

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

**OHIO A. PHILIP RANDOLPH
INSTITUTE,
NORTHEAST OHIO COALITION FOR
THE HOMELESS, and
LARRY HARMON,**

Plaintiffs,

v.

JON HUSTED,

*in his official capacity as Ohio Secretary of
State,*

Defendant.

Case No. 2:16-cv-303

JUDGE GEORGE C. SMITH
Magistrate Judge Elizabeth Preston Deavers

**PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD
NOT ISSUE**

Plaintiffs Ohio A. Philip Randolph Institute ("APRI"), the Northeast Ohio Coalition for the Homeless ("NEOCH"), and Larry Harmon (together "Plaintiffs"), through their counsel, pursuant to Rule 65 of the Federal Rules of Civil Procedure and local civil rule 65.1, and for the reasons contained in the Memorandum of Law being submitted herewith, respectfully move this Court for an emergency temporary restraining order and preliminary injunction that ensures Ohio voters who were unlawfully removed from the registration rolls pursuant to the Supplemental Process, and are currently

eligible to vote in the state, will be able to have their votes counted in the November 2016 General Election and future elections if they appear in person to vote or vote by mail.

WHEREFORE, Plaintiffs respectfully request that this Court issue a temporary restraining order requiring that the Defendant issue instructions to the Board of Elections in each of Ohio's 88 counties ("Counties" or "Boards") requiring them to count provisional ballots cast in the 2016 General Election by voters whose registrations were cancelled pursuant to the Supplemental Process in accordance with the procedures set forth in the proposed order attached hereto. Plaintiffs further request that this Court issue an order for the Defendant to show cause why a preliminary injunction should not issue continuing the temporary restraining order, applying its procedures to any election that takes place in Ohio prior to a final judgment in this case, and prohibiting the state from cancelling the registration of any voter pursuant to the Supplemental Process or any other process triggered by a voter's failure to vote.

Because early voting for the November 8, 2016 election has already begun in Ohio and Election Day is less than four weeks away, Plaintiffs respectfully request that the Court issue the temporary restraining order no later than Friday, October 14, 2016, and that it order Defendant to show cause no later than October 17, 2016, why a preliminary injunction should not issue. Absent such relief, Plaintiffs will be subject to permanent and irreparable harm as a result of Defendant's unlawful actions, and countless Ohio voters will be at risk of being disenfranchised this November.

Given these time constraints, Plaintiffs by this motion request relief solely for purposes of the November 2016 General Election and other elections that occur prior to a

final judgment being entered in this case. Plaintiffs believe further proceedings will then be necessary to fashion an effective and administrable permanent remedy in this case to ensure that unlawfully purged voters are able to exercise their right to vote in the future and that no more Ohio voters have their registrations cancelled as a result of their failure to vote. Accordingly, Plaintiffs do not by this motion waive their right to seek any relief available under the NVRA or other applicable law after the conclusion of the November 2016 General Election, and they request that this Court set a schedule for further proceedings on permanent relief on both of Plaintiffs' causes of action.

Dated: October 13, 2016

Respectfully submitted,

Daniel P. Tokaji*
Cooperating Attorney for ACLU of
Ohio
The Ohio State University
Moritz College of Law**
55 W. 12th Ave
Columbus, OH 43210
Telephone: 310-266-0402
Email: dtokaji@gmail.com

Richard Saphire (0017813)
Cooperating Attorney for ACLU of
Ohio
University of Dayton School of Law**
300 College Park
Dayton, Ohio 45469
Telephone: 937-229-2820
Email: rsaphire1@udayton.edu

Paul Moke (0014099)
Cooperating Attorney for ACLU of
Ohio
Wilmington College**
1252 Pyle Center
Wilmington, Ohio 45177
Telephone: 937-725-7501
Email: paul.moke@gmail.com

/s/ Naila Awan
Naila Awan, Trial Attorney (0088147)
Stuart C. Naifeh*
Cameron Bell*
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
Email: nawan@demos.org
Email: snaifeh@demos.org

Freda J. Levenson (0045916)
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Email: flevenson@acluohio.org

Counsel for Plaintiffs

* Admitted *pro hac vice*

** Institutional affiliation for the purpose of identification only

MEMORANDUM OF LAW

I. INTRODUCTION

On September 23, 2016, the U.S. Court of Appeals for the Sixth Circuit held that Ohio's Supplemental Process violates the National Voter Registration Act ("NVRA"), reversed this Court's order of June 29, 2016, and remanded the case to this Court for further proceedings consistent with its opinion. Under the Sixth Circuit's holding, voters removed from Ohio's rolls pursuant to the Supplemental Process were removed unlawfully. This Court must now implement a remedy to prevent the unlawful conduct from continuing and to cure the harm caused by the state's violation of federal law. In doing so, the Court should remedy as much of the harm as possible, by allowing as many eligible but unlawfully purged voters as possible to vote.

By this motion, Plaintiffs Larry Harmon, Ohio A. Philip Randolph Institute ("APRI"), Northeast Ohio Coalition for the Homeless ("NEOCH," and together with "APRI," "Organizational Plaintiffs") ask this Court merely to ensure that these voters are treated as they would be if their registrations had never been unlawfully cancelled—that is, that they be treated the same as any currently registered Ohio voter. Specifically, Plaintiffs request a temporary restraining order requiring the Secretary to (1) provide voters removed pursuant to the Supplemental Process information on how they can vote provisionally and (2) ensure that voters purged pursuant to the Supplemental Process are able to cast a provisional ballot—by mail, in person at their county's early voting site, or on Election Day—and (3) ensure that any provisional ballot cast by a voter who was removed from the registration rolls pursuant to the Supplemental Process be treated as if

the voter were currently registered in Ohio, so long as the voter has not become ineligible for another reason. Further, Plaintiffs seek a preliminary injunction that would extend the temporary restraining order until a final judgment is entered in this case, apply its procedures to any election that occurs during that time, and prohibit the Secretary from cancelling the registration of any more voters based on a process initiated by the voter's failure to vote.

Defendant Ohio Secretary of State Jon Husted (the "Secretary") agrees in principle that some relief is necessary and appropriate to allow voters purged under the Supplemental Process to cast a ballot that counts in the November 2016 General Election. *See* Doc. 72. However, in contrast to the tailored and appropriate relief that Plaintiffs propose, the relief that the Secretary has proposed is unnecessarily limited and will prevent large numbers of eligible voters from voting in this November's election. There is no reason for these voters to be excluded. Although the Secretary has maintained in this case that he has no record of the voters cancelled pursuant to the Supplemental Process (and that he cannot for that reason identify who would be eligible to vote), *see, e.g.,* Deposition of Matthew M. Damschroder, Exh. A to Declaration of Cameron Bell ("Bell Decl."), Doc. 42-1, PAGEID# 1555, at 94:7-19, Plaintiffs have subsequently learned that the Secretary *does* possess information that would allow him or the Counties to identify voters who were unlawfully cancelled at least as far back as 2011. Because the voters who were wrongfully purged can be readily identified, there is no reason for the limitations imposed by the Secretary's proposed remedy.

Specifically, the Secretary's proposed remedy limits the ballots that will be counted to (1) those cast by voters who continue to reside at the same address, although a voter who moved to another location in the same county continues to be eligible, O.R.C. § 3505.181; *id.* § 3503.16;¹ and (2) to those ballots cast by voters who vote in person although Plaintiffs have learned that the Secretary can readily provide for mail-in provisional voting, and (3) to those cast by voters whose registrations were cancelled in 2015, which is unnecessary because the Secretary possesses information that permits him to identify voters who were wrongfully purged at least back to 2011.

Absent the requested relief, Plaintiffs and a large number of voters throughout the State of Ohio will be subjected to the permanent and irreparable harm of being denied the right to vote as a result of Defendant's unlawful actions.

II. BACKGROUND

Under Ohio's Supplemental Process for maintaining its voter rolls, the state presumes that voters who have been inactive for a two-year period have moved and, after a mere two years of inactivity, the state initiates procedures to remove such voters from the registration rolls. Directive 2015-09, Ex. B to Bell Decl., Doc. 42-1, at PageID# 1587-92. The Sixth Circuit has held that the Supplemental Process violates Section 8 of the NVRA. *Ohio A. Philip Randolph Inst., et al. v. Husted*, No. 16-3746, slip op. at 16

¹ Plaintiffs had previously sought to limit this relief to voters remaining at the same address as an imperfect mechanism for identify voters who were purged under the Supplemental Process on the basis of the Defendant's representation, now proven incorrect, that there was no direct way to identify such voters.

(6th Cir. Sept. 23, 2016) (“*APRP*”). Voters removed from the registration rolls pursuant to that Process have, therefore, been removed from the rolls in violation of federal law.

