

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

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1005; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 863; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 880; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1059, AND INTERNATIONAL CHEMICAL WORKERS UNION, A COUNCIL OF UNITED FOOD AND COMMERCIAL WORKERS and OHIO ORGANIZING COLLABORATIVE,

: Case No. 2:12-cv-562

**FIRST AMENDED COMPLAINT
FOR DECLARATORY RELIEF
AND INJUNCTIVE RELIEF**

CLASS ACTION

Plaintiffs,

vs.

JON HUSTED, in his official capacity as Secretary of State of Ohio; TIMOTHY M. BURKE, in his official capacity as member of the Hamilton County Board of Elections and on behalf of similarly situated members of county boards of elections; JEFF HASTINGS, in his official capacity as member of the Cuyahoga County Board of Elections and on behalf of similarly situated members of county boards of elections; and DOUGLAS J. PREISSE, in his official capacity as member of the Franklin County Board of Elections and on behalf of similarly situated members of county boards of elections,

Defendants.

Plaintiffs Service Employees International Union Local 1 (“SEIU Local 1”); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“UAW”), Local 1005 (“UAW Local 1005”); UAW, Local 863 (“UAW Local 863”); United Food and Commercial Workers Local 75 (“UFCW Local 75”); United Food and Commercial Workers Local 880 (“UFCW Local 880”); United Food and Commercial Workers Local 1059 (“UFCW Local 1059”); International Chemical Workers Union, a Council of the United Food and Commercial Workers (“ICWUC”); and Ohio Organizing Collaborative (“OOC”) seek declaratory and injunctive relief against Defendants Ohio Secretary of State Jon Husted, Hamilton County Board of Elections member Timothy M. Burke, Cuyahoga County Board of Elections member Jeff Hastings, Franklin County Board of Elections member Douglas J. Priesse, and a defendant class of the remaining members of the eighty-eight Ohio County Boards of Elections pursuant to 42 U.S.C. §1983 and the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202. As set forth more fully below, Ohio elections law mandates that elections officials disqualify provisional ballots cast by lawfully registered voters for reasons attributable to poll worker error. The failure of Defendant Ohio state and county elections officials to ensure that all votes in federal, state, and local elections cast by the lawfully registered Ohio voters who are required under Ohio law to cast provisional ballots are counted despite poll worker and election official error has resulted and will continue to result in a denial of the fundamental right to vote of Ohio voters, including Plaintiffs’ members, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, the right to vote for Congress protected by Article

I, Section II and the Seventeenth Amendment to the United States Constitution, and federal voting statutes.

INTRODUCTION

1. In the wake of the 2000 federal election, the United States Congress passed the Help America Vote Act (“HAVA”), 42 U.S.C. §15301 *et seq.*, which requires states to allow individuals to cast “provisional” ballots in the event that the voter believes he or she is registered to vote but for some reason does not appear on the list of registered voters at the polls on election day. Congress expressly stated that HAVA’s provisional voting option is to act as a “fail safe” mechanism to prevent the arbitrary disenfranchisement by state officials of lawfully registered voters in federal elections so long as the state or local officials are able to later confirm verify voters’ registration.

2. In 2006, Ohio enacted one of the nation’s most complicated provisional ballot laws. *See* Ohio. Rev. Code §3505.181-183. Ohio requires at least thirteen categories of voters to cast provisional, rather than regular ballots. As a result, Ohio voters have cast *hundreds of thousands* more provisional ballots than voters in states with comparable voting populations. In 2008 alone, Ohio voters cast more than 200,000 provisional ballots out of 5.7 million votes. As a result, with a far smaller population, Ohio ranks second only to California in total number of provisional ballots cast. States with comparable voting populations required voters to cast far fewer provisional ballots in the 2008 election: Michigan (approximately 5 million votes, only 3,797 provisional ballots cast); Virginia (approximately 3,750,000 votes, only 4,575 provisional ballots cast); Wisconsin (3 million votes; only 211 provisional ballots cast).

3. In addition to requiring substantial categories of provisional voters to cast provisional ballots, Ohio law also requires the County Boards of Election to *reject* provisional

ballots for many reasons. In the 2008 election, over 40,000 of Ohio's provisional ballots were rejected and the numbers in other recent elections have also been substantial. And, a very large number of ballots cast by lawfully registered voters in Ohio have been rejected in every recent election for reasons directly attributable to poll worker error.

4. The most egregious example of widespread disqualification of ballots of registered voters because of poll worker error results from the provisional ballot statute provision, Ohio Rev. Code §3505.183(b)(4)(ii), which requires the County Boards of Election to reject and not count all votes cast on a provisional ballot if the ballot does not correspond to the voter's assigned precinct. The Ohio Supreme Court in 2011 in *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17 (2011), adopted the most strict possible interpretation of this statute, requiring rejection of all wrong-precinct provisional ballots *without exception*, even where the County Board of Election *knows* that poll worker error led to the voter being provided with the wrong ballot. This Ohio law requires rejection not just of the votes cast for precinct-level elections, but *all votes on the ballot*, including votes for President and Vice President, United States Representative and Senator, Governor, and other state and local races.

5. The unfair application of this law has become all the more egregious in light of Ohio's increasing consolidation of voting precincts into multi-precinct polling locations, where poll workers give a wrong precinct ballot to a voter who has come to vote *in the correct polling location*, only to have that ballot disqualified in its entirety, with no notice to the voter, after the election. In some counties, one hundred percent of precincts are now located in multi-precinct polling locations. Ohio ranks at near the top of the nation in use of multi-precinct locations.

6. Ohio law also prohibits County Boards of Elections from counting all votes on provisional ballots cast by registered voters, even if cast in the correct precinct, if the poll worker

processes a provisional ballot without ensuring that all required information is recorded on the envelope in which the provisional ballot is submitted, despite the obligation under Ohio law for the poll worker to ensure that the envelope properly be completed.

7. In elections from 2008 through the March 2012 primary elections, thousands of registered Ohio voters did not have their votes counted as a result of poll worker error under these very strict Ohio provisional ballot disqualification laws. Although the rate of provisional ballots cast and rejected, along with the reasons for rejection, varies by county, a very substantial percentage of all provisional ballots rejected in Ohio are rejected because the voter was provided a precinct ballot that did not correspond to the voter's assigned precinct, or as a result of the poll workers' failure to ensure the proper completion of voting forms.

8. Under these Ohio election laws, and the corresponding directives to County Boards of Elections issued by Defendant Secretary of State Husted, in the upcoming November 2012 general election the County Boards of Election will reject thousands of provisional ballots cast by qualified, registered voters because the ballots were cast incorrectly as a result of poll worker error, either because the poll worker provided the would-be voter with the incorrect precinct ballot or because the poll worker failed to ensure that the provisional ballot envelope was completed.

