

OHIO ELECTION REFORM LEGISLATIVE BRIEF

Introduction

Ohio lawmakers introduced two election reform bills, Senate Bill 8¹ (S.B. 8) and House Bill 260² (H.B. 260), in 2009. Subsequently, both bills were amended and substitution bills were later introduced by their respective General Assembly Sponsors.³

H.B. 260 is the result of bipartisan proposals that were generated after the November 2008 general election. It includes recommendations from election officials, voters, and community advocates developed during post-2008 election summits hosted by the office of Ohio Secretary of State Jennifer Brunner. H.B. 260 would provide sweeping changes to Ohio's election code, including changes to absentee ballot procedures,⁴ provisional ballot rules,⁵ voter registration,⁶ voter ID,⁷ and voter challenges⁸ to name a few.

S.B. 8 was drafted and introduced in early 2009 by Republican members of the Ohio Senate. It is narrower in scope than H.B. 260 and focuses on limited sections of the Election Code, including absentee ballots,⁹ observers,¹⁰ and the statewide voter registration database.¹¹

Meetings are currently being conducted between both bills' sponsors and interested parties with a goal of reaching an agreement that will "marry" the two bills and lay the foundation for a bipartisan overhaul of Ohio's election code.

This legislative brief highlights four important election reform provisions of S.B. 8 and H.B. 260, related to provisional ballots, voter registration, voter challenges, and voter ID that will reduce voter disenfranchisement, if adopted. The four issues highlighted in this brief are under discussion among the Ohio House and Senate members seeking to find common ground on election reform. Discussion of each issue below includes recommendations that, if included in the final election reform bill, will strengthen the protection of Ohio voters' rights.

Provisional Ballots

Ohio's provisional ballot rules are extremely complicated. There are currently 13 reasons that an Ohio voter may be required to cast a provisional ballot, ranging from a voter's inability to present specific types of identification to a voter who

has changed his or her name or address without updating his/her registration prior to Election Day.¹² Absent clear rules, Ohio voters face a lack of uniformity on a grand scale in the counting of provisional ballots, a clear violation of the law.¹³

Ohio law requires the disqualification of provisional ballots cast in the “wrong precinct” – i.e., at a voting location other than the one assigned to the voter’s precinct of residence.¹⁴ Rather than counting the ballot in those races for which the voter is eligible, Ohio’s rigid wrong precinct rule requires the provisional ballot to be rejected in its entirety.¹⁵ A refusal to count provisional ballots cast in the wrong precinct results in massive disenfranchisement of Ohio voters, for those races or issues for which the voter is eligible.

Beginning in 2004, the Help America Vote Act of 2002 (“HAVA”)¹⁶ required states to provide provisional ballots to voters in federal elections in cases where, for whatever reason, they did not appear on the polling book in the location where they appeared to vote but nevertheless asserted that they were eligible and registered to vote in that location. Since that time, Ohio voters have cast increasingly staggering numbers of provisional ballots. In the 2008 general election, Ohio voters cast 206,859 provisional ballots.¹⁷ By way of comparison, in 2004, 158,642 provisional ballots were cast.¹⁸

Data is available for the reasons for rejection of provisional ballots cast in the 2006 and 2008 general elections. While in 2006, 10,610¹⁹ provisional ballots were rejected for having been cast in the wrong precinct, in 2008, 14,335²⁰ were rejected for that reason.

Ohio law requires poll workers to direct voters to the correct polling place.²¹ Yet, in many multi-precinct polling locations, voters who are actually in the correct polling place are casting provisional ballots at the wrong precinct table. It appears that voters who arrive at their correct polling place are not being directed to the correct precinct within the polling place. This problem is exacerbated in those instances when a voter appears at the wrong polling location and needs to be directed to another location.

