id.* at 115).

Administrator Poland did not direct her staff to contact poll workers and does not know if anyone did so. (R. No. 18 at 103). She opined that she does not interpret Directive 2010-74 as requiring the staff to contact poll workers to determine whether there was error, since it uses the term “should” rather than “shall.” (*Id.* at 109-10). However, she did not make the decision not to contact poll workers and does not know why the Directive was not followed. (*Id.* at 117). She does not know whether anyone on her staff looked to see whether multiple “wrong precinct” votes were cast in any particular precinct. (*Id.* at 105).

Defendant-Appellee and Board Member Burke also testified about this category of ballots. (R. No. 18 at 119-33). He identified three precincts where multiple “wrong precinct” provisional ballots had been cast. (*Id.* at 126-27). He

admitted that the Board “probably should have” contacted poll workers in those precincts if one or more voters had used a Social Security number as identification, but explained that the Board did not know about the multiple “wrong precinct” provisional ballots when they voted on this category. (*Id.* at 130).

2. The 27 “wrong precinct” ballots.

With regard to the 27 “wrong precinct” ballots, Administrator Poland stated that voters from all 680 precincts can vote early at the Board of Elections and that voters are wholly dependent upon the poll worker to provide them with the correct ballot. (R. No. 18 at 96-97). She testified that these ballots were cast in the wrong precinct as a result of demonstrated poll worker error. (*Id.* at 97).

H. The District Court Found That Plaintiff-Appellee Demonstrated A Likelihood Of Success On Her Equal Protection Claim Because Of The Board’s Disparate Treatment Of Provisional Ballots.

The District Court issued its Order after finding that Plaintiff-Appellee had demonstrated that Defendant Board “does not treat all provisional ballots cast in the wrong precinct equally.” (R. No. 13 at 5). The District Court concluded that the Board “has—without any specific statutory mandate—carved out situations in which it *will* count provisional ballots cast in the wrong precinct.” (*Id.* at 7) (emphasis in original). As summarized by this Court, “[t]his disparate treatment—counting the 26 wrong precinct ballots based on poll-worker error during early voting without similarly investigating whether poll-worker error led to any of the

849 ballots being cast in the wrong precinct on election day—forms the basis for the injunctive order in this case.” (R. No. 19 at 3).

SUMMARY OF ARGUMENT

The District Court's Order granting Plaintiff-Appellee's motion for a preliminary injunction should be affirmed because the Court properly concluded that she demonstrated a likelihood of success on her Equal Protection claim. The evidence shows that Defendant Board failed to comply with its obligation under the Equal Protection Clause to treat provisional voters equally. Specifically, Defendant Board counted certain provisional ballots after concluding that they were deficient because of poll worker error, but rejected other provisional ballots without similarly considering whether they were deficient because of poll worker error. This arbitrary and disparate treatment of provisional ballots that were cast by registered and qualified Ohio voters violated the Equal Protection Clause.

The arguments raised by Intervenor-Appellant Williams are not well-taken. The District Court has jurisdiction over Plaintiff-Appellee's sole federal claim and abstention is neither required nor appropriate. Also, Defendant Board did not comply with Ohio law governing the counting of "wrong precinct" provisional ballots. Specifically, Defendant Board did not comply with Directive 2010-74 which implements the *NEOCH* Consent Decree.

The arguments raised by the Ohio Republican Party are similarly not well-taken. Ohio law does not prohibit Defendant Board from counting provisional ballots cast in the wrong precinct due to poll worker error, as demonstrated by the

Ohio Supreme Court's statement in *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 2008-Ohio-6333, ¶ 53. A long line of United States Supreme Court decisions not only supports the District Court's interpretation of the Equal Protection Clause, but also shows that election cases do not require a showing of intentional discrimination. Finally, the District Court's Order cures, and does not create, a demonstrated violation of the Equal Protection Clause.

Accordingly, the District Court's Order should be affirmed.