The most recent purge under the Supplemental Process took place in 2015—when hundreds of thousands of infrequent Ohio voters were removed from the registration rolls. Sealed Bell Decl., PAGEID# 1837, ¶ 40(m). A number of voters who were purged pursuant to the Supplemental Process in 2015 and in earlier years, but whose eligibility had not changed, attempted to vote in the November 2015 local election and the March 2016 Presidential Primary only to learn, at the time they appeared to vote, that their names had been removed from the registration rolls. *See, e.g.*, Order, Doc. 66, PAGEID# 23004 (describing Plaintiff Larry Harmon’s experience at the polls); Sealed Bell Decl., PAGEID# 1833, ¶ 40(a) (noting the voters purged pursuant to the Supplemental Process in 2013 attempted to vote in these elections).² While many of these voters were given provisional ballots, those provisional ballots were not counted. Sealed Bell Decl., PAGEID# 1829-42, ¶¶ 30-49 (discussing analysis of provisional ballots cast as a result of the Supplemental Process and disposition of the ballots). However, the provisional ballot affirmations completed by these voters when they cast their ballots served as a new voter registration form—placing the voters who cast them back on the voter registration rolls for future elections. Deposition of Matthew M. Damschroder, Exh. A to Declaration of

² Plaintiffs only had information concerning voters purged in 2013 for only a small number of counties and did not have any information concerning voters purged prior to 2013. However, Defendant Husted possesses information that would allow the Counties to identify the individuals who were purged pursuant to the Supplemental Process at least as far back as 2011.

Cameron Bell, Doc. 42-1, PAGEID# 1560, at 113:18-22. In other words, the Counties determined that these voters were eligible and put them back on the voter rolls—but, despite their acknowledged eligibility, they were denied their right to vote.

On September 23, 2016, the Sixth Circuit Court of Appeals determined that Ohio's Supplemental Process directly violates Section 8 of the NVRA, which prohibits removing voters from the registration "rolls by reason of [their] failure to vote."³ *APRI*, No. 16-3746, slip op. at 16. The Court held that the Supplemental Process violates this prohibition because it is initiated by a voter's failure to vote. The Sixth Circuit then remanded the case to this Court for further proceedings consistent with its opinion. *Id.* at 21. Plaintiffs requested that mandate be expeditiously issued on September 28, 2016, 6th Cir. Doc. 40, and Defendants did not oppose this request. 6th Cir. Doc. 41. The Sixth Circuit's mandate issued on October 4, 2016, 6th Cir. Doc. 43-1, and the Parties in this case immediately began substantive discussions concerning the relief that could feasibly be implemented to ensure that voters removed from the rolls pursuant to the Supplemental Process are able to participate in the November 2016 General Election. These discussions continued until approximately 10:20 on the morning of October 13, 2016, when the Defendant notified Plaintiffs that he was unwilling to enter into a settlement agreement or stipulation, and it became apparent that court-ordered relief

³ The Sixth Circuit also held that Ohio's confirmation notice (presently SOS Form 10-S-1 and formerly SOS Form 10-S), which is sent to voters identified through the Supplemental Process and through the use of National Change of Address ("NCOA") data, does not comply with the NVRA. *APRI*, No. 16-3746, slip op. at 18-21.

provided the only means to protect the right to vote for illegally purged voters this November.

III. ARGUMENT

Ohio's Supplemental Process has been held to violate Section 8 of the NVRA. In light of that holding and the irreparable harm that will result if a remedy for that violation is not ordered immediately, Plaintiffs are entitled to a temporary restraining order that will permit the eligible voters who were removed from the registration rolls pursuant to the Supplemental Process to exercise their right to vote.

In seeking a temporary restraining order or preliminary injunction, a plaintiff must establish:

[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *see also Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). In determining whether such relief should be granted, the four factors are to be balanced and no single factor is determinative. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (“[T]he four considerations applicable ... are factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors.”).

Here, all four factors weigh heavily in favor of issuance of a temporary restraining order and preliminary injunction. First, there is more than a strong likelihood that

Plaintiffs will succeed on the merits: As Defendant has conceded in his Motion to Implement Remedy, Plaintiffs have already succeeded on the merits. Doc. 72. The Sixth Circuit ruled in favor of Plaintiffs' claim that Ohio's Supplemental Process and confirmation notice are facially invalid under Section 8 of the NVRA—that Ohio voters who were removed from the rolls pursuant to the Supplemental Process had been removed illegally. Second, the Supplemental Process threatens to irreparably harm Ohio voters by depriving them of the fundamental right to vote, and it has caused, and will continue to cause, Plaintiffs to divert scarce resources to counteract the purges. Third, the balance of the equities tips in Plaintiffs' favor because the preliminary relief sought can be implemented by the Secretary and the Counties with minimal burden. Finally, the requested relief is in the public interest because it will protect the fundamental right to vote, maximize the number of eligible voters who are able to participate in federal elections, and help create a more robust and responsive democracy. Accordingly, this Court should grant Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

1. *Plaintiffs Have a Strong Likelihood of Success on the Merits.*

To prevail on a motion for a preliminary relief, “a plaintiff must show more than a mere possibility of success,” *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007), but he “is not required to prove his case in full.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In the present case, however, Plaintiffs have proved their case in full. With respect to Count I of Plaintiffs' Amended Complaint, the Court of Appeals has upheld Plaintiffs' claim that Ohio's

Supplemental Process violates Section 8 of the NVRA, and that voters removed from the rolls pursuant to this process were illegally purged. *APRI*, No. 16-3746, slip op. at 16, 21. With respect to Count II, the Court of Appeals has held that both the prior and current address confirmation notices do not comply with the requirements of Section 8 of the NVRA and that Plaintiffs' claim was not mooted by the Secretary's voluntary modification of the notice form. *Id.* at 16-21. Because "[t]he first factor is the most critical inquiry of the four criteria," preliminary relief should be granted in this case. *See, e.g., Planet Aid v. Ypsilanti Twp.*, 26 F. Supp. 3d 683, 697 (E.D. Mich. 2014) (citing *Mason Cnty. Med. Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1997)).

2. *Plaintiffs Will Suffer Irreparable Harm Absent a Temporary Restraining Order and Preliminary Injunction.*

The Sixth Circuit has held that "a restriction on the fundamental right to vote . . . constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Am. Civil Liberties Union of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438 (6th Cir. 2003) ("If it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))); *Mich. State A. Philip Randolph Inst. v. Johnson*, 16-CV-11844, 2016 WL 3922355, at *13 (E.D. Mich. July 21, 2016) (noting that because "[t]he case at bar deals with the right to vote, . . . this factor is presumed satisfied").

Under the Supplemental Process, hundreds of thousands of Ohio voters had their voter registration illegally cancelled in 2015 and countless more had their registrations

cancelled pursuant to this Process in previous years.⁴ *APRI*, No. 16-3746, slip op. at 16. Persons harmed by this Process include APRI and NEOCH members, members of the communities where APRI and NEOCH conduct voter outreach and registration drives, and individuals like Plaintiff Harmon, all of whom were deprived of or are threatened with deprivation of their right to vote. Declaration of Brian Davis (“Davis Decl.”), Doc. 46, PAGEID# 22302, ¶ 20 (“Homeless voters whom NEOCH has previously registered have already been removed from the rolls because of this flawed system.”); Mot. Sum. J., Doc. 39-5 (Declaration of KaRon Waites (“Waites Decl.”)), PAGEID# 1458, ¶¶ 10, 12; Mot. Sum. J., Doc 39-6 (Declaration of Larry Harmon), PAGEID# 1461-62, ¶¶ 7-12. The irreparable harm to Organizational Plaintiffs, their members, Plaintiff Harmon, and Ohio voters more generally suffices to warrant issuance of a preliminary relief.

Moreover, many (if not most) of the voters removed pursuant to the Supplemental Process are unaware that they are no longer registered to vote. As a result, many unlawfully purged voters will show up to vote in the November 2016 General Election, only to be told they are unregistered and therefore unable to vote. And, because Ohio does not send unregistered voters vote-by-mail ballots, others will fruitlessly request vote-by-mail ballots never to receive them, depriving them of their right to a ballot. Unless the temporary restraining order and preliminary injunction requested by Plaintiffs are granted, individuals like Plaintiff Larry Harmon, Organizational Plaintiffs’ members,

⁴ This Court’s previous holding that Plaintiffs’ would not suffer an irreparable injury absent injunctive relief was predicated on the Court’s determination that the “Plaintiffs [had] not substantially demonstrated a violation of the NVRA.” Order, Doc. 66, at PAGEID# 23035. However, the Sixth Circuit reversed this determination. *APRI*, No. 16-3746, slip op. at 16.

and individuals who Organizational Plaintiffs have previously registered will be unlawfully disenfranchised.