In 2008, in *Northeast Ohio Coalition for the Homeless (NEOCH) v. Brunner*²², the court ordered that no provisional ballots cast as a result of poll worker error should be rejected due to poll workers’ failure to comply with their statutorily mandated duties.²³ Following the court’s decision in the *NEOCH* case, Secretary Brunner’s office issued a directive consistent with the court order that enjoined boards of elections from rejecting provisional ballots attributable to poll worker error.²⁴

Sub. Am. H.B. 260

H.B. 260 includes significant improvements in Ohio’s provisional ballot rules. The bill:

1. Reduces from 13 to three the number of reasons that an Ohio voter is required to cast a provisional ballot: 1) individuals who indicate they are registered but whose name does not appear in the poll book or poll list; 2) individuals who do not have or decline to show valid ID; and, 3) individuals marked in the poll book as having requested an absentee ballot.

- Additionally, Sub. H.B. 260 includes a “catch-all” provision that requires individuals who are ineligible to cast a regular ballot for any reason to cast a provisional ballot;
2. Redefines the term “jurisdiction” to mean county rather than precinct, requiring provisional ballots cast in the correct county but outside of the voter’s precinct to be counted for the contests and issues for which the voter is eligible;
 3. Requires the boards of elections to remake a voter’s provisional ballot envelope for all offices, questions and issues for which the voter was eligible to cast a ballot, as long as the voter is deemed a legally registered voter of the county in which he or she cast the ballot, barring any further deficiency;²⁵
 4. Requires the Secretary of State to prescribe the content and form of the required provisional ballot affirmation statements to be used by all boards of elections, thereby providing a statewide uniform standard, rather than a county-by-county approach;
 5. Requires the boards of elections to contact voters who neglect to sign their provisional ballot affirmation statement and provide such voters with 10 days to correct their affirmation;
 6. Requires the provisional ballot to be counted if the signature “substantially conforms” to the signature on the voter registration record barring any other deficiency; and,
 7. Permits public disclosure of the names of individuals who cast provisional ballots and the precincts in which the provisional ballots were cast within 24 hours after the unofficial election results.²⁶

Recommendations

In addition to including all provisions related to provisional ballots in H.B. 260 set forth above, Advancement Project recommends that the election reform bill also permit voters who have moved and appear to vote in their new precinct to update their address on Election Day, and with valid identification, cast a regular ballot instead of a provisional ballot. Current law requires such voters to cast provisional ballots, which leads to a needlessly large number of provisional ballots being cast.

The Ohio Secretary of State has interpreted HAVA to preclude public access to the names of individuals who cast provisional ballots and the determinations as to whether those ballots were counted to anyone other than the individual who cast the ballot. We disagree with this interpretation. Our interpretation of HAVA is while access to the HAVA-mandated “free-access system”²⁷ is only permitted by individuals who cast provisional ballots, HAVA does not preclude access to the names of individual provisional voters and/or the determinations of whether each voter’s provisional ballot was ultimately counted.

The election reform bill should require county election boards to provide public access to the reasons for rejecting provisional ballots, along with the name of the voter. Denial of public access to that information thwarts the ability of voting rights groups to investigate and, where necessary, advocate against the unnecessary use and rejection of provisional ballots.

Finally, the enacted election reform bill should require that provisional ballot envelopes serve as voter registration applications, so that, to the extent that voters who cast provisional ballots are not registered, they will become registered (if eligible) for upcoming elections.

Voter Registration

HAVA requires, in part, that states attempt to match a voter applicant's driver's license number or Social Security number, and other personal information, against the state motor vehicle or Social Security database.²⁸ HAVA does not prescribe the consequences of a matching failure and leaves to the states the "specific choices on the methods of complying" with its requirements.²⁹

Ohio's election code does not require that a voter applicant's personal information match a record in the state Bureau of Motor Vehicle database or Social Security Administration database prior to that applicant being added to the voter registration rolls.

In 2008, the Ohio Republican Party (ORP) brought a lawsuit against the Secretary of State that sought to access lists of non-matched voters in the statewide database *ORP v. Brunner*, Case No. 2:08-cv-00913 (2008). The ORP signaled its intent to challenge unmatched voters' eligibility and thereby force voters to cast provisional ballots—which, in turn, may be rejected for a range of administrative reasons unrelated to the voters' eligibility. The HAVA matching process also flags voters and makes them vulnerable to challenges to their eligibility.

Ultimately, the Supreme Court of the United States held that the Republican Party, a private party, would likely be found to not have "standing" to sue for violations of HAVA under Section 303. The Court noted that it was not reaching the merits of whether Brunner was complying with HAVA.

