

Testimony on Ohio SB 216 (February 18, 2014)

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I am a staff attorney with the Fair Elections Legal Network, a national, nonpartisan voting rights and election reform organization dedicated to removing barriers to registration and voting for traditionally underrepresented constituencies, and improving overall election administration. Since 2006, our organization has been involved in supporting election reform efforts and working with non-partisan organizations to remove barriers to voting and increase voter participation.

It has been a longstanding rule in Ohio that a provisional ballot cast in the wrong precinct must be rejected in full, top to bottom, including votes for President, Congress, and votes for statewide offices such as Governor and Secretary of State. Ohio's long-running saga with provisional ballots has been closely followed by voting rights advocates because tens of thousands of votes have been squandered in this state over the years.

In the 2008 general election, 14,355 provisional ballots were thrown out because they were cast in the wrong precinct. That is a staggering number of ballots that are never opened and, in a close election, this outdated rule may be outcome-determinative. That figure also represented a little over a quarter of the wrong-precinct rejections cast in states that fully reject the provisional ballot for this reason. Stated another way, a voter whose provisional ballot was rejected for this reason had a roughly 1-in-4 chance of being an Ohio voter. About half of these rejections—7,522 provisional ballots—occurred in just four large counties: Cuyahoga (3,423), Franklin (1,139), Hamilton (1,767), and Lucas (1,193). In the 2010 midterm elections, 5,309 of the 11,772 provisional ballots rejected statewide were rejected because they were cast in the wrong precinct.

Prior to the 2012 election, a federal court ordered the state to count provisional ballots cast in the wrong precinct within the correct multi-precinct polling place, so-called “right church, wrong pew” ballots.¹ The court found a due process violation when a ballot was miscast in this specific context because poll worker error was almost certainly the cause. Accordingly, Ohio had to take a year off from discarding “right church, wrong pew” provisional ballots. However,

¹ *SEIU, Local 1 v. Husted*, 906 F. Supp. 2d 745 (2012) (granting preliminary injunction), *affirmed in part, reversed on other grounds by NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012); *SEIU Local 1 v. Husted*, Nos. 2:12-CV-562, 2:06-CV-896, 2013 WL 3456756, at *1-2 (S.D. Ohio July 9, 2013) (granting permanent injunction).

that court order did not prevent the state from fully rejecting 9,482 provisional ballots, many of which were reportedly cast in the wrong polling place, but the right county. SB 216 seeks to make this state of affairs the new status quo by codifying “right church,” *i.e.* the right polling place, as the new line in the sand.²

But that is just what SB 216 is—another arbitrary line in the sand when a more pro-voter rule is possible and the status quo only begs for more litigation on poll worker errors in failing to direct the voter to the proper polling place. Fifteen states plus the District of Columbia have found a better way that has largely settled the issue. Alaska, California, Georgia, Illinois, Kansas, Louisiana, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Utah, and Washington, which together comprise a politically and regionally diverse collection of states, have all adopted partial counting laws.³ These laws require the counting of all votes on an out-of-precinct provisional ballot that the voter was eligible to cast in his or her correct precinct. In short, the state prioritizes voter eligibility over location and salvages validly-cast votes. It is a simple and fair rule. Some of these states require the provisional ballot to be cast in the right county, but that is far superior to rejecting the ballot in full. Two additional states, New York and Missouri, draw the same “right church” line SB 216 seeks to impose, but New York rejected over 94,000 provisional ballots in 2012 and nearly 24,000 in 2008 so it is clearly an insufficient remedy.

Ten other states have Election Day Registration (or “EDR”) and 1 state, North Dakota, has no registration system at all. Technically speaking, a person could still wind up in the wrong precinct in the EDR states, but practically speaking, very few voters do. This is likely because registration forces the poll worker to verify the voter’s residence within the precinct. When a voter merely does not show up on the rolls, poll workers who are less than proactive may simply hand out a provisional ballot, without first checking to see if the voter belongs somewhere else in the state. EDR has done wonders to minimize the rate at which voters wind up casting out-of-precinct provisional ballots.

Therefore, a total of 28 states in this country have figured out a way to either minimize or eliminate this problem. A minority of 22 holdouts, including Ohio, insists on penalizing a voter if he or she votes in the wrong precinct. The only reason can be to deter voters from just showing up anywhere to vote, but provisional ballots are almost always cast in the wrong precinct *by accident*, not willfully. Ohio’s elected officials have a duty to maximize the number of eligible votes cast and counted.

² State of Ohio 130th General Assembly, Regular Session 2013-2014, Sub. S.B. No. 216, *available at* http://www.legislature.state.oh.us/bills.cfm?ID=130_SB_216.

³ Jon Sherman, Fair Elections Legal Network, *Saving Votes: An Easy Fix to the Problem of Wasting Provisional Ballots Cast Out of Precinct* (Updated Jan. 23, 2014).

An additional benefit to adopting partial counting is that it will obviate the need to adjudicate on a ballot-by-ballot basis whether poll worker error caused the miscasting by examining the envelope information called for by SB 216. This would save time and money and reduce lines at the polls. The provisional ballot would not need to be redesigned, and voters in line would not be held up while the poll worker completed no fewer than five items or tasks: (1) recording the correct precinct; (2) reading a statement that the poll worker has instructed the voter to travel to the correct precinct; (3) reading a warning to the voter that some or all of her votes may be rejected if she votes in the wrong precinct; (4) recording the precinct in which the provisional ballot is being cast; and (5) recording the polling location in which the provisional ballot is being cast. Instead, under a partial counting rule, error need not be assigned, since the result is the same either way. The validly cast votes will be counted, even if they were cast in the wrong location, and the analysis of the provisional ballots can still take place after the election and before certification of the results. Ohio could even limit its partial counting rule to apply only to right-county, wrong-precinct ballots as in a number of other states, such as Kansas, New Mexico, Pennsylvania, and Utah. Though that is not the optimal partial counting rule, few would object to it and, if experience in these other states is any indication, no litigation would ensue.

It is time to resolve this issue once and for all in Ohio. The mobility of Americans – 29 million voting-age Americans moving every year⁴ (or approximately 12 percent of the voting-age population) – and the frequent changes to precincts and polling locations mean voter and poll worker mistakes are inevitable. Punishing voters for these wholly understandable errors undermines the most basic right in our democracy. Until Ohio has online voter registration, electronic pollbooks in use statewide, better training for its poll workers, and maybe even Election Day registration, there will still be unacceptably high numbers of wrong-precinct provisional ballots in Ohio. Instead of refusing to count a single vote on out-of-precinct provisional ballots, numerous states preserve votes on these ballots, and that should be the norm in all 50 states.

⁴ Myrna Pérez, Brennan Center for Justice, *When Voters Move* (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/MoversGuideNEW.pdf>.