9. The arbitrary disqualification of ballots required by Ohio's provisional ballot laws results in the unconstitutional and disparate treatment of Ohio voters, and is fundamentally at odds with the purposes of provisional voting. This severe burden on the fundamental right to vote – the right preservative of all rights in our democracy – cannot be justified by *any* state interest, let alone a compelling interest, and violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, as well as the right to

vote in federal congressional elections protected by Article I, Section 2 and the Seventeenth Amendment, and is fundamentally at odds with the purposes and protection of the federal Voting Rights and Help America Vote Acts.

10. This Court should enjoin the Ohio Secretary of State and the County Boards of Election from enforcing the “wrong precinct” requirement for rejecting provisional ballots, Ohio Rev. Code §3505.183(B)(4)(a)(ii). The enforcement of this rule creates a real and imminent threat that Plaintiffs’ members and thousands of other voters will be unjustly and unlawfully denied their fundamental right to vote in the upcoming November 2012 election. The Court should further enjoin the Ohio Secretary of State and the members of the County Boards of Election from refusing to count provisional ballots on the basis that the provisional ballot envelope was not completed correctly, or on the basis that, following the election, a County Board of Elections determines without notice to the voter that the voter’s signature on the provisional ballot does not match the signature on file with the Board of Elections.

PARTIES

Plaintiffs

11. Plaintiff SEIU Local 1 is a local union affiliated with the Service Employees International Union. SEIU Local 1 currently represents approximately 4,000 workers in Ohio. SEIU Local 1 represents numerous low-wage workers who live in large urban counties and who are registered to vote in Ohio, including many voters who are assigned to vote at multi-precinct voting locations. SEIU Local 1 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members. This action pertains to the purposes for which SEIU Local 1’s members are associated together and is germane to the union’s interests. Article II of the Constitution of the Service Employees International Union

provides that one of the union's primary purposes is to "engag[e] in all such civic, social, political, [and] legal . . . activities, whether on local [or] national . . . levels," to advance the union's "standing in the community" and to "further the interests of [the] organization and its membership."

12. Erin Kramer is the SEIU Local 1 Director for Ohio and Indiana, a member of SEIU Local 1, and a registered voter in Franklin County in Ohio. Ms. Kramer plans to vote in the November 2012 election, and wishes to have her ballot and the ballots of all other qualified and registered Ohio voters counted in any forthcoming elections.

13. Plaintiff USW currently represents more than 47,000 workers in Ohio. USW represents workers who live in every one of Ohio's eighty-eight counties. A large number of USW's Ohio membership is registered to vote in Ohio, and many USW members are assigned to vote at multi-precinct voting locations. USW engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members. This action pertains to the purpose for which USW's members are associated together and is germane to the union's interests. As set forth in USW's Constitution, one of the organization's primary purposes is "[t]o engage in educational, legislative, political, civic, . . . community and other activities," including with the goals of "protect[ing] and extend[ing] our democratic institutions and civil rights and liberties," and advancing "the cherished traditions of democracy . . . in the United States."

14. David McCall is the Director of USW District 1, a member of USW, and a registered voter in Franklin County in Ohio. Mr. McCall plans to vote in the November 2012 election, and wishes to have his ballot and the ballots of all other qualified and registered Ohio voters counted in any forthcoming elections.

15. Plaintiff UAW Local 1005 currently represents approximately 1,400 active members and 3,000 retired workers in Ohio. UAW Local 1005 represents automobile workers and janitorial workers. UAW Local 1005's members primarily reside in six Ohio counties: Cuyahoga County, Medina County, Lorain County, Lake County, Summit County, and Portage County. A large number of UAW Local 1005's members are registered to vote in Ohio, and many of these registered voters are assigned to vote at multi-precinct polling locations. UAW Local 1005 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members. This action pertains to the purposes for which the union's members are associated together and is germane to the union's interests. The UAW Constitution provides in its preamble that "Union members must take seriously their responsibilities as citizens and work, through their union and individually, to realize the goals of participatory democracy," and, in Article II, states that one of the primary objects of the organization is "[t]o engage in legislative, political, educational, civic . . . and other activities which further . . . the joint interests of the membership of th[e] organization."

16. Steven Frammartino is the President of UAW Local 1005, a member of that union, and a registered voter in Cuyahoga County in Ohio. Mr. Frammartino previously has been assigned to vote in a multi-precinct polling location and, in voting at such plans to such a location, has experienced the difficulty of determining whether, within a multi-precinct location, one is voting in the correct precinct. Mr. Frammartino intends to vote in the November 2012 elections, and wishes to have his ballot and the ballots of all other qualified and registered Ohio voters counted in any forthcoming election.

17. Plaintiff UAW Local 863 currently represents approximately 1,500 active members and 4,500 retired workers, many of whom reside in and around Hamilton County,

Ohio. UAW Local 863 represents automobile manufacturing workers employed by Ford in Sharonville, Ohio. Many of UAW Local 863's members are registered to vote in Ohio, primarily in Hamilton County, and many of the members who are registered to vote are assigned to multi-precinct polling locations. In the 2012 primary, Hamilton County assigned more than sixty percent of its precincts to multi-precinct polling locations. UAW Local 863 engages in voter education and other election-related activities within the State of Ohio on behalf of its members. This action pertains to the purposes for which the union's members are associated together and is germane to the union's interests. As noted above, the UAW Constitution provides in its preamble that "Union members must take seriously their responsibilities as citizens and work, through their union and individually, to realize the goals of participatory democracy," and, in Article II, states that one of the primary objects of the organization is "[t]o engage in legislative, political, educational, civic . . . and other activities which further . . . the joint interests of the membership of th[e] organization."

18. Rick Lawwill is the President of UAW Local 863, a member of that union, and a registered voter in Butler County in Ohio. Mr. Lawwill, in past elections, has been assigned to vote in multi-precinct polling locations and personally has been confused about how, within that multi-precinct location, to determine where properly to cast a ballot that will be counted. Mr. Lawwill plans to vote in the November 2012 elections, and wishes to have his ballot and the ballots of all other qualified and registered Ohio voters counted in any forthcoming election.

19. Members of Plaintiffs SEIU Local 1, USW, UAW Local 1005, UAW Local 863, UFCW Local 75, UFCW Local 880, UFCW Local 1059, and ICWUC are registered Ohio voters who have been required to vote provisional ballots in recent Ohio elections, for one of the thirteen reasons required by Ohio law for voting provisional ballots. On information and belief,

each of the Plaintiff organizations has members who are registered to vote in Ohio, who will attempt to vote in the upcoming 2012 general election, and who will be required by poll workers to cast provisional ballots. On information and belief, each of the Plaintiff organizations has members who are registered to vote in Ohio, will be required to cast provisional ballots in upcoming elections, and will not have their ballots opened and counted by Ohio County Boards of Elections for reasons attributable to poll worker error, including for the reason that the ballot was cast in the “wrong precinct” and based on technical deficiencies in the provisional ballot injury. On information and belief, as a result, these voters will have all votes for federal, state and local elections disqualified, and will be thereby be deprived of their right to vote in upcoming elections.