As explained below, H.B. 260 and S.B. 8 seek to mitigate the possibility that lists of non-matched voters could be used for caging purposes by setting forth procedures for matching a voter applicant's personal information against records in the state motor vehicles and Social Security database and specifying the consequences for a nonmatch. Additionally, H.B. 260 would modernize and automate voter registration in several regards.³⁰

"Matching" Voter Applicants' Personal Information

Consistent with federal law, H.B. 260 and S.B. 8 require the Ohio Secretary of State and the Registrar of the Bureau of Motor Vehicles to enter into an agreement to match information on a voter registration application with the state motor vehicles or Social Security database. In addition, the bills require the

Secretary of State to promulgate rules for notifying boards of any relevant nonmatch, as well as specifying what constitutes a “nonmatch.”³¹

A nonmatch is prohibited as the sole reason for: 1) failing to add a voter to the statewide voter registration database, 2) challenging or upholding a challenge to a person’s voter registration or right to vote; 3) canceling a person’s voter registration; 4) requiring a person to vote a provisional ballot; or, 5) for failing to provide a regular ballot or absent voter’s ballot to an otherwise eligible voter.”³²

Consequently, voters will not be disenfranchised due to incorrect information that may be the result of clerical data input errors or factors beyond the applicant’s control.

Recommendations

The matching process is fraught with errors. Typos by election officials, clerical mistakes, data entry errors, and meaningless common spelling and punctuation differences in computerized records—none of which relate to a voter applicant’s eligibility to vote—may generate a nonmatch. Analysis of unmatched voters’ applications in Florida reveals that the citizens affected by the matching process are disproportionately from minority communities.

Because matching errors are not reliable indicators of voter ineligibility and fall disproportionately on voters of color, Advancement Project supports the bills’ provisions that would prohibit the exclusion of voters from the rolls, and other adverse consequences, solely based on a nonmatch.

Voter Registration Modernization

In an attempt to bring Ohio’s voter registration system into the 21st century and shift the burden for registration from individual citizens to election officials, H.B. 260 would automate voter registration for many of Ohio’s eligible voters and require the establishment of online voter registration services.

H.B. 260 would require, by August 1, 2012, the automatic registration of all individuals who meet requirements to register to vote in Ohio, i.e., U.S. citizen, 18 years of age or older, and a resident of Ohio for 30 days and registered to vote 30 days immediate preceding the election, if they graduate from high school, apply for or receive services from a designated public service agency, or obtain, apply for, or review their driver’s license or state ID card. The bill would permit eligible voters to opt-out of automatic voter registration.³³

H.B. 260 would also require the Secretary of State to establish, no later than December 31, 2010, a secure Internet connection to permit individuals to submit voter registration applications, update current registrations, and determine the status of previously submitted voter registration applications.³⁴

Recommendations

Advancement Project supports the provision in HB 260 that would require automatic voter registration of certain eligible voters, particularly individuals who receive services from public service agencies and have historically been

registered at lower rates than other populations. Automatic voter registration would facilitate more voter registration, while simplifying the process of voter registration.

Voter Challenges

“Voter caging” is a partisan, discriminatory method of challenging the eligibility of voters of color. The term derives from the use of politically motivated, direct mailings that are sent to targeted voters. Typically, a political party sends nonforwardable mail to the addresses of targeted, registered voters. If the mail is returned as undeliverable—for example, because the voter is homeless or the postal worker mistakenly delivers the mail to the wrong address and the occupant returns the mail—the party adds that voter to what is known as a “caging list.”

The party, pursuant to a state challenger statute, then challenges the eligibility of the voters on the “caging list” on the ground that because the registered mail directed to the address was returned as undeliverable, the applicant does not reside at that address and the registration is fraudulent. Once a challenge is made to a voter’s registration, the voter must prove that her or his registration is valid.

“Voter caging” schemes threatened the rights of tens of thousands of Ohio’s voters in both the 2004 and 2008 presidential elections. In 2004, challenges were registered against 35,000 Ohio voters based on returned non-forwardable mailings.³⁵ In response, several lawsuits, including one brought by Advancement Project on behalf of a challenged voter, were filed to block the challenges. As a result of these lawsuits, there were very few challenges to Ohio voters on Election Day.