ARGUMENT

I. The District Court Correctly Concluded That Plaintiff Demonstrated A Likelihood Of Success On Her Equal Protection Claim.

A. Standard of Review.

The decision of whether to grant a motion for a preliminary injunction “is left to the sound discretion of the district court.” *Déjà Vu of Cincinnati, LLC v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 782 (6th Cir. 2005). A district court abuses its discretion “when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact.” *Id.* (internal quotations and citations omitted).

The governing legal standard requires the district court to consider the following factors when deciding whether to grant a preliminary injunction: “(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits, (2) whether there is a threat of irreparable harm to the plaintiff, (3) whether issuance of the injunction would cause substantial harm to others, and (4) whether the public interest would be served by granting injunctive relief.” *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 888 (6th Cir. 2000).

B. The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution Requires Defendant Board To Treat All Voters Equally, Including Provisional Voters.

A long line of United States Supreme Court cases, the most recent of which is *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000), has repeatedly held that the

Equal Protection Clause requires every state to treat its voters equally, and has struck down state laws that violated that constitutional right. A review of some of these cases demonstrates the breadth and enduring nature of this protection.

In *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963), the Supreme Court held that the district court properly enjoined a statewide primary election system that weighted votes cast in rural counties more heavily than votes cast in urban counties. Justice Douglas explained that the Equal Protection Clause required this result:

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of “we the people” under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State ... underlies many of our decisions.... Every voter’s vote is entitled to be counted once. It must be correctly counted and reported.... [O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.

Gray, 372 U.S. at 379-881.

In *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 86 S. Ct. 1079 (1966), the Supreme Court held that Virginia’s poll tax violated the Equal Protection Clause:

[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.... We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.

Harper, 383 U.S. at 665-66.

In *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), the Supreme Court affirmed the injunction of Ohio election laws that had the effect of making it virtually impossible for a third political party to place its candidates on the ballot:

[N]o State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall ... deny to any person ... the equal protection of the laws.'... [H]ere the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is invidious discrimination, in violation of the Equal Protection Clause.

Williams, 393 U.S. at 29, 34.

In *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969), the Supreme Court held that a state law that allowed only certain voters to vote on school issues (i.e., property owners and parents of schoolchildren) violated the Equal Protection Clause:

Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626-27.

In *Evans v. Cornman*, 398 U.S. 419, 90 S. Ct. 1752 (1970), the Supreme Court affirmed an order enjoining enforcement of a Maryland voter residency law that excluded individuals living on the grounds of a federal enclave, the National Institutes of Health:

Appellants argue that even if appellees are residents of Maryland, the State may constitutionally structure its election laws so as to deny them the right to vote. This Court has, of course, recognized that the States ‘have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.’ At the same time, however, there can be no doubt at this date that ‘once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.’

Evans, 398 U.S. at 422 (citations omitted).

In *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849 (1972), the Supreme Court affirmed an injunction of a state’s primary election filing fee system that required candidates to pay substantial fees as a condition of running for election:

Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment.... [T]here is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system.... This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.

Bullock, 405 U.S. 134, 140-41, 144 92 S. Ct. 849 (1972).

In *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972), the Supreme Court affirmed the injunction of a state law requiring voters to reside in the state for one year and in the county for three months as a condition to voting:

Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of ‘a fundamental political right, ... preservative of all rights.’ There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right

to participate in elections on an equal basis with other citizens in the jurisdiction.

Dunn, 405 U.S. at 336.

Most recently in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000), the Supreme Court reversed a *state* court's decision ordering a recount on the grounds that its decision had violated the Equal Protection Clause by failing to identify and require uniform standards for accepting or rejecting the contested ballots:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another....

Florida's basic command for the count of legally cast votes is to consider the 'intent of the voter.'... The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.... The want of those rules here has led to unequal evaluation of ballots in various respects.... An early case in our one person, one vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties.... The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

Bush, 531 U.S. at 104-08.⁶

⁶ Although the ORP argues that *Bush v. Gore* is not relevant to this election case, this Court has previously held that *Bush v. Gore* is applicable to unequal voting procedures including, among other things, the improper utilization of provisional (continued...)