3. *A Balancing of the Equities Demands that Plaintiffs Be Granted a Temporary Restraining Order and Preliminary Injunction.*

In this case, the balance of the equities strongly favors issuance of preliminary relief because the harm to Plaintiffs outweighs any potential harm to Defendant.⁵ *See, e.g., Winter*, 555 U.S. at 26; *cf. Lorillard Tobacco Co.*, 453 F.3d at 382 (balancing potential harm to Plaintiffs if an injunction were not issued with potential harm to Defendants if an injunction were issued). The temporary relief requested in Plaintiffs' motion is narrowly tailored to prevent widespread disenfranchisement this November without placing a significant burden on the Secretary or the Counties. Plaintiffs simply seek to require Ohio to (1) inform voters who have been affected by the Supplemental Process how they may vote in the 2016 General Election, and (2) count the provisional ballots cast by such voters.

Indeed, Plaintiffs' requested relief is a modest extension of the relief already proposed by the Defendant, but an extension that will reach a significant number of additional voters. *See* Doc. 72 (proposing to count the provisional ballots of any voter purged under the Supplemental Process in 2015 who appears to vote in-person). The temporary restraining order Plaintiffs seek would merely extend that relief to (1) voters purged from 2011 to the present—rather than only those purged in 2015; (2) voters who

⁵ Prior to remand, this Court determined that injunctive relief should not be granted and that voters would not be harmed based purely on the determination that the Supplemental Process did not violate the NVRA. *See* Order, Doc. 66, at PAGEID# 23035 (“[S]ince there has been no violation of the NVRA, there will be no harm to others in continuing” the Supplemental Process.).

may have changed residence within the same county; and (3) voters who elect to vote by mail. This relief will reach significantly more of the voters who have had their registrations unlawfully cancelled than the relief proposed by Defendant, and, crucially, it would extend it to the most marginalized of those voters: low-income and minority voters who are much more likely to have moved locally, who are unable to make it to the polls to vote, and who vote with less frequency than the population at large.

Counting provisional ballots cast by these voters is very straightforward. Under state and federal law, Counties are **already** required to provide any individual who appears to vote and whose name does not appear on the registration rolls with a provisional ballot. Under Ohio law, completed provisional ballot applications serve as voter registration applications if the voter is found to be eligible and is not already registered; therefore, Counties **already must determine whether each provisional voter is qualified to vote**. O.R.C. § 3505.182. Further, Counties **already compare** the information provided on a provisional ballot with their voter registration records—including records of individuals who have been removed from the rolls—to determine whether to reactivate an existing registration record or create a new registration record. Ohio Secretary of State, Election Official Manual, Ch. 6, attached hereto as Exhibit B, at 6-13. Indeed, the relief sought by Plaintiffs would be less burdensome than that proposed by the Secretary in at least one respect—because it is not limited to voters who remain at the same address, it would not require the Counties to compare the address on the provisional ballot to the address in their voter registration records, a step that under current law, Counties do not take for voters who are currently registered.

Moreover, Plaintiffs have learned that the Secretary has the ability and the information to immediately implement every element of the exact relief Plaintiffs are seeking. Thus, any additional burden Plaintiffs' requested relief might impose on the Secretary or Counties will be de minimus. In contrast, the harm Plaintiffs will suffer if this relief is not ordered will be substantial and irreparable: Organizational Plaintiffs' members, individuals they have registered, and other Ohio voters like Plaintiff Larry Harmon will be entirely deprived of their right to vote. The harms such voters will experience far outweigh any minimal additional effort state officials may have to expend to allow the voters harmed by the Secretary's unlawful actions to vote provisional ballots that will count. The equities clearly favor issuance of the temporary relief Plaintiffs seek, and a temporary restraining order and injunction should issue. *See, e.g., Obama for Am.*, 697 F.3d at 436-37 ("While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote. That interest is best served by *favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful.*" (internal quotations and citations omitted)).

4. *A Temporary Restraining Order and Preliminary Injunction Would Advance the Public Interest.*

Relief that requires Ohio to inform voters who may have been affected by the Supplemental Process how they may have their votes counted and requires the state to count the ballots cast by unlawfully purged voters will advance the public interest. The United States Supreme Court has acknowledged that there is "a strong interest in

exercising the fundamental political right to vote.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (internal quotations omitted). Denial of this fundamental right makes “[o]ther rights, even the most basic, ... illusory[.]” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Absent a temporary restraining order and preliminary injunction, eligible Ohio voters who have been unlawfully purged from the voter rolls will be barred from participating in the 2016 General Election. Depriving eligible voters—voters who in the absence of the state’s violation of the law would be registered and able to vote—of the opportunity to participate in the democratic process infringes on those voters’ fundamental rights and compromises the integrity and validity of the Election. Preliminary relief that ensures voters unlawfully purged under the Supplemental Process are able to participate in this November’s election would advance the public interest. *See U.S. Student Ass’n v. Land*, 546 F.3d 373, 388–89 (6th Cir. 2008) (determining that an injunction reinstating the registrations of voters whose registrations were rejected “eliminates a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process”); *see also Obama for Am.*, 697 F.3d at 437 (“The public interest ... favors permitting as many qualified voters to vote as possible.”). Conversely, Plaintiffs’ requested relief presents no danger to the public interest. There is no dispute that the voters whose voting rights Plaintiffs seek to protect—voters who reside in Ohio, who the state agrees are eligible to register to vote and to vote in future elections, and who have not become ineligible for any reason subsequent to the time that they were purged—are eligible Ohio voters who would be on the registration rolls but for the Supplemental Process, and enabling them to participate in the democratic process will

have no adverse consequences. Accordingly, the public interest favors issuance of the temporary restraining order and preliminary injunction Plaintiffs request.

5. *A Temporary Restraining Order Should Issue Immediately.*

Pursuant to Rule 65(b), this Court may issue a temporary restraining order without providing the opposing party the opportunity to be heard where the facts “clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Here, early voting in Ohio has already begun and Election Day is less than four weeks away. Mail-in ballot applications are already being processed and, if the applicant has been cancelled under the Supplemental Process, they are being rejected. Plaintiffs have acted diligently in seeking this temporary restraining order. Even prior to the issuance of the Court of Appeals’ mandate, Plaintiffs initiated settlement discussions to ensure unlawfully purged voters would be able to participate in the November 2016 General Election, and they have been actively engaged with the Secretary in detailed discussions of a negotiated remedy since that time. They are filing this motion on the same day they learned that the Secretary was unwilling to enter into any settlement. Accordingly, this Court should issue a temporary restraining order immediately and order the Secretary to show cause why it should not continue as a preliminary injunction.

IV.CONCLUSION

For the reasons stated above Plaintiffs’ respectfully request that this Court:

- a. Enter a temporary restraining order, no later than October 14, 2016, requiring the Secretary to instruct Counties to count provisional ballots cast by voters

whose registrations were cancelled pursuant to the Supplemental Process in accordance with the procedures set out in Plaintiffs proposed temporary restraining order;

- b. Order Defendant to show cause no later than October 17 why a preliminary injunction should not issue continuing the temporary restraining order, applying its procedures to any election that occurs in Ohio during the pendency of this action, and prohibiting the state from cancelling the registration of any voter or issuing any confirmation notice pursuant to the Supplemental Process or any other process initiated by a voter's failure to vote; and
- c. Set a schedule for further proceedings after the November 2016 General Election on permanent relief on both of Plaintiffs' causes of action.

Dated: October 13, 2016

Respectfully submitted,

Daniel P. Tokaji*
Cooperating Attorney for ACLU of Ohio
The Ohio State University
Moritz College of Law**
55 W. 12th Ave
Columbus, OH 43210
Telephone: 310-266-0402
Email: dtokaji@gmail.com

Richard Saphire (0017813)
Cooperating Attorney for ACLU of Ohio
University of Dayton School of Law**
300 College Park
Dayton, Ohio 45469
Telephone: 937-229-2820
Email: rsaphire1@udayton.edu

Paul Moke (0014099)
Cooperating Attorney for ACLU of Ohio
Wilmington College**
1252 Pyle Center
Wilmington, Ohio 45177
Telephone: 937-725-7501
Email: paul.moke@gmail.com

/s/ Naila Awan

Naila Awan, Trial Attorney (0088147)
Stuart C. Naifeh*
Cameron Bell*
Dēmos
220 Fifth Ave., 2nd Flr.
New York, NY 10001
Telephone: 212-485-6055
Email: nawan@demoss.org
Email: snaifeh@demoss.org

Freda J. Levenson (0045916)
ACLU of Ohio
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Email: flevenson@acluohio.org

Counsel for Plaintiffs

* Admitted *pro hac vice*

** Institutional affiliation for the purpose of identification only

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE was filed this October 13, 2016 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: October 13, 2016

/s/ Naila Awan

Naila Awan, Trial Attorney (0088147)

Dēmos

220 Fifth Ave., 2nd Flr.

New York, NY 10001

Telephone: 212-485-6055

E-mail: nawan@demos.org

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

**OHIO A. PHILIP RANDOLPH
INSTITUTE,

NORTHEAST OHIO COALITION
FOR THE HOMELESS, and

LARRY HARMON**

Plaintiffs,

v.