House Bill 3 (H.B. 3), enacted in 2005, required boards of elections to mail non-forwardable notices to all registered Ohio voters 60 days prior to the 2008 primary and general elections.³⁶ Approximately 600,000 of these notices were returned in five of Ohio’s largest counties prior to the primary election. Ohio’s challenge law permitted electors whose notices were returned to be removed without notice or hearing.³⁷

Advancement Project sent a letter to Ohio Secretary of State Jennifer Brunner explaining the potential disenfranchisement to Ohio voters due to the returned notices and arguing that Ohio’s challenge procedures that denied voter’s notice and hearing before removal from the voter rolls violated the U.S. Constitution.

Secretary Brunner responded with a directive³⁸ to the 88 county boards of elections acknowledging that Ohio’s challenge rules likely violated the U.S. Constitution and mandating that challenged Ohio voters be afforded notice and hearing prior to removal from the voter rolls based on returned non-forwardable notices.

H.B. 260 would codify Secretary Brunner’s directive mandating notice and hearing to Ohio voters prior to their removal from the voter rolls.³⁹ H.B. 260 would also limit the grounds on which an Ohio voter can be challenged to the following circumstances:

1. The voter does not live in the precinct where he/she is registered to vote;
2. The voter is not a U.S. citizen;
3. The voter is not 18 years of age or older;
4. The voter is not a qualified elector for that election; and,
5. The voter is not the individual he/she purports to be.⁴⁰

Challenges to Ohio voters would only be permitted if the challenger knows or reasonably believes that the individual challenged is not qualified and entitled to vote. The challenger would bear the burden of proving by “clear and convincing” evidence that the individual challenged is not eligible to vote a regular ballot on challenge grounds.⁴¹ Local boards of elections would be required to conduct hearings, prior to Election Day, to resolve each challenge to a voter’s registration.⁴² Election Day challenges would be permitted only by poll workers.

In addition to combating voter caging, H.B. 260 would prohibit individuals, organizations, and political parties from compiling lists of voters to challenge on the sole basis of mail returned as undeliverable, unclaimed mail, or foreclosure locations.⁴³ Further, the bill would increase the penalty for engaging in voter caging, if found guilty, from a misdemeanor to a felony of the fourth degree and impose a fine of \$500 per name compiled, in addition to any criminal penalties that may be imposed.⁴⁴

Finally, H.B. 260 would codify the decision in *Boustani v. Blackwell*⁴⁵ enjoining as unconstitutional an Ohio law that requires an individual challenged on the basis of citizenship to provide a naturalization certificate.⁴⁶

Challenges to a voter’s absentee ballot application may only be made on the same grounds as an individual’s right to vote.⁴⁷ Election officials or other individuals are prohibited from challenging the validity of a voter’s returned absentee ballot using challenge procedures—instead, the validity of a ballot is required to be made through the processing and county process.⁴⁸

Recommendations

Massive voter caging schemes chill the participation of eligible voters, particularly among voters in communities of color, in elections. Advancement Project strongly supports H.B. 260’s overhaul of Ohio’s challenge laws. Among its other laudable provisions, H.B. 260 would limit the grounds for challenges to those based on a failure to satisfy one or more voter eligibility requirements and prohibit challenges solely based on returned mail or foreclosure notices. The bill would also increase the penalties for engaging in voter caging, thereby deterring this form of voter suppression.

Voter Identification

Ohio's voter ID laws require voters to produce an ID with a current address unless the ID is a valid Ohio driver's license or state-issued photo identification.⁴⁹ A valid Ohio driver's license without a current address is acceptable ID permitting a voter to cast a regular ballot.⁵⁰ All other permissible IDs must list the same address that appears on the voter's registration application, or the voter is required to vote by provisional ballot. This confusion may have resulted in the unnecessary use of provisional ballots in recent elections, due to poll worker confusion over the various ID rules.

