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August 18, 2008

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Donita Judge, Esq.
Advancement Project
1730 M Street, NW, Suite 910
Washington DC 20036

Re: Ohio's 60-day Notice and Voter Challenge Statutes

Dear Ms. Judge:

Our office has received your letter dated August 7, 2008, in which you request that the Secretary of State enter into a settlement agreement with the Advancement Project, the League of Young Voters Educational Fund—Ohio Affiliate and Project Vote. You propose that the Secretary of State issue a directive to the boards of elections “prohibiting Ohio electors from challenging Ohio voters whose name appears on any returned mailings and/or any past, current or future caging list generated pursuant to [R.C. 3501.19, 3503.24, 3505.19 and 3505.20].”

Currently no litigation is pending concerning these statutes, and discussion of a settlement agreement appears premature. I have, however, for some time been concerned that all or parts of the statutes you reference could be deemed legally unenforceable under controlling federal law if challenged in a court of law. This concern has prompted me to ask the Legal Services Division of the Secretary of State's office to conduct comprehensive legal research and analysis of the legal issues you have raised.

I believe, on the basis of that legal research and analysis, that the Ohio challenge statutes, and specifically R.C. 3503.24 and 3505.19, if applied in conflict with requirements of federal law, would put a board of elections in a legally vulnerable position. I therefore plan to instruct and advise the boards of elections concerning appropriate steps they should take to assure that challenges under these statutes are

administered so that all qualified Ohio electors are provided an efficient, accurate and constitutional voting experience consistent with federal law. The reasons for these conclusions are discussed in this letter.

Statutory Framework:

Ohio Law:

To briefly summarize, Ohio statutes authorize challenges to be made to an individual Ohioan's status as a qualified elector as follows:

R.C. 3503.24

Written Challenges to Precinct Registration Lists or to Registered Elector's Right to Vote Using Form No. 257

No later than 20 days before an election any elector of a county may challenge the right to vote of any other registered elector of the same county, using the following process:

1. The challenge must be filed at the county board of elections using the form prescribed by the Secretary of State (Form No. 257). The challenger must state the reason he or she believes the challenged elector is ineligible to vote and must sign the form under penalty of election falsification, a fifth degree felony.
2. The board of elections must promptly review its records. If the board is able to determine that a challenge should be granted or denied solely on the basis of the board's records, it must immediately vote to grant or deny the challenge.
3. If the board of elections ties on the challenge, the tie vote must be submitted to the Secretary of State;
4. If the board's records alone do not justify disenfranchising the challenged elector, the director of the board must promptly set a time and date for a hearing.
5. The board must send written notice to the challenged elector, informing him or her of the time of the hearing and that they have the right to subpoena witnesses.
6. The board must reach a decision on the challenge immediately after the hearing.
7. If the board of elections ties on the challenge, the tie vote must be submitted to the Secretary of State.
8. Although the law provides that a board may postpone a hearing on a challenge filed within 30 days of an election, Secretary of State Directive 2007-06 advises boards to determine all challenges at one or more hearings prior to an election.

R.C. 3505.19

Written Challenges to an Elector's Right to Vote Made by Mail or Personal Appearance at Board

Prior to the 19th day before an election any qualified elector of a county may challenge the right to vote of another elector of the same county, using the following process:

1. The challenger may either send a letter to the board of elections or appear in person at the board.
2. The challenger must: (1) state the ground(s) upon which the challenge is made; (2) sign a written challenge that includes the challenger's address and voting precinct.
3. The board of elections must promptly review its records. If the board is able to determine that a challenge should be granted or denied solely on the basis of the board's records, it must immediately vote to grant or deny the challenge.
4. If the board's records alone do not justify disenfranchising the challenged elector, the director of the board must promptly set a time and date for a hearing.
5. The board must send written notice to the challenged elector, informing him or her of the time of the hearing and that they have the right to subpoena witnesses.
6. The board must reach a decision on the challenge immediately after the hearing.
7. If the board is satisfied that the "challenge is well taken," it must immediately notify the precinct poll workers of that determination. Should the challenged person appear at the polling place, the pollworkers must examine or question the elector for which a "challenge is well taken" to determine whether the person's "disabilities have been removed and the person has the right to vote." Examination of voter qualifications by pollworkers is governed by R.C. 3505.20. (See next section.)
8. If the challenged elector establishes to the satisfaction of the precinct poll workers (also known as precinct judges) that the elector has the right to vote, the elector shall be permitted to vote.
9. The statute does not expressly provide for the voter to vote provisionally should the election judges not be "satisfied" that the person is a qualified elector.