This long line of cases—only some of which are excerpted here—shows beyond a doubt that the Equal Protection Clause protects the fundamental right to vote in a wide variety of circumstances and demands that all voters be treated equally, with respect to both the casting *and the counting* of ballots. It is in the context of this jurisprudence that the District Court’s Order should be evaluated.

C. The District Court Correctly Found That Defendant Board Failed To Treat The 849 “Wrong Precinct” Provisional Voters And The 26 “Wrong Precinct” Provisional Voters Equally.

The District Court’s Order is supported by the foregoing case law and the uncontroverted evidence presented by motion and at the hearing. It is undisputed that Defendant Board unanimously voted to count 27 ballots that were cast in the wrong precinct at the Board of Elections because the poll worker must have erred by giving them the wrong ballot. Defendant Board did not inquire whether some or all of these ballots were cast using a Social Security number as identification, as would be required to apply the limited exception set forth in Directive 2010-74. Instead, Defendant Board understandably and reasonably concluded that voters should not be penalized by poll workers’ mistakes and voted to count all of these ballots because of demonstrated poll worker error.

ballots. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008).

Defendant Board did not use this same approach when it unanimously voted to reject 851 “wrong precinct” ballots that were cast in various polling locations on Election Day. There was no consideration given to counting these ballots because of poll worker error. Although Defendant-Appellee and Board Member Faux did ask how many ballots were cast in the wrong precinct but correct polling location and suggest that poll worker error was the cause, the Board declined to entertain the issue. (R. No. 1-3 at 35-39). Operations Administrator Poland said she did not know how many of these “wrong precinct” ballots were cast in the correct polling location because “[i]t doesn’t go to the eligibility of counting ballots.” (*Id.* at 36). Defendant Board then voted to reject these ballots without inquiring whether they should be counted because of poll worker error. (*Id.* at 39).

These facts clearly illustrate the different approaches taken by Defendant Board. In the case of the 27 “wrong precinct” ballots, where poll worker error was obvious, it voted to count all of the ballots even though neither Directive 2010-74 nor any other provision of Ohio law mandated that it do so. In the case of the 851 “wrong precinct” ballots, where poll worker error was not obvious—but instead would require some investigation—it voted to reject all of the ballots without considering whether there was poll worker error. The District Court correctly concluded that Plaintiff-Appellee demonstrated a likelihood of success on her

claim that Defendant Board's disparate treatment of "wrong precinct" provisional ballots violated the Equal Protection Clause.

D. The District Court's Order Is Also Supported By Evidence Of Defendant Board's Unequal Treatment Of Other Categories Of Provisional Ballots Implicating Poll Worker Error.

The District Court reached its decision based on a comparison of Defendant Board's treatment of these two categories of "wrong precinct" provisional ballots. The District Court could have reached the same result by considering all of the above-described provisional ballots categories—five that it counted, and four that it rejected—and finding that Defendant Board unequally applied its policy of counting provisional ballots that are deficient because of poll worker error.⁷

The facts are straightforward. As shown above, Defendant Board counted five categories of provisional ballots that were technically deficient *where it was obvious* that there had been poll worker error. It counted: (1) 686 provisional ballots that were deficient because the poll worker noted on the envelope that further information was required and no such information was provided, since the envelopes also showed that valid identifications had been provided; (2) 27 provisional ballots that were deficient because they were cast in the wrong precinct during early voting at the Board office, since poll workers must have erroneously

⁷ 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.").

provided the wrong ballots; (3) one provisional ballot that was deficient because the affirmation had only a partial name, since the poll worker wrongly required the voter who had moved within the same precinct to cast a provisional ballot; (4) one provisional ballot that was deficient because there was no printed name in the affirmation, since the poll worker wrongly required the voter to cast a provisional ballot due to lack of identification where the envelope contained a driver's license number; and (5) 11 provisional ballots that were deficient because the voters did not sign them, since the poll workers wrongly required them to cast provisional ballots. For all of these provisional ballots, Defendant Board applied a policy of counting them even though they were legally deficient because it was obvious that there had been poll worker error.