20. Plaintiff UFCW Local 75 is a local union affiliated with the United Food and Commercial Workers Union. UFCW Local 75 currently represents approximately 25,000 active and retired workers in Ohio. Most of these members are registered to vote. Some are assigned to vote at multi-precinct voting locations, and some will be assigned to polling locations that have moved or been consolidated. UFCW Local 75 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members. Some members of UFCW Local 75 have been required to cast provisional ballots in past elections and, on information and belief, some of those ballots have not been counted for reasons attributable to poll-worker error. UFCW Local 75 is concerned to ensure that its members’ and other voters’ ballots in upcoming elections are counted. This action pertains to the purposes for which UFCW Local 75’s members are associated together and is germane to the union’s interests. Article 2 of the UFCW Constitution provides that “political freedom” and “the successful functioning of a democracy,” “advanc[ing] the principles and practice of freedom and democracy for all,” “to

encourage members and all workers to register to vote,” and engaging in “legislative, political [and] civic” activities are core objectives of UFCW. Article III of UFCW Local 75’s bylaws sets forth similar objectives.

21. William James Dudley is the UFCW Local 75 Director of Legislative and Strategic Campaigns, a member of UFCW Local 880, and a registered voter in Warren County in Ohio. Mr. Dudley plans to vote in the November 2012 election, and wishes to have his ballot and the ballots of all other qualified and registered Ohio voters counted in any forthcoming elections.

22. Plaintiff UFCW Local 880 is a local union affiliated with the United Food and Commercial Workers Union. UFCW Local 880 currently represents approximately 22,000 active and retired workers in Ohio. Most of these members are registered to vote. Some are assigned to vote at multi-precinct voting locations, and some will be assigned to polling locations that have moved or been consolidated. UFCW Local 880 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members. Some members of UFCW Local 880 have been required to cast provisional ballots in past elections and, on information and belief, some of those ballots have not been counted for reasons attributable to poll-worker error. UFCW Local 880 is concerned to ensure that its members’ and other voters’ ballots in upcoming elections are counted. This action pertains to the purposes for which UFCW Local 880’s members are associated together and is germane to the union’s interests. Article 2 of the UFCW Constitution provides that “political freedom” and “the successful functioning of a democracy,” “advanc[ing] the principles and practice of freedom and democracy for all,” “to encourage members and all workers to register to vote,” and engaging in

“legislative, political [and] civic” activities are core objectives of UFCW. Article III of UFCW Local 880’s bylaws sets forth similar objectives.

23. Bob Gravougl is the UFCW Local 880 President, a member of UFCW Local 880, and a registered voter in Wayne County in Ohio. Mr. Gravougl plans to vote in the November 2012 election, and wishes to have his ballot and the ballots of all other qualified and registered Ohio voters counted in any forthcoming elections.

24. Plaintiff UFCW Local 1059 is a local union affiliated with the United Food and Commercial Workers Union. UFCW Local 1059 currently represents approximately 17,500 active and retired workers in Ohio. Most of these members are registered to vote. Some are assigned to vote at multi-precinct voting locations, and some will be assigned to polling locations that have moved or been consolidated. UFCW Local 1059 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members. Some members of UFCW Local 1059 have been required to cast provisional ballots in past elections and, on information and belief, some of those ballots have not been counted for reasons attributable to poll worker error. UFCW Local 1059 is concerned to ensure that its members’ and other voters’ ballots in upcoming elections are counted. This action pertains to the purposes for which UFCW Local 1059’s members are associated together and is germane to the union’s interests. Article 2 of the UFCW Constitution provides that “political freedom” and “the successful functioning of a democracy,” “advanc[ing] the principles and practice of freedom and democracy for all,” “to encourage members and all workers to register to vote,” and engaging in “legislative, political [and] civic” activities are core objectives of UFCW. Local 1059’s bylaws contain similar provisions.

25. Plaintiff International Chemical Workers Union, a Council of the United Food and Commercial Workers (“ICWUC”), is affiliated with the United Food and Commercial Workers Union and has local union affiliates that represent members in Ohio. ICWUC’s member local unions currently represent hundreds of workers in Ohio including many registered voters. Some are assigned to vote at multi-precinct voting locations, and some will be assigned to polling locations that have moved or been consolidated. ICWUC and its member local unions engage in voter registration, education and other election-related activities within the State of Ohio on behalf of members. ICWUC is concerned to ensure that members’ and other voters’ ballots in upcoming elections are counted. This action pertains to the purposes for which ICWUC and its member locals’ members are associated together and is germane to the union’s interests. Article 2 of the UFCW Constitution, which governs ICWUC, provides that “political freedom” and “the successful functioning of a democracy,” “advanc[ing] the principles and practice of freedom and democracy for all,” “to encourage members and all workers to register to vote,” and engaging in “legislative, political [and] civic” activities are core objectives of UFCW.

26. Plaintiff Ohio Organizing Collaborative (“OOC”) is a statewide, nonpartisan community organizing and advocacy association comprised of faith-based, labor, and neighborhood organizations that works to build and support community throughout Ohio. OOC has a voter engagement campaign, the primary goal of which is to ensure that all Ohioans who are eligible and want to vote are able to do so. The OOC devotes staff and financial resources toward this end. As a result of OOC’s understanding that poll worker errors jeopardize the ability of voters who cast provisional ballots on Election Day to have those ballots counted, OOC has decided to dedicate a large portion of its limited staff time and resources this summer and fall to addressing this problem, including by putting additional funds into voter registration efforts

and into more broadly-applicable voter education efforts. If Ohio County Boards of Elections were not invalidating provisional ballots because of poll worker error, OOC would be using these limited resources on other organizational priorities.

Defendants

27. Defendant Jon Husted is the current Ohio Secretary of State, a public officer of the State of Ohio and is named as Defendant in this action in his official capacity only. In his capacity as Secretary of State, Defendant Husted is the chief elections official of the State and has supervisory control over local election officials. Ohio Rev. Code §3501.05. He is responsible for administering all statewide elections, including for federal office, appointing all members of the County Boards of Elections, issuing instructions and promulgating rules for the conduct of elections, publishing manuals of instructions on elections administration for use at polling places, prescribing uniform forms and notices for use in the conduct of elections, instructing county elections officials with respect to election administration and compelling observance, prescribing training of polling place officials, and certifying statewide election results. *Id.*

28. Defendant Douglas J. Preisse is currently a member and the chairperson of the Franklin County Board of Elections.

29. Defendant Jeff Hastings is currently a member and the chairperson of the Cuyahoga County Board of Elections.

30. Defendant Timothy M. Burke is currently a member and the chairperson of the Hamilton County Board of Elections.

31. Defendants Preisze, Hastings, and Burke are sued on their own behalves in their official capacities as members and chairpersons of County Boards of Elections, and as representatives of all other similarly situated members of the Ohio County Boards of Elections.