R.C. 3505.20

Challenges by Pollworkers at Polling Place on Election Day

A poll worker may challenge at the polling place any person's right to vote, with the exception that a poll worker may not challenge an elector if the board of elections has

already ruled that a particular elector is eligible to vote—in that event the person must be permitted to vote a regular ballot.

If a poll worker challenges an individual's right to vote, the following procedures must be followed:

1. The presiding judge of the precinct must tender and obtain from the challenged elector the following oath: "You do swear or affirm under penalty of election falsification that you will fully and truly answer all of the following questions put to you concerning your qualifications as an elector at this election."
2. The challenged elector must be asked specific questions based on the grounds for eligibility: that the person is (1) a citizen; (2) an Ohio resident for 30 days; (3) a resident of the precinct; and/or (4) of legal age.
3. The precinct presiding judge may put other questions relevant to the elector's qualifications to vote that are necessary under Ohio law to determine the elector's eligibility.
4. If a majority of the precinct's pollworkers are not satisfied that the elector is qualified to vote, the elector may not vote a regular ballot, *but may vote provisionally*.
5. If an elector is in the wrong precinct, the pollworkers must direct the voter to the correct precinct, whether or not it is in the same polling location. If the voter refuses to go to his or her correct precinct, the poll workers must offer the voter the opportunity to vote provisionally, with the caution that the elector's ballot will likely not be counted.

R.C. 3501.19

Heightened ID Requirements Resulting from Returned R.C. §3501.19 Notices

You have also referenced R.C. 3501.19. Under that statute boards of elections must, by September 5, 2008, send notices, by nonforwardable mail, to every person registered to vote in that county as of August 6, 2008 (thirty days prior to the notice deadline).

R.C. §3501.19 also provides that, if that notice is returned as undeliverable, an appropriate notation must be made in the poll book. If the poll book contains a notation that a particular elector's notice was returned, that voter will be required to vote a provisional ballot unless he or she can provide a current and valid photo identification, a military identification, or a copy of a current (within 12 months) utility bill, bank statement, government check, paycheck, or other government document (other than a notice of an election mailed by a board of elections) that shows the elector's current name and address.

You observe that boards may produce reports listing only voters whose R.C. 3501.19 notices were returned to the board as undeliverable and nonforwardable. You suggest that these lists, which would be subject to disclosure as a public record, could then be used as a “caging list.”

Two points may be made concerning R.C. 3501.19. First, the statute “sunsets” after the November 4, 2008, election. Second, R.C. 3501.19 does not on its face disenfranchise a voter, as every voter impacted by the statute may cast a ballot provisionally on Election Day. In our view the critical statutes at issue here remain the challenge statutes, R.C. 3503.24 and R.C. 3505.19, as opposed to R.C. 3501.19.

Federal Law:

Several provisions of federal law are critical to an analysis of the enforceability of the Ohio statutes summarized above.

The National Voter Registration Act (“NVRA”)

Under the federal National Voter Registration Act, a county board of elections is permitted by law to cancel a voter’s registration for reasons of residency only if the elector has either (1) confirmed in writing that he or she has moved to a different precinct, or (2) failed to vote at two general elections after receiving a “return service requested” notice from the county board of elections sent by forwardable mail.¹

¹ Specifically, 42 U.S.C. § 1973gg-6(a)(3) and 6(a)(4), provide:

“In the administration of voter registration for elections for Federal office, each State shall . . .

“(3) provide that the name of a registrant may not be removed from the official list of eligible voters except -

“(A) at the request of the registrant;

“(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

“(C) as provided under paragraph (4).

“(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of -

“(A) the death of the registrant; or

“(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section.”