Where poll worker error was not obvious, though, Defendant Board declined to count the exact same types of ballots. It rejected the following four categories of similarly deficient provisional ballots without considering whether they should be counted because of poll worker error: (1) 851 provisional ballots that were deficient because they were cast in the wrong precinct, including some cast in the correct polling location; (2) 53 provisional ballots that were deficient because there was no printed name in the affirmation; (3) 9 provisional ballots that were deficient because the affirmation had only a partial name; and (4) 74 provisional ballots that

were deficient because the voter did not sign them.⁸ This disparate treatment is especially startling because the same deficiencies appeared in the provisional ballots that were counted (where poll worker error was obvious) and those that were rejected (where poll worker error was not obvious, but instead would require investigation), i.e., wrong precinct, failure to sign, partial name and lack of name.

The fact that Defendant Board's staff apparently conducted a limited investigation of the 851 ballots does not cure the violation. Defendant Board was completely unaware of the existence, nature, extent or results of that investigation when it voted to reject these ballots. And the investigation itself was so limited as to be insufficient, as shown by the fact that the staff did not even know how many "wrong precinct" ballots were cast in the correct polling location, or whether one or more precincts had multiple "wrong precinct" ballots cast in them.⁹

Accordingly, the District Court's Order should be affirmed not only because of the evidence cited in the Order (i.e., the disparate treatment of the 27 "wrong precinct" ballots and the 851 "wrong precinct" ballots), but also because Defendant Board's disparate treatment of these nine categories of provisional ballots shows

⁸ Astonishingly, Defendant Board rejected all of these ballots without considering whether there was evidence of poll worker error *even though* Directive 2010-74 required it to investigate whether it should count a subset of provisional ballots cast using Social Security numbers that were deficient because of poll worker error.

⁹ Directive 2010-74 instructs Boards of Elections to question poll workers if multiple "wrong precinct" ballots are cast in a single precinct. (R. No. 1-2 at 12).

that it violated the Equal Protection Clause by counting deficient provisional ballots where poll worker error was obvious, and rejecting similarly deficient provisional ballots without considering whether there was poll worker error.

II. Intervenor-Appellant's Arguments Are Not Well-Taken.

A. The District Court Has Subject-Matter Jurisdiction Over Plaintiff-Appellee's Claims.

Intervenor-Appellant argues that the District Court lacked jurisdiction over Plaintiff-Appellee's claims—which were brought solely under 42 U.S.C. Section 1983 and the Equal Protection and Due Process Clauses of the United States Constitution—because only states have the power to determine which provisional ballots should be counted. This argument flies in the face of well-settled law.

“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear.” *Reynolds v. Sims*, 377 U.S. 533, 554-55, 84 S. Ct. 1362 (1964) (collecting cases). “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Id.*, 377 U.S. at 562.

It is well-settled that cases involving alleged violations of the constitutional right to vote are justiciable. *Baker v. Carr*, 369 U.S. 186, 207-26, 82 S. Ct. 691

(1962); *Wesberry v. Sanders*, 376 U.S. 1, 6-7, 84 S. Ct. 526 (1964). “These cases do raise a justiciable controversy under the Constitution and cannot be relegated to the political arena.” *Williams v. Rhodes*, 393 U.S. 23, 28, 89 S. Ct. 5 (1968).

The fact that states have the power to regulate elections does not insulate them from constitutional challenges. “[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.” *Williams*, 393 U.S. at 29. Indeed, federal courts have a duty to protect the constitutional right to vote even though elections are regulated by state law:

[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in *Gomillion v. Lightfoot*, supra: ‘When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.’