32. There are 88 County Boards of Elections, which are organized pursuant to Ohio Rev. Code §3501.06. As members of these Boards, Defendants Preisze, Hastings and Burke, like other similarly situated members of the Boards throughout the State, are responsible for performing the Boards' duties that are outlined in Ohio Rev. Code §3501.11, including but not limited to: providing for the delivery of ballots, pollbooks, and other required materials to the polling places, investigation of irregularities or nonperformance of duties by election officers and other persons, receipt of the returns of elections, canvassing of the returns and creation of abstracts of the returns, and transmission of the abstracts to the proper authorities, and performance of other duties as prescribed by law or the rules, directives and advisories of the Secretary of State. County Boards of Elections collect, review, count, and reject all provisional ballots in Ohio, pursuant to duties imposed by Ohio Rev. Code §§3505.181-183.

JURISDICTION

33. This action for declaratory and injunctive relief arises under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution; Article I, Section 2 of the United States Constitution; the Seventeenth Amendment to the United States Constitution; the Voting Rights Act of 1965, 42 U.S.C. §1971; the Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. §15301 *et seq.*; 42 U.S.C. §1983; and the Supremacy Clause, U.S. Const., Art. VI, cl. 2. This Court has subject matter jurisdiction of this action under 28 U.S.C. §§1331, 1343(3) & (4), and 42 U.S.C. §§1971(d), and 1973j(f). Plaintiffs' claims for declaratory

and injunctive are authorized under 28 U.S.C. §§2201 and 2202. At all times relevant to this action, Defendants have acted under color of state law.

VENUE

34. Venue in this district and division is proper under 28 U.S.C. §1391(b) because this action is predicated upon a federal question and a substantial part of the events or omissions giving rise to the claims alleged herein occurred, and will continue to occur, in this district. Plaintiffs have members who are registered to vote in the district and who will be subject in the district to the unlawful practices described in this Complaint.

INTRADISTRICT ASSIGNMENT

35. Pursuant to Civil L. R. 3-8, this action should be assigned to the Eastern Division of the Southern District of Ohio, because a substantial part of the events and omissions giving rise to the claims herein occurred in counties in the Eastern Division. Plaintiffs SEIU Local 1, USW, UFCW Local 75, and UFCW Local 880 have numerous members who live and are registered to vote within the Eastern Division; and the Defendant Secretary of State has his main offices in the Eastern Division.

FACTUAL ALLEGATIONS

A. Provisional Voting

36. In response to numerous problems in the state administration of federal elections revealed by the 2000 Presidential election, Congress enacted the Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. §15301 *et seq.* HAVA mandates that all States permit certain individuals to cast provisional ballots. One of Congress’ central purposes in enacting HAVA

was to provide a “fail-safe” mechanism to prevent the disenfranchisement of voters on Election Day as a result of errors in processing voters by states, where voter registration and eligibility to vote can be verified after Election Day.

37. HAVA requires that all States permit individual whose name does not appear on the official list of eligible voters for the polling place to cast a provisional ballot, to be verified after the election:

If an individual declares that such 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 for Federal office, 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, such individual shall be permitted to cast a provisional ballot as follows:

- (1) Notification. 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—
 - (A) a registered voter in the jurisdiction in which the individual desires to vote; and
 - (B) eligible to vote in that election.

42 U.S.C. §15482(a).

38. HAVA further provides that “[a]n election official at the polling place shall transmit” a provisional ballot or the written affirmation to an appropriate State or local election official for verification. 42 U.S.C. §15482(a)(3). HAVA also requires states to provide a mechanism to voters to learn whether their votes have been counted. *Id.* §15482(a)(5)(B).

B. Ohio Law Governing Casting and Counting of Provisional Ballots

39. Pursuant to Ohio law, there are thirteen different statutorily-defined circumstances in which voters are not permitted to cast regular ballots, and instead must use provisional ballots.

Ohio Rev. Code §3505.181(A)(1)-(13). Only one of these is when the voter is not included in the precinct list. *Id.* §3505.181(A)(1).

40. Ohio law governs when, and the manner in which, poll workers should provide voters with provisional ballots at the polling place. Ohio poll workers must first determine whether a voter is included on the precinct list of registered voters, and if the voter is required to vote provisionally for one of the thirteen statutory reasons. Ohio Rev. Code §3505.181(C)(1) provides:

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.

41. Ohio law further provides that a poll worker should provide a provisional ballot to a voter not on the precinct list only if the voter has been directed to the proper precinct, and the voter “refuses to travel to the polling places for the correct jurisdiction or to the office of the board of elections to cast a ballot.” Ohio Rev. Code §3505.181(C)(2).

42. Once a poll worker determines that an individual must cast a provisional rather than regular ballot, the poll worker is required to provide the voter with an affirmation form and instruct the individual to complete “a written affirmation . . . before an election official at the polling place” stating that she or he is a “registered voter in the jurisdiction in which the individual desires to vote” and “[e]ligible to vote in that election.” Ohio Rev. Code §3505.181(B)(2)(a)-(b).

43. Ohio has created a uniform provisional ballot affirmation form to be printed by all 88 Boards on provisional ballot envelopes. Ohio poll workers have the duty to make sure the voter fills out the provisional ballot affirmation correctly, and must verify that the affirmation has been completed before providing a voter with a provisional ballot. Ohio Rev. Code §§3505.181(B)(6), 3505.182, 3505.183(B)(1); *see also Skaggs ex rel. Skaggs v. Brunner*, 588 F.Supp.2d 828, 836 (S.D. Ohio 2008).

44. The provisional ballot envelopes, together with the ballots inside those envelopes, are transmitted to the Boards of Elections for their post-election determination of whether “individual[s’] provisional ballot[s] shall be counted as a vote[s] in [the] election.” Ohio Rev. Code §3505.181(B)(4); *see also id.* §3501.1(L), 3505.183(D). This determination is made pursuant to the requirements set forth in Ohio provisional ballot laws and happens several days after the election, when the results of the regular ballot voting are known. *Id.* §3505.181(B)(1), (E)(3).

45. To determine the validity of a provisional ballot, the County Board of Elections first must examine its records to determine whether the individual who cast the provisional ballot is registered and eligible to vote in the election. *Id.* §3505.183(B)(1). The Board also examines the information provided by the voter on his or her provisional ballot affirmation statement. *Id.*

46. After disqualifying all those provisional ballots that cannot be determined to have been cast by registered voters, the Boards then disqualify ballots for other reasons. Ohio Rev. Code §3505.183(B)(4)(a) provides that “[i]f, in examining a provisional ballot affirmation” and certain additional information provided pursuant to the statute, “the board determines that any of the following applies, the provisional ballot envelope shall not be opened, and the ballot shall not be counted: . . .

(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.”

47. Additionally, Ohio law provides that if, in the Board of Elections’ examination of the provisional ballot affirmation and additional information provided pursuant to statute, the board is “unable to determine” whether “the individual named in the affirmation is eligible to cast a ballot in the precinct . . . in which the individual cast the provisional ballot,” then the “provisional ballot envelope shall not be opened, and the ballot shall not be counted.” Ohio Rev. Code §3505.183(B)(4)(b)(ii).