JON HUSTED,

*in his official capacity as Ohio Secretary
of State,*

Defendant.

CIVIL ACTION NO. 2:16-cv-303

**[PROPOSED] TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW
CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Plaintiffs Ohio A. Philip Randolph Institute, Northeast Ohio Coalition for the Homeless, and Larry Harmon have filed an emergency motion for a temporary restraining order and for an order to show cause why a preliminary injunction should not be granted pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

I. Findings

The Court has considered the Plaintiffs' motion and the pleadings, memoranda, declarations, and exhibits filed in this matter, and makes the following findings of fact.

1. This Court has jurisdiction of the subject matter of this case and personal jurisdiction over all parties.
2. Venue lies properly in this Court.
3. Ohio's Supplemental Process for conducting maintenance of the state's voter rolls, as described in directives issued periodically by the Defendant between 1994 and 2015, violates the requirements of Section 8 of the National Voter Registration Act of 1993 ("NVRA"). *See A. Philip Randolph Inst. v. Husted*, No. 16-3746, 2016 WL 5328160, at *9 (6th Cir. Sept. 23, 2016). Plaintiffs are therefore likely to prevail on their First Cause of Action.
4. Ohio's SOS Form 10-S and SOS Form 10-S-1, the "confirmation notice" that Defendant sends to registered Ohio voters as the first step in both its Supplemental Process and NCOA Process for the maintenance of the state's voter rolls, does not comply with the requirements of Section 8 of the NVRA.¹ *See A. Philip Randolph Inst. v. Husted*, No. 16-3746, 2016 WL 5328160, at *11 (6th Cir. Sept. 23, 2016). Plaintiffs are therefore likely to prevail on their Second Cause of Action.

¹ At the time that this case was filed, voters who now receive SOS Form 10-S-1 and SOS Form 10-S-2 received a form known as SOS Form 10-S, which the Sixth Circuit determined was also deficient under the NVRA and the fact that the state had changed for format of the form did not render Plaintiffs' initial claims regarding SOS Form 10-S moot. *Ohio A. Philip Randolph Inst., et al. v. Husted*, No. 16-3746, slip op. at 16-21 (6th Cir. Sept. 23, 2016).

5. There is good cause to believe that, if not immediately restrained by Order of this Court, Defendant will deny Ohio voters whose registrations were cancelled under the Supplemental Process, including members and constituents of the Plaintiff organizations, the right to cast a ballot that counts in the November 2016 General Election. Irreparable harm to these voters' constitutional right to vote is therefore imminent. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

6. There is good cause to believe that in the absence of immediate intervention by this court, Plaintiff organizations' voter engagement efforts will be significantly more burdensome and significantly less effective because many of the voters they wish to engage will be unable to vote as a result of the Supplemental Process.

7. There is good cause to believe that the requested relief will not disrupt the conduct of November 2016 General Election and that the burden of a temporary restraining order on the Defendant and Ohio's county boards of elections will be minimal. The irreparable harm to Plaintiffs absent a temporary restraining order therefore outweighs any potential harm to Defendant such an order may impose.

8. There is good cause to believe that issuance of a temporary restraining order will serve the public interest by ensuring that eligible voters who were unlawfully removed from Ohio's voter rolls are able to exercise their fundamental right to vote and participate in the democratic process.

9. The mandate of the United States Court of Appeals for the Sixth Circuit in this matter issued on October 4, 2016. Since that time, the parties have diligently engaged in settlement discussions. Those discussions reached an impasse on October 13,

2016, and Plaintiffs filed their Motion for a Temporary Restraining Order that same day. Early voting in Ohio, including both absentee vote-by-mail and in-person voting at early voting sites, began on October 12, 2016, and Election Day is less than four weeks away. Plaintiffs' request for this emergency relief is not the result of any lack of diligence on the Plaintiffs' part, but instead is based on the need for immediate relief to prevent eligible voters from being denied the right to participate in the November 2016 General Election. Accordingly, there is good cause for relieving the Plaintiffs of the duty to provide the Defendants with prior notice of their motion.

II. Order

It is therefore ORDERED,

Plaintiffs' Motion for a Temporary Restraining Order is GRANTED. Defendant is directed as follows:

1. Only for purposes of the November 8, 2016 election, the Secretary shall issue a directive instructing County Boards of Elections to count as valid a provisional ballot cast by a voter who is not registered to vote in the State of Ohio if all of the following conditions apply:
 - a. the individual's voter registration was cancelled in 2011 (confirmation cards sent in 2007), 2013 (confirmation cards sent in 2009), or 2015 (confirmation cards sent in 2011) pursuant to the Supplemental Process;
 - b. the provisional ballot affirmation form reflects that the voter currently resides at either (i) the address at which the voter was last registered to vote in the State of

Ohio at the time of cancellation, or (ii) another address within the same county as the address at which the voter was last registered to vote in the State of Ohio at the time of cancellation;

- c. the individual does not appear on a list of (i) deceased voters provided by the state department of health or by the State and Territorial Exchange of Vital Events (“STEVE”) database, (ii) individuals incarcerated on a felony conviction provided by an Ohio clerk of court or a federal district court, or (iii) voters adjudicated as incompetent under Ohio law by a county probate court, where the relevant event (i.e., death, incarceration, adjudication of incompetence) occurred after the individual’s registration record was cancelled;
- d. the board did not receive a certified copy of the individual’s death certificate from the deceased elector’s spouse, parent, or child, by the administrator of the deceased elector’s estate, or by the executor of the deceased elector’s will; and
- e. the voter’s provisional ballot affirmation form and the ballot otherwise complies with all applicable laws and directives.

2. For purposes of this Order, an individual shall be deemed to have been removed pursuant to the Supplemental Process as provided in Paragraph 1(a) above if either of the following are true:

- a. in a county that recorded the reason for cancellation at the time the voter was cancelled, the county board of elections registration database reflects that the voter’s registration was cancelled pursuant to the Supplemental Process; or

- b. in a county that did not record the reason for cancellation at the time the voter was cancelled, the voter is not listed on the National Change of Address (“NCOA”) list from the year in which the voter was sent a confirmation notice (four years prior to the year of cancellation).

The Secretary’s Office shall possess the NCOA lists from 2007, 2009, and 2011.

A county seeking to determine whether an individual is on the NCOA list in accordance with subsection (b) above shall contact the Secretary’s Office, which shall provide the county with a prompt response.

3. For each voter who submits a valid application to cast an absentee ballot by mail and whose name does not appear on the registration rolls, the county board of elections will use the procedure laid out in Paragraphs 1 and 2 above to determine if the voter was removed from the rolls pursuant to the Supplemental Process in 2011, 2013, or 2015. If the voter was removed from the rolls pursuant to the Supplemental Process in 2011, 2013, or 2015, the board shall mail the voter a provisional ballot. This mailed provisional ballot shall count if (i) the provisional ballot is returned and postmarked no later than the day before Election Day and received at the board of elections office no later than the tenth day after Election Day, or if the provisional ballot does not have a postmark, it must be received at the board the elections no later than 7:30 p.m. on Election Day, (ii) the board confirms the voter was cancelled pursuant to the Supplemental Process and the provisional ballot fully satisfies the requirements in Paragraphs 1 and 2, and (iii) the provisional ballot otherwise complies with all applicable laws and directives.

4. The Secretary will, by Friday, October 14, 2016, add the following language in prominent type within the “MyOhioVote.com” and “<http://voterlookup.sos.state.oh.us>” webpages of the Ohio Secretary of State containing the online “Voter Lookup” tool: “If you are unable to locate your voter registration information but think you are registered to vote, and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot either during the in-person absentee voting period or at the correct polling place for your current address that *may* be counted pursuant to court order. To find your polling place, please [click here](#) or call your county board of elections.” The phrase “pursuant to court order” will be a hyperlink to a time-stamped copy of this stipulated order. The phrase “click here” will be a hyperlink to the online resource described in Paragraph 7. The phrase “call your county board of elections” will be a hyperlink to a list of the phone numbers of all of Ohio’s 88 county boards of elections.

The Secretary will direct each county that operates its own online voter lookup tool to add the language described above, including the hyperlinks, to the webpage containing that tool.