Reynolds, 377 U.S. at 566 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

Intervenor-Appellant attempts to sidestep this well-settled law by arguing that this case presents only a “garden variety election irregularity” that does not warrant the Court’s intervention. Not only is this argument limited to the Due Process Claim—which was not the basis for the Order challenged here—but it does not defeat the existence of subject-matter jurisdiction. Whether the Court

elects to exercise its jurisdiction in a particular case is separate from the issue of whether Plaintiff-Appellee seeks to vindicate rights secured by the United States Constitution. Moreover, by statute, the District Court unquestionably has jurisdiction over her claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See* 28 U.S.C. § 1343(a)(3).

Finally, Intervenor-Appellant suggests that Plaintiff-Appellee's allegations do not rise to the level of arbitrary treatment that would constitute a violation of the Equal Protection Clause. This argument is not only belied by the District Court's Order, which found a likelihood of success on that claim, but also is properly raised in the context of a 12(b)(6) motion to dismiss rather than an attack on the Court's subject-matter jurisdiction.

B. *Pullman* Abstention Is Neither Required Nor Appropriate.

In *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941), the Supreme Court held that federal courts should abstain "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S. Ct. 2321 (1984). *Pullman* abstention will only apply if the state statute is both ambiguous and "obviously susceptible of a limiting construction" that "will render unnecessary adjudication of the federal constitutional question." *Id.* at 236-37 (internal quotations and citation omitted).

The *Pullman* abstention doctrine is inapplicable here. Plaintiff-Appellee has not asserted any state-law claim or challenged the constitutionality of any state statute. There is no unsettled state-law question that the District Court could remand to a state court. *Anderson v. Charter Twp. Of Ypsilanti*, 266 F.3d 487, 491 (6th Cir. 2001). Also, Intervenor-Appellant has not shown that an ambiguous state law is “obviously susceptible to a limiting construction” that would moot Plaintiff-Appellee’s constitutional claims—claims that would be stayed, not dismissed, with the expectation that they would resume if Plaintiff-Appellee were unable to obtain relief in state court on state-law grounds. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10, 103 S. Ct. 927 (1983). Mere speculation of a possible state court resolution does not justify *Pullman* abstention. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 481, 97 S. Ct. 1898 (1977).

Nor would it be appropriate to abstain from ruling on Plaintiff-Appellee’s constitutional claims. The Supreme Court has emphasized that federal courts have a duty to exercise jurisdiction over Equal Protection claims implicating the fundamental right to vote. *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S. Ct. 1362 (1964). “A federal court owes no duty to abstain in deference to a state court when a federal constitutional question is at issue.” *Assoc. General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 740 (6th Cir. 2000).

C. Defendant Board Did Not Comply With Ohio Law Governing “Wrong Precinct” Provisional Ballots.

Intervenor-Appellant’s argument that Defendant Board complied with Ohio law governing “wrong precinct” provisional ballots is incorrect. When it rejected the above-described four categories of deficient provisional ballots—including the 851 “wrong precinct” ballots—Defendant Board did not identify how many of them contained Social Security numbers and thus were covered by Directive 2010-74, which required that such ballots be counted if there was evidence of poll worker error. Nor did Defendant Board inquire whether there was evidence of poll worker error with respect to these ballots. In both respects, Defendant Board failed to comply with Directive 2010-74 and therefore failed to follow Ohio law.

Even if Defendant Board had followed Ohio law, however, that would not insulate it from Plaintiff-Appellee’s claim under the Equal Protection Clause. Her claim is based on the constitutionally infirm disparate treatment of provisional voters, not an allegation that Defendant Board violated Ohio law. Moreover, as shown above, federal courts do not hesitate to enjoin state action that infringes on the fundamental right to vote even where that action complies with state law.

III. The Ohio Republican Party’s Arguments Are Not Well-Taken.

A. Ohio Law Does Not Prohibit Boards From Counting Provisional Ballots Cast In The Wrong Precinct Due To Poll Worker Error.