48. Ohio law, as interpreted by the Ohio Supreme Court in *Painter*, prohibits County Boards of Election from investigating or counting provisional ballots cast in the incorrect precinct for reasons attributable to poll worker error. 128 Ohio St.3d at 28, 32. Thus, even when a voter is required to cast provisional ballots during early voting at a Board of Elections office, and is handed the wrong ballot because Board staff mistakenly looks up the voter’s precinct, *Painter* requires a Board to ignore that undeniable error and reject the vote. *Id.* at 32.

49. Similarly, Ohio law prohibits County Boards of Elections from counting provisional ballots that contain incomplete ballot affirmations. *See State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506 (2008); *see also* Ohio Rev. Code §3505.183(B)(4)(a)(iii).

50. In recent elections, the Boards have not recognized any exception to the rule that they must reject provisional ballots that are in envelopes containing incomplete affirmations that are the result of poll worker error. And Secretary of State Husted has instructed Boards to reject

provisional ballots on grounds that a voter's name or signature is in the wrong place on the ballot envelope.

51. Ohio Rev. Code §3505.28 provides that "no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice."

52. Pursuant to a consent decree entered in April 19, 2010 by the State of Ohio, the Ohio Secretary of State, in *Northeast Ohio Coalition for the Homeless v. Brunner* ("NEOCH"), S.D. Ohio (E.D.) Case No. C2-06-896, and effective through 2013, County Boards of Elections are prohibited from rejecting provisional ballots cast by voters using the last four digits of their Social Security numbers as identification to vote, where the ballots are cast in the wrong precinct or contain technical affirmation errors "for reasons attributable to poll worker error."

B. Large Numbers of Provisional Ballots Cast and Rejected in Ohio

53. In recent general elections, Ohio County Boards of Elections have rejected large numbers of provisional ballots of lawfully registered voters.

54. A very substantial percentage of the rejected provisional ballots in Ohio in recent elections have resulted from voters being given the wrong precinct ballot, including within the proper polling location. Under Ohio law, County Boards first determined that these are lawfully registered voters before rejecting the ballots for corresponding to the wrong precinct for that voter.

55. In the 2008 election, Ohio County Boards of Elections rejected more than 14,000 provisional ballots on the basis that the ballot had been cast in the wrong precinct or county.

56. In the most recent general election in 2011, Ohio voters cast a total of 3,380 provisional ballots in the correct polling location but were given the wrong precinct ballot. Of these, 1,826 ballots were rejected, and another 1,554 ballots were counted by the County Boards

of Elections only as a result of the Consent Decree in *NEOCH v. Husted*. In 2011, County Boards of Elections also rejected an additional 2,392 provisional ballots cast by voters in the wrong precinct and wrong polling place.

57. When the county Boards of Elections rejected these ballots, they did not open or count any of the votes on the ballot, regardless of whether precinct lines were relevant to the race, including votes for federal and statewide office. Upon information and belief, precinct divisions within a county are irrelevant to the majority of federal and state races on Ohio ballots.

58. Substantial numbers of provisional ballots also have been rejected by County Boards of Elections when a voter does not sign the provisional ballot envelope; when a voter or poll worker does not print the voter's name on the provisional ballot envelope; when a printed name or signature is in the wrong place on the provisional ballot envelope; and when, following the election, a County Board of Elections determines that the voter signature on the provisional ballot envelope does not match the signature on the voter's registration form. Under Ohio law, County Boards first determine that these ballots were cast by lawfully registered voters before rejecting the ballots for incomplete affirmations.

59. In the 2011 election, County Boards of Elections rejected 240 provisional ballots on the basis that the provisional ballot envelopes were signed but were missing a printed name; 304 provisional ballots on the basis that the provisional ballot envelopes had a printed name but were missing a voter signature; 23 provisional ballots on which the County Board of Elections determined after the election that the signatures on the provisional ballot envelopes did not match the signature exemplars held by the Board; and 1 provisional ballot on the basis that the printed name or signature was in the wrong place on the envelope.

60. The rates by which provisional ballots are rejected for being the wrong precinct ballot or for technical ballot envelope flaws vary arbitrarily and widely from county to county, polling location to polling location, and precinct to precinct, resulting in the arbitrary and unequal counting and rejecting of the ballots of lawfully registered Ohio voters.

61. Ohio County Boards of Elections' consideration of poll worker error with respect to provisional ballots cast by individuals using Social Security numbers as identification but refusal to consider poll worker error with respect to provisional ballots cast by individuals using any other form of identification results in the arbitrary and unequal counting and rejecting of the provisional ballots of lawfully registered Ohio voters.

C. Voters' Provisional Ballots Are Rejected for Reasons Attributable to Poll Worker Error

62. Statewide evidence from recent elections demonstrates that: a) poll workers control whether and how voters receive and cast provisional ballots; b) virtually all of the "wrong precinct" ballots rejected by county boards of elections were given to voters as a result of poll worker error; and c) County Boards of Elections are well aware of the extent and nature of poll worker error that leads to wrong precinct ballots and technical flaws in ballot affirmations.

63. When a voter appears at polling location on Election Day in any county in Ohio, the voter is processed by various poll workers before being allowed to vote.

64. Statewide evidence demonstrates that poll workers are giving voters the incorrect precinct ballots without having complied with the statutory duty to direct a voter to the correct precinct before providing the voter with a provisional ballot.

65. Voters in multi-precinct locations throughout Ohio end up with wrong-precinct ballots due to poll worker error, despite having arrived at the proper polling location. In many

multi-precinct locations, voters must first check in with poll workers whose duty it is to determine which precinct ballot the voter is supposed to vote. If the voter is given an incorrect ballot or incorrect information that another poll worker uses to retrieve the incorrect ballot, the fact that this voter casts an invalid ballot is due entirely to poll worker error, not because the voter chose to vote “in the wrong precinct.” Other polling locations process all provisional voters at one table, and the poll worker error is the only reason a voter can be given the wrong ballot at those tables.

66. When voters cast provisional ballots at a Board’s office, it is practically impossible for the voter, through some fault of the voter’s, to cast a ballot in the incorrect precinct because a poll worker will provide the voter with the ballot to be cast. Yet, for example, in 2011 in Cuyahoga County, the Board rejected 47 wrong precinct provisional ballots cast “in house” at the Board’s office on the basis that *Painter* required such rejection.

67. Evidence from counties throughout Ohio reflects that poll workers err in a number of ways in processing voters’ provisional ballots, beginning from the time the voter arrives at a polling location and continuing through the voter’s completion of the provisional ballot envelope and ballot.

68. Poll workers throughout Ohio misunderstand Ohio law and therefore give provisional ballots to anyone not on the precinct register without attempting to discern the correct precinct, in a misguided effort to help people vote.