H.B. 260's proposed amendments to Ohio's voter ID laws would will bring those laws more in line with voter ID laws in other states by focusing on proof of a voter's identity rather than his or her address.⁵¹ In particular, the bill would amend voter ID to include *either* a current and valid photo ID from the state or federal government or from a public, private or proprietary institution of higher learning, with the voter's name in a manner that substantially conforms to the elector's name in the voter registration records.⁵² H.B. 260 also eliminates the requirement that a voter's ID include the voter's address.⁵³

A registered Ohio voter who does not possess any of the above ID would be permitted to vote by regular ballot, upon signing an affirmation (with his or her name, signature, date of birth, and the four digits of his or her Social Security number or Ohio driver's license number) to prove his or her identity.⁵⁴

Recommendations

Advancement Project supports H.B. 260's reform of Ohio's voter ID laws. Ohio's varying voter ID rules confuse poll workers. Requiring voters to provide a valid photo ID or submit an affirmation form affirming that the voter does not have the required photo ID will simplify Ohio's voter ID laws. Enacting a voter ID rule that simplifies the voter ID law will also reduce the use of provisional ballots cast.

Conclusion

S.B. 8 and H.B. 260 provide Ohio legislators with an opportunity to amend election rules that disenfranchise Ohio voters. The goal in 2009, when both bills were introduced, was to find common ground and enact legislation that could be signed into law and implemented in advance of the 2010 mid-term elections. Unfortunately, for Ohio's 2010 primary election, that time has come and gone.

To ensure that reforms are enacted and implemented before the 2010 general election, procedures must be promulgated, training manuals updated, poll workers trained, and voters educated on the new rules. A failure to find common ground and enact election reform during the current legislative session increases the risk that needed reforms will not be in place to prevent burdens on voters during the 2010 general election. Ohio voters deserve election reform that will eliminate barriers and increase access to the ballot now.

¹ S.B. 8, 128th Gen. Assem., Reg. Sess. (Ohio 2009).

² H.B. 260, 128th Gen. Assem., Reg. Sess. (Ohio 2009).

³ Am. Sub. S.B. 8, 128th Gen. Assem., Reg. Sess. (Ohio 2009); Am. Sub. H.B. 260, 128th Gen. Assem., Reg. Sess. (Ohio 2009).

⁴ Am. Sub. H.B. 260, 128th Gen. Assem., Reg. Sess. at § 3509 (2009).

⁵ *Id.* at § 3505.181 (2009).

⁶ *Id.* at § 3503 (2009).

⁷ *Id.* at § 3501.01 (2009).

⁸ *Id.* at § 3503.24 (2009); *see id.* at § 3505.20 (2009); *see id.* at § 3509.07 (2009); *see id.* at § 3511.04 (2009); *see id.* at § 3513.19 (2009).

⁹ OHIO REV. CODE ANN. § 3509 (LEXISNEXIS 2010).

¹⁰ *Id.* at § 3505.21 (2009).

¹¹ *Id.* at § 3503.15 (2009).

¹² OHIO REV. CODE ANN § 3505.181 (A) (LEXISNEXIS 2010).

¹³ *See LWV v. Brunner*, Case No. 3:05-CV-7309 (N.D. Ohio 2009).

¹⁴ OHIO REV. CODE ANN § 3505.183 (B)(1)(a) (LEXISNEXIS 2010).

¹⁵ *Id.*

¹⁶ 42 U.S.C. § 15482 (2002).

¹⁷ <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>

¹⁸ <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2004ElectionsResults/04-1102ProvisionalBallots.aspx>

¹⁹ *See* Advancement Project, Provisional Voting: Fail-Safe Voting or Trapdoor to Disenfranchisement? Pg. 12, Sept. 2008.

²⁰ <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>; *see also*, Judge, Ohio House of Representatives Hears Testimony on Election Reform Bill (Oct. 2009), <http://www.advancementproject.org/news/newsletters/democracy-in-action-november-30-2009/ohio-house-of-representatives-hears-testimony->

²¹ OHIO REV. CODE ANN. § 3505.181 (C)(1) (LEXISNEXIS 2010).

²² *NEOCH v. Brunner*, Case No. C2-06-896 (S.D. Ohio 2009).