5. The Secretary’s Office will continue to provide online and telephonic resources in response to voter inquiries to assist voters in determining the correct polling location and precinct for their address.

6. The Secretary’s Office shall add a column on its “Provisional Supplemental Report” stating the number of individuals in each county who had provisional ballots counted pursuant to Paragraph 3 above.

7. The Secretary shall undertake additional efforts to inform and educate the public concerning how voters whose registrations were cancelled under the Supplemental Process may participate in the November 2016 General Election, including making public service announcements via television, radio, and social media, and posting information on the Secretary's web site.

It is further ORDERED that the Temporary Restraining Order granted herein shall expire on _____, unless within such time, the Order, for good cause shown, is extended for an additional period not to exceed fourteen (14) days, or unless it is further extended pursuant to Federal Rule of Civil Procedure 65.

It is further ORDERED, pursuant to Federal Rule of Civil Procedure 65(b), that the Defendant shall no later than October 17, 2016, show cause why this Court should not enter a preliminary injunction pending a final judgment in this case continuing the relief ordered in this Temporary Restraining Order, applying its procedures to any election that occurs prior to a final judgment being entered in this case, prohibiting the state from cancelling the registration of any voter or issuing any confirmation notice pursuant to the Supplemental Process or any other process initiated by a voter's failure to vote, and imposing such additional relief as may be appropriate.

IT IS SO ORDERED this ____ day of _____, 2016.

UNITED STATES DISTRICT JUDGE

Chapter 6

Provisional Voting Directive 2015-28

Jon Husted
Ohio Secretary of State 

Ohio Election Official Manual

SECTION 1.01 THE BASICS - WHAT, WHO, WHEN, WHERE, AND HOW

A. What is a provisional ballot?

Provisional voting is a failsafe that allows a voter whose identity and/or eligibility is in question to cast a ballot that is counted after the voter's eligibility is verified. Provisional voting ensures that no eligible elector is denied the opportunity to cast a ballot in an election.

Though Ohio had a form of provisional voting prior to the enactment of the Help America Vote Act of 2002 (HAVA), HAVA requires every state to offer provisional voting in each federal election.¹

B. Who is eligible to cast a provisional ballot?²

The reasons that a voter must cast a provisional ballot are:

1. The voter's name is not in the poll book or on the supplemental voter list.

Note: Before a precinct election official issues a provisional ballot for this reason, he or she must make sure that the voter is in the correct precinct and is not eligible to cast a regular ballot in a different

¹ Section 303(b) of HAVA, 52 U.S.C.A. § 21082.

² [R.C. 3505.181\(A\)\(1\)-\(7\)](#).



precinct or polling location. If the voter is in the wrong precinct, the precinct election official must direct the voter to the correct precinct.³

2. The voter does not provide or is unable to provide proper or valid identification.
3. The voter has changed his or her name and moved to a different precinct without updating his or her address by the voter registration deadline (30 days prior to the election).
4. The voter has moved to a different precinct without updating his or her address by the voter registration deadline (30 days prior to the election).
5. The voter has changed his or her name and does not have proof of the legal name change.

Note: A voter who changes his or her name and fails to update his or her registration may be eligible to cast a regular ballot if that voter presents one of the following to the precinct election officials on Election Day and completes and signs Form 10-L:

- Court order;
 - Marriage license; or
 - Proof of legal name change that includes both the voter's former and current names.⁴
6. The voter's signature does not match the signature on file with the board of elections (i.e., the signature in the poll book or displayed by the electronic poll book).
 7. The voter has been challenged, and the challenge has not been resolved or has been resolved against the voter.

³ R.C. 3505.181(C)(1).

⁴ R.C. 3503.16(B)(1)(b).

8. The notice of registration or acknowledgment notice has been returned to the board as undeliverable.
9. The voter requested an absentee ballot for the election.
10. The voter already has cast a provisional ballot.

For reasons 8, 9, and 10, the voter should be marked or flagged in the poll book as needing to cast a provisional ballot.

C. When and where can a provisional ballot be cast?

When and where an elector is able to cast a provisional ballot depends upon the reason why he or she must cast a provisional ballot.

The following voters can cast a provisional ballot at the board of elections office or at another site designated for early in-person absentee voting beginning the 28th day prior to a general, non-presidential primary, or special election and the 25th day prior to a presidential primary election and ending at the end of in-person absentee voting on the Monday prior to the election:

1. A voter who has moved from one precinct to another within a county and failed to update his or her address by the voter registration deadline.⁵
2. A voter who has moved from one precinct to another within the county and changed his or her name but failed to update his or her voter registration.⁶
3. A voter who has moved outside of his or her county (but still within Ohio) and failed to update his or her address by the voter registration deadline.⁷

⁵ [R.C. 3503.16\(B\)\(2\).](#)

⁶ [R.C. 3503.16\(B\)\(2\).](#)

⁷ [R.C. 3503.16\(C\).](#)



Additionally, a voter who is unable to appear at the board of elections office on account of personal illness, physical disability, or infirmity can request and cast a provisional/absentee ballot beginning the 27th day prior to an election and ending at noon on the Saturday prior to Election Day.⁸ For details on a provisional/absentee voter, please refer to [Chapter 5 Absentee Voting in this manual](#).

If a voter must cast a provisional ballot for any reason other than those listed in this subsection, he or she must cast it in his or her precinct on Election Day.

D. How does a voter cast a provisional ballot?

1. What Each Precinct Needs

A board of elections must supply each precinct with enough of the following for provisional voters:

- The Provisional Ballot Affirmation Statement or provisional ballot envelope containing the affirmation statement ([Form 12-B](#) with the most-recent issue date);
- The provisional ballot notice ([Form 12-H](#) with the most-recent issue date);
- [Form 12-D](#), Provisional Voter Precinct Verification Form;
- [Form 10-L](#) for Change of Name Voters; and
- An optical scan ballot for each ballot configuration within the polling location.

[Form 12-D](#) is used only when a voter insists on casting a provisional ballot in the wrong precinct within the polling location after being directed to the correct precinct within the polling location.⁹

⁸ [R.C. 3503.16\(G\)](#).

⁹ [R.C. 3505.181\(C\)](#).

2. What Each Provisional Voter Needs

After it has been determined that a voter must cast a provisional ballot, the voter must be given the following three items:

- A Provisional Ballot Affirmation Statement or provisional ballot envelope containing the affirmation statement ([Form 12-B](#) with the most-recent issue date).
- The provisional ballot notice ([Form 12-H](#) with the most-recent issue date).
- The appropriate optical scan ballot.

The provisional ballot notice ([Form 12-H](#)) is required both by state and federal law.¹⁰ It provides information on provisional voting and applicable deadlines, as well as a toll-free number that the voter may call to learn the status of his or her provisional ballot.

3. What Each Provisional Voter Must Do

The voter is responsible for completing and signing the Provisional Ballot Affirmation Statement ([Form 12-B](#)).¹¹

The voter must provide five items on the provisional ballot affirmation in order for the ballot to be eligible to be counted. The required five items are:

- The voter's printed name;
- The voter's valid signature;
- The voter's date of birth;
- The voter's current address; and
- An acceptable form of identification.

¹⁰ 52 U.S.C.A. § 21082; [R.C. 3505.181\(B\)](#).

¹¹ [R.C. 3505.182](#).

A provisional voter must print and sign his or her name. If a voter fails either to print or sign his or her name on the affirmation statement, the provisional ballot cannot be counted.¹² Ohio law does not permit a voter to appear at the board of elections office after the election to print and/or sign his or her name on the affirmation statement.

A provisional voter must provide his or her date of birth and current address on the affirmation statement.¹³ Ohio law does not permit a voter to appear at the board of elections office after the election to provide his or her date of birth or current address on the affirmation statement.

The month and day of the voter's date of birth on the affirmation statement must match the month and day of the voter's date of birth in the voter registration database unless one of the following two exceptions applies:

- The voter's date of birth in the database is 1/1/1800, or
- The board of elections finds by a vote of at least three members that the voter has met all of the other requirements of division (B)(3) of R.C. 3505.183.¹⁴

Note: The requirements of division (B)(3) of R.C. 3505.183 are:

- The provisional voter is registered to vote;¹⁵
- The provisional voter is eligible to cast a ballot in the precinct and for the election in which the individual cast the ballot;¹⁶

¹² R.C. 3505.183(B)(1)(a).

¹³ R.C. 3505.183(B)(3).

¹⁴ R.C. 3505.183(B)(3)(e).

¹⁵ R.C. 3505.183(B)(3)(a).

¹⁶ R.C. 3505.183(B)(3)(b).