69. Poll workers throughout Ohio mistakenly think the voter is in the correct precinct, even when they are not able to locate the voter in the poll book.

70. Poll workers throughout Ohio direct voters to the wrong precincts; or, within a multi-precinct location where poll workers have access to ballot for several precincts, give voters the wrong precinct ballot.

71. Poll workers throughout Ohio fail to give correct precinct information because they make errors in reading the counties' complicated street guides, particularly where streets are split between precincts by odd and even addresses and where there may be more than one residence with the same street number and street name within a county.

72. Poll workers throughout Ohio are not available to inform voters of where and how they should cast their ballots.

73. Poll workers throughout Ohio do not inform voters that if they vote a provisional ballot in the wrong precinct, it will not count.

74. Poll workers throughout Ohio direct voters to vote provisionally without instructing voters on how and/or where they could cast a regular ballot or a correct precinct provisional ballot.

75. Poll workers throughout Ohio provide voters with provisional ballots without first informing voters of their correct precinct and without voters refusing to cast a ballot in that correct precinct.

76. Poll workers throughout Ohio fail to ensure that voters correctly sign and print their names on provisional ballot envelopes before casting a provisional ballot.

77. Poll workers throughout Ohio borrow ballots or ballot envelopes from another precinct table because they run out of the necessary materials.

78. On information and belief, virtually all of the voters whose provisional ballots are rejected by County Boards of Elections because they were cast in incorrect precincts, were not

properly informed of their correct precincts and did not refuse to travel to those precincts before casting their ballots.

79. On information and belief, virtually all of the voters whose provisional ballot envelopes are rejected by County Boards of Elections for missing a signature or a printed name, or because there is a misplaced signature or printed name, were not informed by poll workers that they had failed fully or properly to complete the envelope before receiving provisional ballots from the poll workers.

80. When meeting to consider provisional ballots cast in elections from the 2008 general election through the recent 2012 primary, numerous County Boards of Elections have acknowledged that poll worker error results in voters being given wrong precinct ballots and in processing ballots that contain incomplete affirmation forms.

81. Despite acknowledging the existence of poll worker error, County Boards of Elections are required by Ohio law to reject provisional ballots cast by registered voters on the basis that the ballots are cast in the incorrect precinct and contain incomplete or incorrect affirmations and provisional ballot envelopes.

82. County Boards of Elections also use a variety of means to document voter and poll worker questions, problems, and concerns on Election Day, including incident reports and logs. These documents from counties throughout Ohio for the recent 2008 through 2012 elections demonstrate that poll worker errors lead to voters casting provisional ballots on incorrect precinct ballot forms and to voters failing to complete the affirmation and provisional ballot envelopes. On information and belief, other documents in possession and control of the County Boards of Elections demonstrate the extent to which poll worker error exists and results in provisional ballots being disqualified.

83. In taking the actions described herein, Defendants have acted and will be acting under color of state law.

CLASS DEFINITION AND ALLEGATIONS

84. Plaintiffs bring this case as a defendants' class action pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure against a proposed defendant class of "all members of County Boards of Elections." Defendants Burke, Hastings and Preisser (hereinafter "named County Defendants") are members of the proposed class of all members of County Boards of Elections.

85. This action is appropriately certified as a defendants' class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure because: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the defenses of the representative parties are likely typical of the defenses of the class; (iv) the representative parties will fairly and adequately protect the interests of the class; and (v) injunctive relief and corresponding declaratory relief is appropriate with respect to the defendant class as a whole.

86. The proposed defendant class is so numerous that separate joinder of each class member is impracticable. Each of Ohio's 88 County Boards of Elections has four members. Thus, the proposed class of members of County Boards of Elections consists of 352 individuals.

87. There are questions of fact and law common to the claims and defenses of the named County Defendants and all members of the Class of members of County Boards of Elections. These questions include, but are not limited to, the following:

- (a) Whether Ohio's provisional ballot counting statute, Ohio Rev. Code §3505.183(B)(4)(a)(ii), which requires members of County Boards of Elections not to open and

count provisional ballots cast by individuals in an incorrect precinct as a result of poll worker error, is consistent with the U.S. Constitution and federal voting laws;

(b) Whether Ohio's provisional ballot counting statute, Ohio Rev. Code §3505.183(B)(4)(a)(iii), which requires members of County Boards of Elections not to open and count provisional ballots in ballot envelopes that contain incomplete or incorrect ballot affirmations as a result of poll worker error, is consistent with the U.S. Constitution and federal voting laws;

(c) Whether declaratory relief, holding unconstitutional the enforcement of Ohio Rev. Code §3505.183(B)(4)(a)(ii) and (iii) where the reasons for rejection of provisional ballots are attributable to poll worker error, is appropriate; and

(d) Whether injunctive relief, requiring members of the County Boards of Elections, absent affirmative evidence that county poll workers have complied with their statutory duties, to open and count provisional ballots that are cast in incorrect precincts and in ballot envelopes that have incomplete or incorrect affirmations, is appropriate.

88. The claims or defenses of the named County Defendants are identical to those of all class members. The named County Defendants, like every other member of the County Boards of Elections, are charged with following Ohio statutory law and Ohio law as interpreted by the Ohio Supreme Court, and with implementing directives of the Defendant Secretary of State. The named County Defendants, like every other member of every County Board of Elections in Ohio, are statutorily required to reject provisional ballots cast by registered voters that are cast in an incorrect precinct, and to reject such ballots where the ballots' envelopes contain incomplete or incomplete affirmations. Thus, the defenses of the named defendants are

typical of, indeed identical to, that of class members because the named County Defendants and all class members are all charged with implementing the same unconstitutional state law.

89. The named County Defendants can fairly and adequately represent the interests of the class because their interests are identical to those of class members. As public officials, the named County Defendants will properly defend this action.

90. Because the predominant thrust of Plaintiffs' claims is that the provisional ballot-counting statute is unconstitutional and because Plaintiffs seek identical relief against each class member, certification of a defendant class is appropriate under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

FIRST CLAIM FOR RELIEF

Rejection of “Wrong Precinct” Ballots – Severe Burden on Fundamental Right to Vote in Violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; 42 U.S.C. §1983

91. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

92. Ohio's strict provisional ballot law requiring disqualification of “wrong precinct” ballots without exception, as set forth in Ohio Rev. Code §3505.183(B)(4)(a)(ii), (B)(4)(b)(ii), and in the Ohio Supreme Court's decision of *Painter*, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by causing a severe and arbitrary denial of the fundamental right to vote of registered Ohio voters. No legitimate state interest at all, let alone a specific and compelling state interest, justifies such an extraordinary burden on the right to vote where virtually all of the ballots rejected pursuant to this rule are rejected for reasons attributable to poll worker error.