²³ *Id.*; *see also NEOCH v. Brunner*, Case No. C2-06-896 (S.D. Ohio 2009)(recognizing that Consent Decree issued on April 20, 2010, Section I(1)(e) provides that “poll worker error will not be presumed, but must be demonstrated through evidence[.]”).

²⁴ Ohio Secretary of State Directive 2008-103 (2008). Issued Pursuant to Court Order.

²⁵ In the alternative, Advancement Project recommends that the election reform bill define what constitutes “poll worker error.” This amended language should require “clear and convincing” evidence in an affirmation statement signed by the poll worker that voters were directed to their correct polling place to vote but refused to go. This should be the only basis for rejecting a provisional ballot cast outside the voter’s precinct and county in which the voter is registered.

²⁶ Am. Sub. H.B. 260, 128th Gen. Assem., Reg. Sess. (Ohio 2009); *see also* OHIO REV. CODE ANN. § 3505.181 (2010).

²⁷ 42 U.S.C. § 15482 (a)(2002).

²⁸ *Id.* at § 15483 (a)(5)(B)(i).

²⁹ *Id.* at 15485.

³⁰ Am. Sub. S.B. 8, 128th Gen. Assem., Reg. Sess. (Ohio 2009); Am. Sub. H.B. 260, 128th Gen. Assem., Reg. Sess. (Ohio 2009), OHIO REV. CODE ANN. § 3503 (2010).

³¹ Am. Sub. H.B. 260 § 3503.19 (2009).

³² *Id.* at § 3503.15 (2009).

³³ Am. Sub. H.B. 260 (2009).

³⁴ Am. Sub. H.B. 260 (2009).

³⁵ *See DNC v. RNC*, 543 U.S. 1304 (2004)(Advancement Project reopened the case when a Motion to Intervene was filed on behalf of Ohio voter Ebony Malone. Ms. Malone was on the list of individuals subject to challenge based on the nonforwardable, returned mailing. Recognizing the chaos that would have resulted if the challenges were permitted to go forward, on Election Day, Ohio’s Attorney General barred all challenges on Election Day. Ms. Malone successfully voted, without challenge, in the November 2004 election).

³⁶ Am. Sub. House Bill 3 (2005); *see also* OHIO REV. CODE ANN. § 3501.19 (2010).

³⁷ OHIO REV. CODE ANN. § 3503.24 AND 3505.19 (2010).

³⁸ Ohio Secretary of State Directive 2008-79 (2008). Required Procedures in Administering Voter Challenge Statutes, R.C. 3503.24 and 3505.19.

³⁹ *Id.*; *see also* OHIO REV. CODE ANN. §§ 3503.24 AND 3505.19 (2010).

⁴⁰ *Supra* note at n. 8.

⁴¹ *Id.*

⁴² *Id.* at 3503.24 (2009).

⁴³ *Id.* at 3599.30 (2009).

⁴⁴ *Id.*

⁴⁵ *Boustani v. Blackwell*, Case No. 1:06CV2065(2006)(finding that Ohio Revised Code Section 3505.20(A)(2)(3) and (4) are unconstitutional.

⁴⁶ *Id.*

⁴⁷ Am. Sub. H.B. 260 (2009), OHIO REV. CODE ANN. §§ 3509.07 AND 3511.041 (2010).

⁴⁸ *Id.*

⁴⁹ *Id.* at § 3501.01 (2010).

⁵⁰ Secretary of State Directive 2008-80 (2008). Voter Identification Requirements (explaining that an Ohio driver's license or Ohio-issued photo ID card may be used that does not contain the voter's address appearing in the board of elections' records. In this instance, election officials are required to record the last four (4) digits of the voter's driver's license or Ohio ID card number).

⁵¹ Election Enhancements for Ohio - Final Legislative Summary, Ohio Secretary of State (July 28, 2009).

⁵² Am. Sub. H.B. 260 (2009), OHIO REV. CODE ANN. § 3501.01 (2010).

⁵³ *Id.*

⁵⁴ Am. Sub. H.B. 260 (2009) (HB 260 would not alter HAVA's ID requirements for first-time voters who register by mail); *see* OHIO REV. CODE ANN. § 3501.01 (2010).