- The provisional voter provided all of the information required (i.e., printed name, signature, date of birth, and current address and provided identification on Election Day or during the seven days following the election)¹⁷;
- If the provisional voter provided his or her Social Security number, driver's license, or state identification number, that number is not different than the number contained in the Statewide Voter Registration Database;¹⁸
- The provisional voter provided his or her current address;¹⁹ and
- If the provisional voter has been challenged, he or she provided information necessary to resolve the challenge during the seven days following the election or the board resolved the challenge in favor of the voter at a hearing.²⁰

A provisional voter must provide an acceptable form of identification either on Election Day or during the seven days following the election.²¹ Acceptable identification to cast a provisional ballot includes the following:²²

- The last four digits of the voter's Social Security number;
- The voter's driver's license or state identification card number;
- A current and valid photo identification;
- A military identification; or

¹⁷ R.C. 3505.183(B)(3)(c).

¹⁸ R.C. 3505.183(B)(3)(d).

¹⁹ R.C. 3505.183(B)(3)(f).

²⁰ R.C. 3505.183(B)(3)(g) & (h).

²¹ R.C. 3505.181(B) (6) & (7).

²² R.C. 3505.181(B)(6).

- A copy of a current²³ utility bill (including cell phone bill), bank statement, government check, paycheck, or other government document that shows the voter's name and current address.

For additional information and definitions on acceptable identification for voting purposes, please see [*Chapter 7 of this manual*](#) and [*Directive 2008-80 in the resources section*](#).

SECTION 1.02 PROVISIONAL BALLOTS CAST IN THE WRONG PRECINCT

A. The Importance of the Correct Precinct

When an individual registers to vote in Ohio, he or she is placed within a precinct based upon his or her residential address and is eligible to vote in all elections held in that precinct.²⁴ A voter must be a resident of the precinct in which he or she offers to vote.²⁵

B. Provisional Ballot Cast in the Wrong Precinct of a Single-Precinct Polling Location

Because Ohio law requires a voter to be a resident of the precinct in which he or she offers to vote, a provisional ballot cast in the wrong precinct cannot be counted unless it falls under the exception outlined in subsection (c), below.

C. Provisional Ballot Cast in Wrong Precinct of Multi-Precinct Polling Location

Under Ohio law, a provisional ballot cast in the wrong precinct of a multi-precinct polling location may be eligible to be counted if the precinct election official did not notify the voter that he or she was in the wrong

²³ "Current" means that the document contains a date within the last 12 months or an expiration date that has not passed.

²⁴ [*R.C. 3503.01\(A\)*](#).

²⁵ [*R.C. 3503.01\(A\)*](#).

precinct. A precinct election official must notify and direct a voter to the correct precinct.²⁶

If a voter refuses to cast a ballot in the correct precinct, he or she must be permitted to cast a provisional ballot and advised that a ballot cast in the wrong precinct cannot be counted.²⁷ To document the fact that the voter was directed to the correct precinct but opted to cast a provisional ballot in the wrong precinct, a precinct election official must complete Form 12-D and attach it to the provisional voter's provisional ballot envelope.²⁸

If a precinct election official does not complete and attach Form 12-D to the provisional envelope, the board must remake and count the provisional ballot for any contest in which the voter would be eligible to vote if the voter were to cast a ballot in the correct precinct.

Details on processing a provisional ballot cast in the wrong precinct but correct polling location are contained in Section 1.04, Step-by-Step Process For Determining Eligibility.

SECTION 1.03 PROCESSING PROVISIONAL BALLOTS

A. Examination of Provisional Affirmations Prior to Official Canvass

Board staff, working in bipartisan teams, may begin examining provisional ballot envelopes the day after the election,²⁹ as long as the board has adopted a provisional ballot policy allowing its staff to do so. The bipartisan teams may categorize provisional ballots into groups of like ballots (e.g., ballots that have been verified and eligible to be counted, provisional affirmations that are missing the voter's signature, etc.) for the board to consider.

²⁶ R.C. 3505.181(C)(1).

²⁷ R.C. 3505.181(C)(1).

²⁸ R.C. 3505.181(C)(2).

²⁹ R.C. 3505.183(G)(1).

B. Supplemental Information during Seven-Day Period

A provisional voter who failed to provide identification on Election Day may appear at the board of elections and provide identification during the seven days following the election.³⁰

A provisional voter who has been challenged and needs to provide information to resolve the challenge also may appear at the board of elections and provide information during the seven days following the election.³¹

C. Board Members Vote on Eligibility

It is important to remember that only the board members themselves can determine the validity of each provisional ballot. The board must, by a majority vote, determine whether to accept and count – or whether to reject and not count – each and every provisional ballot in a properly-noticed, public meeting.

D. Opened and Counted in Official Canvass

No provisional ballot envelope may be opened and no provisional ballot may be counted until the board has voted on the eligibility of each and every provisional ballot cast in the election.³²

The opening of provisional ballot envelopes and the counting of provisional ballots cannot begin until the start of the official canvass, which may begin no earlier than the 11th day following the election.³³

A board must complete the counting of provisional ballots and the official canvass no later than the 21st day after the election.³⁴

³⁰ [R.C. 3505.181\(B\)\(7\).](#)

³¹ [R.C. 3505.181\(B\)\(7\).](#)

³² [R.C. 3505.183\(F\).](#)

³³ [R.C. 3505.32\(A\).](#)

³⁴ [R.C. 3505.32\(A\).](#)

E. Mandatory Step-by-Step Process for Determining Eligibility

Each board is required to follow the step-by-step instructions outlined below to determine the eligibility of a provisional ballot to be counted.

SECTION 1.04 STEP-BY-STEP PROCESS FOR DETERMINING ELIGIBILITY

- Step 1:** Determine whether the affirmation statement on the provisional ballot envelope contains each of the following five items: 1) voter's printed name, 2) voter's valid signature, 3) voter's date of birth, 4) voter's current address, and 5) voter's identification.
- If the affirmation statement contains all five of the required items, proceed to Step 2.
 - If the affirmation statement does not contain both the voter's printed name and valid signature, then the board must reject the provisional ballot.³⁵
 - If the affirmation statement does not contain the voter's date of birth or it does not fall into the exception below, then the board must reject the provisional ballot.³⁶
 - Exception: If the affirmation statement contains the voter's date of birth but the month and day are different from the month and day in the Statewide Voter Registration Database, the board must reject the provisional ballot unless 1) the voter's date of birth in the database is 1/1/1800; or 2) the board of elections finds by a vote of at least three of its members that the voter has met all of the other requirements

³⁵ R.C. 3505.183(B)(4)(a)(iii).

³⁶ R.C. 3505.183(B)(4)(a)(ix).

of division (B)(3) of R.C. 3505.183.³⁷ If the ballot falls into this exception, proceed to Step 2.

- Step 2:** Determine whether the provisional voter indicated on the affirmation statement that he/she showed an acceptable form of identification to the precinct election official or whether the provisional voter provided at least one of the following on the affirmation statement: The last four digits of the voter's Social Security number, the voter's driver's license number, or state identification card number.
- If the voter indicated on the affirmation statement that he/she showed the precinct election official one of the acceptable forms of identification, proceed to Step 3.³⁸
 - If the voter provided identification on the affirmation statement, and the number (or, if a driver's license or state identification card number, the combination of letters and numbers) provided is not different from the number that is contained in the Statewide Voter Registration Database, proceed to Step 3.³⁹
 - If the voter provided identification on the affirmation statement but that identification is different from what is contained in the Statewide Voter Registration Database (i.e., the number or, if a driver's license or state identification card number, the combination of letters and numbers, provided is different), the board must reject the provisional ballot.⁴⁰
 - If the voter did not provide identification on the affirmation statement or did not indicate that he/she showed an acceptable form of identification to the precinct election official

³⁷ R.C. 3505.183(B)(4)(a)(ix).

³⁸ R.C. 3505.181(B)(6).

³⁹ R.C. 3505.183(B)(3)(d).

⁴⁰ R.C. 3505.183(B)(4)(a)(viii).

but returned to board of elections within seven days after the election and provided one of the acceptable forms of voter identification, proceed to Step 3.⁴¹

- If the voter did not provide identification on the provisional ballot affirmation, did not indicate on the affirmation statement that he/she showed the precinct election official an acceptable form of identification, and did not return to the board within the seven days after the election to remedy the missing item, the board must reject the provisional ballot.⁴²

Step 3: Determine whether the board can verify the identity of the voter based on the information provided on the provisional ballot affirmation or provided by the voter within the seven-day period.