93. Defendants' actions implementing this law deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

SECOND CLAIM FOR RELIEF

Rejection of Ballots for “Technical Deficiencies” in Ballot Envelope – Severe Burden on Fundamental Right to Vote in Violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; 42 U.S.C. §1983

94. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

95. Ohio's strict provisional ballot law requiring disqualification of ballots when the provisional ballot envelope contains sufficient information for the county to identify the lawfully registered voter but when that envelope is missing or has a misplaced voter signature or printed name, without exception, as set forth in Ohio Rev. Code §3505.183(B)(4)(a)(iii), and in the Ohio Supreme Court's decisions of *Painter* and *Skaggs*, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by causing the severe and arbitrary denial of the fundamental right to vote of registered Ohio voters. No legitimate state interest justifies such an extraordinary burden on the right to vote where virtually all ballots rejected pursuant to this rule were processed by poll workers who failed to comply with their duty to ensure the completion of Ohio's voting forms.

96. Defendants' actions implementing the Ohio state law prohibiting the counting of provisional ballots with “technical deficiencies” in the ballot envelope deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

THIRD CLAIM FOR RELIEF

Unnecessary Burden on the Right to Vote for U.S. Representative— Violation of Article I, Section Two of the United States Constitution; 42 U.S.C. §1983

97. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

98. Ohio's strict provisional ballot law requiring disqualification of "wrong precinct" ballots and ballots with technical flaws in the ballot envelope form, without exception, as set forth in Ohio Rev. Code §§3505.183(B)(4)(a)(ii)-(iii), (B)(4)(b)(ii), and in the Ohio Supreme Court's decisions of *Painter* and *Skaggs*, imposes an unnecessary burden on the right to cast and have counted a ballot for United States Representative in violation of Article I, Section 2 of the United States Constitution. No legitimate state interest at all, let alone a specific and compelling state interest, justifies such an extraordinary burden on the right to vote where virtually all of the ballots rejected pursuant to this law are rejected for reasons attributable to poll worker error.

99. Defendants' actions implementing this law deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

FOURTH CLAIM FOR RELIEF

Unnecessary Burden on the Right to Vote for U.S. Senator— Violation of the Seventeenth Amendment of the United States Constitution; 42 U.S.C. §1983

100. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

101. Ohio's strict provisional ballot law requiring disqualification of "wrong precinct" ballots and ballots with technical flaws in the ballot envelope form, without exception, as set

forth in Ohio Rev. Code §§3505.183(B)(4)(a)(ii)-(iii), (B)(4)(b)(ii), and in the Ohio Supreme Court's decisions of *Painter* and *Skaggs*, imposes an unnecessary burden on the right to cast and have counted a ballot for United States Senator in violation of the Seventeenth Amendment to the United States Constitution. No legitimate state interest at all, let alone a specific and compelling state interest, justifies such an extraordinary burden on the right to vote where virtually all of the ballots rejected pursuant to this law are rejected for reasons attributable to poll worker error.

102. Defendants' actions implementing this law deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

FIFTH CLAIM FOR RELIEF

Unequal Treatment of Provisional Voters – Violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; 42 U.S.C. §1983

103. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

104. Plaintiffs' members and other registered voters required by Ohio law to cast provisional ballots are treated arbitrarily and unequally from county to county, polling location to polling location, and precinct to precinct with respect to the counting and rejection of provisional ballots based on: the wrong precinct rule, incomplete or misplaced information on the provisional ballot envelope, and comparison of the voter's signature on the provisional ballot envelope to a signature previously provided to the Board by the voter. These voters are subject to inconsistent practices by poll workers and County Boards of Elections from county to county.

This arbitrary rejection of voters' ballots violates the uniformity required by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Const., Amend. XIV.

105. Defendants' actions deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

SIXTH CLAIM FOR RELIEF

Unequal Treatment of Provisional Voters Based on Form of Identification – Violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; 42 U.S.C. §1983

106. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

107. Plaintiffs' members and other individuals required by Ohio law to vote provisional ballots are treated differently based on the type of identification they use to vote. Ohio County Boards of Elections' consideration of poll worker error with respect to ballots cast by individuals using Social Security numbers as identification but refusal to consider poll worker error with respect to ballots cast by individuals using any other form of identification results in the arbitrary and unequal counting and rejecting of the ballots of lawfully registered Ohio voters in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Const., Amend. XIV.

108. Defendants' actions deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

SEVENTH CLAIM FOR RELIEF

**Violation of the Substantive Due Process Clause of the Fourteenth Amendment
of the United States Constitution; 42 U.S.C. §1983**

109. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

110. Ohio's strict provisional ballot laws requiring disqualification of entire ballots of lawfully registered voters for reasons attributable to poll worker error, including the rejection of and refusal to count wrong precinct provisional ballots and provisional ballots with "technical deficiencies" in the ballot envelopes, renders Ohio's provisional ballot laws fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Const., Amend. XIV.

111. Defendants' actions deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

EIGHTH CLAIM FOR RELIEF
**Violation of the Procedural Due Process Clause of the Fourteenth Amendment
of the United States Constitution; 42 U.S.C. §1983**

112. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

113. Defendants' rejection of provisional ballots without notice to voters on the basis of a Board's post-election determination that a voter's signature on a provisional ballot envelope does not match the signature previously provided by the voter to the Board violates the Procedural Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, U.S. Const., Amend. XIV.

114. Defendants' actions deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the Constitution of the United States, in violation of 42 U.S.C. §1983.

NINTH CLAIM FOR RELIEF
Violation of the Voting Rights Act of 1965, 42 U.S.C. §1971; 42 U.S.C. §1983;
Violation of Supremacy Clause of the United States Constitution

115. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

116. Under Section 1971(a)(2) of the Voting Rights Act, “[n]o person acting under color of law shall . . . (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such an election.”

117. Ohio law requires the denial of the right of registered voters to vote because of ballot and ballot envelope errors that are not material to determining whether the voters are qualified to vote in the election contests on the ballot:

118. When voters cast provisional ballots in the wrong precinct as a result of poll worker error, the fact that the ballots were cast in the wrong precinct is not material to determining the voters' qualifications to vote in the election.

119. When voters cast provisional ballots that have technical deficiencies in the ballot affirmations and envelopes as a result of poll worker error, those deficiencies are not material to determining the voters' qualifications to vote in the election.

120. Defendants' actions pursuant to this Ohio law, violate Section 1971(a)(2) of the Voting Rights Act.

121. Defendants' actions deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the federal laws of the United States, in violation of 42 U.S.C. §1983, and are inconsistent with Section 1971(a)(2) of the Voting Rights Act and are preempted by the Supremacy Clause of the U.S. Const., art. IV.

TENTH CLAIM FOR RELIEF
Violation of Rights Granted Under the Help America Vote Act of 2002,
42 U.S.C. §15301 *et seq.*; Violation of Supremacy Clause of Article 6 of the United States
Constitution; 42 U.S.C. §1983

122. Plaintiffs reallege and incorporate herein by reference each and every allegation and paragraph set forth previously.