The Ohio Republican Party (“ORP”) argues that Ohio law requires that “wrong precinct” provisional ballots be rejected unless the limited exception set

forth in Directive 2010-74 is applicable. To the extent that the ORP is challenging Defendant Board's decision to count the 27 "wrong precinct" ballots, its challenge should be rejected. The Ohio Supreme Court expressly left open the possibility of counting deficient provisional ballots where there was evidence of poll worker error (*State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 2008-Ohio-6333, ¶ 53) and Defendant Board properly decided to count these 27 votes *even though* it did not distinguish between those that were cast using a Social Security number (thus coming within the exception set forth in Directive 2010-74) and those that did not.

B. The Equal Protection Clause Does Not Require A Showing Of Intentional Discrimination In Election Cases.

The ORP asserts that Plaintiff-Appellee cannot succeed on her claims unless she also shows that Defendants-Appellees intentionally discriminated when they violated the Equal Protection Clause. This assertion entirely misstates the law.

The United States Supreme Court has repeatedly held that the Equal Protection Clause protects the right to vote from *invidious* discrimination. It has not required that intentional discrimination be proven as a condition precedent to enjoining state laws that infringe on the right to vote. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963) (plaintiff voter not required to show intent); *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 86 S. Ct. 1079 (1966) (plaintiff voters not required to show intent); *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) (plaintiff political parties not required to show intent); *Kramer v. Union Free Sch.*

Dist. No. 15, 395 U.S. 621, 89 S. Ct. 1886 (1969) (plaintiff voter not required to show intent); *Evans v. Cornman*, 398 U.S. 419, 90 S. Ct. 1752 (1970) (plaintiffs refused the right to register to vote not required to show intent); *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849 (1972) (plaintiff candidates not required to show intent); *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972) (plaintiff refused the right to register to vote not required to show intent); *Bush v. Gore*, 531 U.S. 98, 104-08, 121 S. Ct. 525 (2000) (plaintiff candidates not required to show intent).

Instead, courts focus on whether the discrimination is “invidious,” that is, whether it is arbitrary, irrational and unjustified by a legitimate purpose. Black’s Law Dict. 573 (6th ed. abridged 1991). Indeed, this Court recently declined to engraft an “intentional discrimination” requirement upon voting rights cases alleging a violation of the Equal Protection Clause, holding instead that the critical question is whether the state’s action arbitrarily denied the right to vote:

The Secretary and Governor argued in the district court, and before us, that the equal protection claim requires a showing of ‘intentional and purposeful discrimination.’ The League contends that the proper scienter requirement is, alternatively, knowledge, willful blindness, or deliberate indifference. We need not decide this issue, however, because the only question before us is whether the amended complaint pleads facts, if proven, sufficient to establish that the defendants arbitrarily deny Ohioans the right to vote depending on where they live. We hold that it does.

League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008)
(citations omitted).

C. The District Court's Order Does Not Create Equal Protection Problems.

Finally, the ORP argues that the District Court's Order itself violates the Equal Protection Clause because it will result in different counties applying different standards. This is incorrect. This is not a situation where a court is instructing one county to apply a one standard, and other counties to apply other standards. Instead, the District Court is requiring Defendant Board to apply *its own standard* to all deficient provisional ballots, not just those where poll worker error was obvious. The ORP's speculative assertion that Defendant Board's standard is different from those of other counties is not only wholly unsupported by any evidence¹⁰ but, if true, is not the result of any action by the District Court.

¹⁰ Contrary to the ORP's speculative assertion, the evidence will show that some other Boards of Election in fact decided to count "wrong precinct" ballots even though they did not fall within the limited exception set forth in Directive 2010-74. That evidence is not currently before the Court, however, and neither its presence nor its absence can provide any basis for its decision.

CONCLUSION

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

Respectfully submitted,

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December 21st, 2010

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I hereby certify that on December 21st, 2010, 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.

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ADDENDUM OF CITED STATUTES

3505.181 Eligibility to cast provisional ballot - procedure.

(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 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 and 3505.183 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.

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3505.183 Testing and counting of provisional ballots - rejection.

(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 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 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 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 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 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 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 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.

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