- If the board can verify the identity of the voter based upon the information provided on the provisional ballot affirmation and/or provided by the voter within seven days of the election, proceed to Step 4.
- If the board cannot verify the identity of the voter based upon the information provided on the provisional ballot affirmation and/or the information provided by the voter within seven days of the election, the board must reject the provisional ballot.⁴³

Note: To verify identity, the board must 1) conduct at least one “wildcard” search of the county’s local voter registration database, if available, 2) conduct a voter query of the Statewide Voter Registration Database using ‘Search by Driver License Number’ and 3) conduct at least one voter query of the Statewide Voter Registration Database

⁴¹ [R.C. 3505.183\(B\)\(3\)\(g\).](#)

⁴² [R.C. 3505.183\(B\)\(4\)\(a\)\(vii\).](#)

⁴³ [R.C. 3505.183\(B\)\(4\)\(b\)\(i\).](#); *State ex rel. Skaggs v. Brunner* (2008), 120 Ohio St. 3d 506.

by entering as much or as little information as is available using 'Search by Name.' Once a board has successfully identified a voter with one search, it is not necessary to conduct the additional queries.

- Step 4:** Determine whether the voter is a registered voter anywhere in the State of Ohio at least 30 days before the election.
- If the voter was registered to vote anywhere in the State of Ohio at least 30 days before the election, proceed to Step 5.
 - If the voter was not registered to vote anywhere in the State of Ohio at least 30 days before the election, then the board must reject the provisional ballot.⁴⁴
- Step 5:** Determine whether the voter is a resident of the county and precinct in which the voter offers to vote.⁴⁵
- If the voter is a resident of the county and precinct in which the provisional ballot was cast, proceed to Step 6.
 - If the voter moved and provided a new address within the precinct on the affirmation statement, then the voter is considered a resident of the new precinct and the board must proceed to Step 6.
 - If the voter cast the provisional ballot in the wrong precinct, but in the correct polling place, including the board of elections office, and a precinct election official did not complete and attach [*Form 12-D*](#) to the provisional ballot envelope, the board must remake and count the provisional ballot for only those contests for which the voter was otherwise eligible to vote.⁴⁶

⁴⁴ [*Ohio Constitution Article V, Section 1; R.C. 3505.183\(B\)\(4\)\(a\)\(i\).*](#)

⁴⁵ [*R.C. 3503.01\(A\).*](#)

⁴⁶ [*R.C. 3505.183\(D\)\(1\).*](#)

- If the voter cast the provisional ballot in the wrong precinct, but in the correct polling place, including the board of elections office, and a precinct election official did complete and attach [Form 12-D](#), but the board verified that the precinct to which the precinct election official directed the voter was the incorrect precinct, the board must remake and count the provisional ballot for only those contests for which the voter was otherwise eligible to vote.
- If the voter cast the provisional ballot in the wrong precinct, but correct polling place, including the board of elections office, and 1) a precinct election official completed [Form 12-D](#) and 2) the board verified that the precinct to which the precinct election official directed the voter was the correct precinct, the board must reject the provisional ballot.⁴⁷
- If the voter cast the provisional ballot in the wrong precinct and wrong polling place the board must reject the provisional ballot.⁴⁸

Step 6: Determine whether the voter already requested and cast a ballot in the election.

- If the voter has not cast another ballot, proceed to Step 7.
- If the voter has requested and cast an absentee ballot but either of the following exceptions apply, proceed to Step 7.
 - Exception 1: The board of elections shall count the provisional ballot, instead of the absentee ballot, if the board determines that the absentee ballot is invalid because the elector's signature on the absentee voter's identification envelope does not match the signature on file with the board of

⁴⁷ [R.C. 3505.183\(D\)\(1\)](#).

⁴⁸ [R.C. 3505.183\(D\)\(3\)](#).

elections, and the elector cast the provisional in the voter's precinct on Election Day.⁴⁹ If the ballot meets this exception, proceed to Step 7.

- Exception 2: The board of elections does not receive the voter's absentee ballot by the 10th day following the election, and the elector cast the provisional in the voter's precinct on Election Day.⁵⁰ If the ballot meets this exception, proceed to Step 7.
- If the voter has cast another ballot, or requested and cast an absentee ballot and the exceptions above do not apply, the board must reject the provisional ballot.

Step 7: If you have completed Steps 1 through 6 and determined that the provisional ballot should be rejected, you must consider and apply the consent decree issued by the federal court in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896, ("NEOCH"), which is copied in full in Section 1.06, below.

SECTION 1.05 REGISTERING TO VOTE / UPDATING ADDRESS FROM AFFIRMATION

A board cannot count a provisional ballot cast by an individual who is not registered to vote in Ohio by the voter registration deadline for that election. However, a completed Provisional Ballot Affirmation Statement (envelope) also serves as a voter registration form, change of address, and/or change of name form. Even if the provisional ballot envelope is not opened and the ballot counted, the board must use the information on the application to enter the person as a new registered voter, or update the voter's address and/or name.

⁴⁹ [R.C. 3509.09\(C\)\(2\).](#)

⁵⁰ [R.C. 3509.09\(C\)\(3\).](#)

If the board needs information in addition to that provided on the Provisional Ballot Affirmation Statement in order to register the individual to vote, the board must contact the individual and request the information needed.

SECTION 1.06 NEOCH

Boards of elections are instructed to comply with the injunctive relief cited below as provided in the April 19, 2010 Consent Decree and modified by the Court on October 26, 2012 and November 2, 2012.

Additionally, each board of elections must post the notice, which was updated in 2014 following amendments to the statutes governing the casting and counting of provisional ballots, that contains the text of the injunctive relief granted in a conspicuous place in every location in which provisional ballots are processed after an election.

Notice Issued Pursuant Court Order

III. GENERAL INJUNCTIVE RELIEF.

4. THE COURT ADOPTS AND ANNEXES HEREAFTER DIRECTIVE 2008-80 AS AN ORDER OF THIS COURT.
5. DEFENDANT SECRETARY OF STATE, HER AGENTS, EMPLOYEES AND REPRESENTATIVES WILL INSTRUCT OHIO'S COUNTY BOARDS OF ELECTIONS TO ADHERE TO THE FOLLOWING RULES REGARDING THE CASTING AND COUNTING OF PROVISIONAL BALLOTS FOR PERSONS WITHOUT IDENTIFICATION OTHER THAN A SOCIAL SECURITY NUMBER:
 - α. BOARDS OF ELECTIONS MUST COUNT THE PROVISIONAL BALLOT CAST BY A VOTER USING ONLY THE LAST FOUR DIGITS OF HIS OR HER SOCIAL SECURITY NUMBER AS IDENTIFICATION IF ALL OF THE FOLLOWING CONDITIONS ARE MET:
 - i. THE INDIVIDUAL WHO CAST THE PROVISIONAL BALLOT IS REGISTERED TO VOTE;

- ii. THE INDIVIDUAL IS ELIGIBLE TO CAST A BALLOT IN THE PRECINCT AND FOR THE ELECTION IN WHICH THE INDIVIDUAL CAST THE PROVISIONAL BALLOT;
- iii. THE PROVISIONAL BALLOT AFFIRMATION INCLUDES A STATEMENT THAT THE INDIVIDUAL IS REGISTERED TO VOTE IN THE PRECINCT IN WHICH THE PROVISIONAL BALLOT WAS CAST AND A STATEMENT THAT THE INDIVIDUAL IS ELIGIBLE TO VOTE IN THE ELECTION IN WHICH THE PROVISIONAL BALLOT WAS CAST;
- iv. THE INDIVIDUAL'S NAME AND SIGNATURE APPEAR IN THE CORRECT PLACE ON THE PROVISIONAL BALLOT AFFIRMATION FORM;
- v. THE SIGNATURE OF THE VOTER SUBSTANTIALLY CONFORMS TO THE SIGNATURE CONTAINED IN THE BOARD OF ELECTION'S RECORDS FOR THAT VOTER;
- vi. THE PROVISIONAL BALLOT AFFIRMATION INCLUDES THE INDIVIDUAL'S DATE OF BIRTH, AND THE MONTH AND DAY OF THE DATE OF BIRTH ARE NOT DIFFERENT FROM THE DAY AND MONTH OF THE INDIVIDUAL'S DATE OF BIRTH CONTAINED IN THE STATEWIDE VOTER REGISTRATION DATABASE; OR, THE INDIVIDUAL PROVIDED HIS OR HER DATE OF BIRTH, AND THE MONTH AND DAY OF THE DATE OF BIRTH ARE DIFFERENT FROM THE DAY AND MONTH OF THE INDIVIDUAL'S DATE OF BIRTH IN THE STATEWIDE VOTER REGISTRATION DATABASE, BUT THE INDIVIDUAL'S DATE OF BIRTH IN THE STATEWIDE VOTER REGISTRATION DATABASE IS JANUARY 1, 1800 OR THE BOARD OF ELECTIONS HAS FOUND, BY A VOTE OF AT LEAST 3 OF ITS MEMBERS, THAT THE INDIVIDUAL HAS MET ALL OTHER REQUIREMENTS OF DIVISION (B)(3) OF [R.C. 3505.183](#);
- vii. THE INDIVIDUAL PROVIDED HIS OR HER CURRENT ADDRESS;