And 42 U.S.C.A. § 1973gg-6(d), provides:

“(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

Thus, under the NVRA, a board may remove the name of a voter from its rolls where the voter confirms in writing that he or she has moved outside the county, or if the board has acted according to a “general program” as prescribed in 42 U.S.C. § 1973gg-6(a)(4). Absent those circumstances, however, a county board of elections may not remove a voter’s name from its list of registered voters, i.e., based on a R.C. 3503.24 or 3505.19 challenge asserting non-residence, unless the board first sends the voter, by forwardable mail, a prepaid and pre-addressed return card; the voter has failed to respond to that notice; and the voter has not voted during the last two general elections for federal office. Please refer to Secretary of State Directive 2007-11, “2007 General Voter Records Maintenance Program (National Change of Address and Supplemental Processes); Grounds for Registration Cancellations” (enclosed).

The United States Constitution:

In addition to the NVRA, the United States Constitution provides a due process guarantee that, “An elector cannot be disenfranchised without notice and an opportunity to be heard,” because “denial of the right to vote is a denial of a fundamental liberty.” *Bell v. Marinko* (2002, D.C. Ohio), 235 F.Supp.2d 772, 777. See

“(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

*“(B) (i) has failed to respond to a notice described in paragraph (2); and
(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.*

“(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

“(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B) of this section. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant’s name will be removed from the list of eligible voters.

“(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote. *(Emphasis added)*

also, *League of Women Voters of Ohio v. Blackwell* (2005, N.D. Ohio) 432 F.Supp.2d 723, 730 (“[Plaintiffs] contend that local officials removed the names of the individual plaintiffs, and others, from the voter registration rolls and did not provide them with either notice or opportunity to challenge the decision. *That conduct, if true, would be actionable under § 1983.*” (Emphasis added.))

Conclusions:

1. We conclude that R.C. 3503.24 and 3505.19 must be read *in pari material* with the provisions of the NVRA.
2. We also conclude that R.C. 3503.24 and 3501.19 are in conflict with the NVRA to the extent that they authorize the removal of a registered elector’s name from the list of qualified electors based on non-residency without first having provided the elector with a prepaid and pre-addressed return card notice, sent to the elector by forwardable mail, and at a point in time not earlier than two federal election cycles after the date of the notice. In light of this conflict the federal NVRA prevails over the Ohio statutes. This conclusion is supported under federal preemption doctrine and in light of the federal government’s authority to prescribe rules for conducting elections to federal office, including the office of president.
3. We also conclude that a board of elections may not rule favorably on a challenge to a registered elector’s status as a qualified voter and remove that voter from the voter registration rolls without first providing the due process requisites of adequate notice and an opportunity to be heard.
4. We further conclude that a board of elections would be vulnerable in a *42 USC § 1983* action should it, under the authority of R.C. 3503.24 and 3505.19, remove a voter from its list of qualified voters based on non-residency without first providing notice to the challenged voter and holding a hearing. This would be the case even though R.C. 3503.24 purports to authorize removal based on “the records maintained by the board.”

By holding an adequate hearing with notice, an opportunity to be heard and to confront adverse witnesses, the elector will be provided necessary due process, and the board will significantly minimize its exposure to an award of damages and attorneys fees in a *42 USC § 1983* action. An elector who has been provided the due process protections of adequate notice and hearing is less susceptible to denial of those constitutional rights, even though R.C. 3503.24 on its face permits removal from the rolls without those protections. R.C. 3503.24 would not be unconstitutional as applied to a voter who has been provided adequate notice and

an opportunity to be heard prior to being deprived of his or her fundamental liberty interest in having the right to vote.

Our office is in the process, among numerous other activities, of preparing written instructions to boards of elections to assure that boards act in accordance with both Ohio and federal law governing elector challenges to another elector's qualifications to vote.

We would appreciate in the future, when you submit a request to me or this office, such as your letter faxed on Thursday, August 7, 2008 at 3:55 p.m. demanding a response no later than Monday, August 11, 2008, that you **request** a date for response that permits our office to reasonably provide you with a reply that allows for time to fully research your question and develop policy that includes the participation of the legal and election administration staff of the office. As you may recall, Eleanor Speelman, general counsel for the Secretary of State, provided you with a written response on August 11, 2008 via email that indicated that a formal response would be forthcoming within a week, which is this letter.

Sincerely,



Jennifer Brunner

cc: Sheila Y. Thomas, Esq.
Teresa James, Esq.
Eleanor Speelman, Esq., General Counsel to Ohio Secretary of State
David Farrell, Deputy Assistant Secretary of State and Director of Elections