123. Under HAVA, states must provide a “fail safe” voting mechanism. HAVA requires that a voter be given the opportunity to vote provisionally in a federal election if the individual affirms in writing that she is “a registered voter in the jurisdiction in which the individual desires to vote,” and that she is “eligible to vote in that election.” 42 U.S.C. §15482(a)(2)(A)-(B).

124. HAVA’s provisional voting requirements are intended to approximate conditions in which voters interact with a voting system free of human error. Thus, “[i]f a person presents at a polling place and seeks to vote, and if that person would be allowed to vote by an honest election worker with perfect knowledge of the facts and law, then the person’s vote should count.” *Sandusky County Dem. Pty. v. Blackwell*, 387 F.3d 565, 570 (6th Cir. 2004).

125. Under HAVA, Plaintiffs' members who are required by Ohio to cast provisional ballots have a federal right to have those ballots counted if an election official acting with perfect knowledge of the facts and law would have determined the members were eligible to vote in the election.

126. Ohio's refusal to count provisional ballots of registered Ohio voters for reasons that are attributable to poll worker error directly contravenes the purpose of HAVA and its mandate that an individual be permitted to cast provisional ballots that will be counted if an election worker had had "perfect knowledge" at the time the individual sought to cast a regular ballot.

127. Defendants' actions therefore deprive Plaintiffs and their members of rights, privileges or immunities secured to them by the federal law, in violation of 42 U.S.C. §1983, are inconsistent with and stand as an obstacle to the purposes of HAVA, and are preempted by the Supremacy Clause of the U.S. Const., art. IV.

IRREPARABLE HARM

128. Defendants' actions, as alleged herein, have resulted in, and will continue to result in, irreparable injury to Ohio voters including Plaintiffs and their members for which Plaintiffs and their members have no plain, speedy, or adequate remedy at law. Some of Plaintiffs' members will suffer irreparable injury in that they will be deprived of their right to cast a ballot in upcoming elections that will be counted.

129. Defendants' actions will also result in harm to the Plaintiff organizations, which dedicate significant resources to voter education and voter registration in Ohio, efforts that will be undermined by Defendants' unlawful conduct. Additionally, Plaintiffs will be harmed by

Defendants' unlawful conduct because they will need to divert limited resources to address the effects of that conduct.

130. The balance of harms favors entering an injunction because the harm suffered by individuals denied their fundamental right to vote in violation of the Constitution and federal law outweighs any potential interest Defendants may articulate in support of rejecting the votes of lawfully registered Ohio voters. No such legitimate interest exists to support this strict disqualification law. It is in the public interest that the Court grant an injunction to ensure that Plaintiffs, their members, and the electorate of Ohio that lawfully registered voters not have their votes discarded as a result of poll worker error.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court order the following relief and remedies:

- a) Assume jurisdiction over this action and maintain continuing jurisdiction until Defendants are in full compliance with every order of this Court;
- b) Certify this case as a defendants' class action against a class of all members of County Board of Elections;
- c) Declare that Ohio Rev. Code §3505.183(B)(4)(a)(ii) and Defendants' enforcement of Ohio Rev. Code §3505.183(B)(4)(a)(ii) violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, Article I, Section 2, and the Seventeenth Amendment of the U.S. Constitution, the Voting Rights Act, the Help America Vote Act, and 42 U.S.C. §1983, and are preempted by the Supremacy Clause;
- d) Declare that Ohio Rev. Code §3505.183(B)(4)(a)(iii) and Defendants' enforcement of Ohio Rev. Code §3505.183(B)(4)(a)(iii) with respect to missing or misplaced voter and poll worker signatures and printed names on the provisional ballot envelope violates

the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, Article I, Section 2, and the Seventeenth Amendment of the U.S. Constitution, the Voting Rights Act, the Help America Vote Act, and 42 U.S.C. §1983, and are preempted by the Supremacy Clause;

e) Declare that Defendant County Boards of Elections' rejection of provisional ballots without notice to voters on the basis a voter's signature does not match the voter's signature previously submitted by the voter to the Board violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, and 42 U.S.C. §1983;

f) Grant a preliminary and permanent injunction enjoining Defendants, their officers, agents, employees, attorneys, and all persons who are in active concert or participation with them from:

- i) implementing Ohio Rev. Code §3505.183(B)(4)(a)(ii) to prohibit the counting of a provisional ballot cast by a lawfully registered voter in a precinct other than the one to which the voter is assigned, absent specific affirmative evidence from the poll worker that the voter was directed to the polling place for the precinct in which he or she appeared to be eligible to vote, was informed that his or her vote would not count, and insisted on voting an invalid ballot in the wrong precinct;
- ii) implementing Ohio Rev. Code §3505.183(B)(4)(a)(iii) to prohibit the counting of a provisional ballot cast by a lawfully registered voter that is missing or has a misplaced signature or printed name, absent specific affirmative evidence that the poll worker complied with his or her

- statutory duty and properly instructed the voter that the affirmation form was incomplete and the voter refused to complete the form; and
- iii) rejecting any provisional ballots without notice to the voters on the grounds that the signature on the provisional ballot envelope does not match a signature previously provided by the voter to a Board of Elections;
- g) Award the Plaintiffs the costs of this action and reasonable attorneys' fees pursuant to 42 U.S.C. §§1988, 12133, 12205; and as otherwise may be allowed by law; and
- h) All such other and further relief as the Court deems to be just and equitable.

Dated: July 13, 2012

Respectfully submitted

/s/Michael J. Hunter
MICHAEL J. HUNTER, *trial attorney* (0018756)
CATHRINE J. HARSHMAN (0079373)
Hunter, Carnahan, Shoub, Byard & Harshman
3360 Tremont Road, Suite 230
Columbus, Ohio 43221
Telephone: (614) 442-5626
E-mail: mhunter@hcands.com

Attorneys for All Plaintiffs

STEPHEN P. BERZON (*pro hac vice* application pending)
STACEY M. LEYTON (*pro hac vice* application pending)
BARBARA J. CHISHOLM (*pro hac vice* application pending)
DANIELLE LEONARD (*pro hac vice* application pending)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
E-mail: sberzon@altshulerberzon.com

Attorneys for Plaintiffs SEIU Local 1, USW, UAW Local 1005, UAW Local 863, UFCW Local 75, UFCW Local 880, UFCW Local 1059, and ICWUC

PENDA HAIR (*pro hac vice* application pending)
DONITA JUDGE (*pro hac vice* application pending)
UZOMA NKWONTA (*pro hac vice* application pending)
Advancement Project
1220 L Street, N.W., Suite 850
Washington, D.C. 20005
Telephone: (202) 728-9557
E-mail: phair@advancementproject.org

Attorneys for Plaintiff OOC

CERTIFICATE OF SERVICE

I certify that on July 13, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. All parties have entered appearances with Court and will be notified through and may access the foregoing on the CM/ECF system.

/s/Michael J. Hunter
MICHAEL J. HUNTER, *trial attorney* (0018756)