- viii. THE PROVISIONAL BALLOT AFFIRMATION INCLUDES THE LAST FOUR DIGITS OF THAT VOTER'S SOCIAL SECURITY NUMBER, WHICH IS NOT FOUND TO BE INVALID;
 - ix. THE INDIVIDUAL'S RIGHT TO VOTE WAS NOT SUCCESSFULLY CHALLENGED;
 - x. THE INDIVIDUAL DID NOT ALREADY CAST A BALLOT FOR THE ELECTION IN WHICH THE INDIVIDUAL CAST THE PROVISIONAL BALLOT; AND
 - xi. PURSUANT TO R.C. 3505.183(B)2, THE BOARD OF ELECTIONS DETERMINES THAT, IN ADDITION TO THE INFORMATION INCLUDED ON THE AFFIRMATION, THERE IS NO ADDITIONAL INFORMATION FOR DETERMINING BALLOT VALIDITY PROVIDED BY THE PROVISIONAL VOTER OR TO THE BOARD OF ELECTIONS DURING THE SEVEN DAYS AFTER THE DAY OF THE ELECTION THAT CASTS DOUBT ON THE VALIDITY OF THE BALLOT OR THE INDIVIDUAL'S ELIGIBILITY TO VOTE.
- 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:
- i. THE VOTER PROVIDED THE LAST FOUR DIGITS OF A SOCIAL SECURITY NUMBER BUT DID NOT PROVIDE A CURRENT DRIVER'S LICENSE, STATE ISSUED IDENTIFICATION, OR OTHER DOCUMENT WHICH SERVES AS IDENTIFICATION UNDER OHIO LAW;
 - ii. THE MONTH AND DAY OF THE VOTER'S DATE OF BIRTH ARE DIFFERENT FROM THE DAY AND MONTH OF THE VOTER'S DATE OF BIRTH IN THE STATEWIDE VOTER REGISTRATION DATABASE, BUT THE VOTER'S DATE OF BIRTH IN THE STATEWIDE VOTER REGISTRATION DATABASE IS JANUARY 1, 1800 OR THE BOARD OF ELECTIONS HAS FOUND, BY A VOTE OF AT LEAST 3 OF ITS

MEMBERS, THAT THE VOTER HAS MET ALL OTHER REQUIREMENTS OF DIVISION (B)(3) OF R.C. 3505.183;

- iii. THE VOTER DID NOT PROVIDE AN ADDRESS THAT IS TIED TO A HOUSE, APARTMENT OR OTHER DWELLING PROVIDED THAT THE VOTER INDICATED THAT HE OR SHE RESIDES AT A NON-BUILDING LOCATION, INCLUDING BUT NOT LIMITED TO A STREET CORNER, ALLEY OR HIGHWAY OVERPASS LOCATED IN THE PRECINCT IN WHICH THE VOTER SEEKS TO CAST A BALLOT AND THAT THE NON-BUILDING LOCATION QUALIFIES AS THE INDIVIDUAL'S VOTING RESIDENCE UNDER R.C. 3503.02;
 - iv. THE VOTER INDICATED THAT HE OR SHE IS HOMELESS;
 - v. IN LIGHT OF THE INJUNCTION ISSUED IN SEIU LOCAL 1 V. HUSTED, SECTION III (5) (b) (v) OF THE APRIL 19, 2010 CONSENT DECREE HAS BEEN REMOVED FOR THE PURPOSES OF THE NOVEMBER 6, 2012 ELECTION. COUNTY BOARDS OF ELECTION ARE ORDERED TO COMPLY WITH THE DIRECTIVES THAT GOVERN THE COUNTING OF PROVISIONAL BALLOTS CAST IN THE CORRECT POLLING LOCATION, BUT IN THE WRONG PRECINCT;
 - vi. THE COURT HAS REMOVED THIS PROVISION OF THE CONSENT DECREE. SEE NEOCH V. HUSTED FIRST ORDER ISSUED OCTOBER 26, 2012; OR
- c. BOARDS OF ELECTIONS MUST OBSERVE THE FOLLOWING RULES REGARDING THE DELEGATION OF PROCESSING PROVISIONAL BALLOTS, AND DETERMINING THEIR VALIDITY, TO BOARD STAFF:
- i. ULTIMATELY, THE MEMBERS OF BOARDS OF ELECTIONS MUST DETERMINE THE VALIDITY OF ALL VOTES CAST IN AN ELECTION AND MUST CERTIFY THE RESULTS OF ALL ELECTIONS. HOWEVER, NOTHING IN OHIO LAW REQUIRES THAT THE MEMBERS OF A BOARD OF ELECTIONS MUST PERSONALLY COMPLETE ALL TASKS ASSOCIATED WITH PREPARING FOR THAT CERTIFICATION.

- ii. THUS, BOARDS OF ELECTIONS MAY, UNDER A POLICY ADOPTED BY THE BOARD, DELEGATE THE PROCESSING AND SOME ASPECTS OF COUNTING PROVISIONAL BALLOTS TO BOARD STAFF. SUCH PROCESSING MUST BE DONE IN BIPARTISAN TEAMS.
- iii. IF A BOARD OF ELECTIONS DELEGATES THE PROCESSING OF PROVISIONAL BALLOTS, IT MUST FIRST ADOPT A POLICY SETTING FORTH PROCEDURES FOR THE PROCESSING OF PROVISIONAL BALLOTS. UNDER THAT POLICY, BOARD STAFF RESPONSIBLE FOR PROCESSING PROVISIONAL BALLOTS MUST MAKE A RECOMMENDATION TO THE BOARD AS TO THE ELIGIBILITY OF EACH PROVISIONAL BALLOT CAST IN THE COUNTY, EITHER ON AN INDIVIDUAL BASIS, OR AS TO GROUPS OR CATEGORIES OF SIMILARLY SITUATED PROVISIONAL BALLOTS.
- iv. ULTIMATELY, THE MEMBERS OF BOARD OF ELECTIONS MUST DETERMINE THE ELIGIBILITY OR INELIGIBILITY OF ALL PROVISIONAL BALLOTS CAST WITHIN THE COUNTY IN ACCORDANCE WITH OHIO LAW. BOARDS MAY NOT DELEGATE THIS TASK.
- v. EACH BOARD OF ELECTIONS MUST THEN CAUSE THE BALLOTS TO BE COUNTED BY BOARD STAFF, AND MUST INCLUDE THE TABULATION OF THAT COUNT IN ITS OFFICIAL CANVASS OF THE ELECTION RESULTS AND, TO THE EXTENT REQUIRED, ITS CERTIFICATION OF THE ELECTION RESULTS TO THE SECRETARY OF STATE.

SECTION 1.07 FREE ACCESS SYSTEM

Both Ohio and Federal law require the state to establish a free access system, in the form of a toll-free number, which enables a provisional voter to call and learn whether his or her provisional ballot was counted.⁵¹ If the provisional

⁵¹ [R.C. 3505.181\(B\)\(5\)](#); 52 U.S.C.A. § 21082.

ballot was not counted, the individual can ascertain why the ballot was not counted and how to register to vote or resolve any issues with his or her voter registration.⁵²

Each provisional voter must be given Form 12-H, which contains the toll-free number for the free access system and the deadline by which the voter can appear at the board of elections office to provide identification.

Only the provisional voter can access information about his or her provisional ballot.⁵³ A board of elections is prohibited from releasing information on a provisional ballot through the free access system to anyone other than the provisional voter.⁵⁴

SECTION 1.08 PUBLIC RECORDS

A. When Provisional Ballot Affirmation Statements Can Be Disclosed

Provisional ballot affirmation statements are public records. However, they are not subject to disclosure or inspection pursuant to a request for public records until after the time period for any recount or elections contest has passed.⁵⁵ As with all requests for public records, the board might want to consult with its legal counsel if it receives a request for Provisional Ballot Affirmation Statements.

The Secretary of State's retention schedule sets forth the retention period for Provisional Ballot Affirmation Statements/envelopes. The retention schedule is available in the resources section of this manual.

⁵² R.C. 3505.181(B)(5)(b).

⁵³ R.C. 3505.181(B)(5)(b).

⁵⁴ R.C. 3505.181(B)(5)(b); 2011 OAG 012.

⁵⁵ 2011 OAG 012.



B. Provisional Ballot Affirmation Statement as Voter Registration Forms

If a Provisional Ballot Affirmation Statement is used to register an individual to vote, it must be retained permanently, because it serves as the individual's voter registration application.

