

BRENNAN  
CENTER  
FOR JUSTICE



Brennan Center for Justice  
*at New York University School of Law*

161 Avenue of the Americas  
12th Floor  
New York, New York 10013  
212.998.6730 Fax 212.995.4550  
[www.brennancenter.org](http://www.brennancenter.org)

November 6, 2012

Joyce Kale-Pesta, Director  
Mahoning County Board of Elections  
345 Oak Hill Ave. Entrance A  
Youngstown, OH 44502

Dear Ms. Kale-Pesta,

We know that your office has been working very hard in advance of the election and we hope that Election Day goes smoothly. We write on behalf of the undersigned groups because we have identified a problem that needs to be addressed tomorrow. Specifically, we urge you to take immediate steps to prevent the unwarranted disenfranchisement of many eligible Ohio voters who cast provisional ballots on Election Day. We are concerned that an inadequate voter registration look-up system, without additional procedures, places large numbers of provisional ballots cast by registered voters at risk of not being counted. To avert this problem, we strongly urge the Board to use its discretion to employ flexible data-matching procedures, including multiple checks of both the county-wide and statewide lists, with different searches including wild cards and different configurations of voter data. This is essential to ensure that all eligible provisional voters are properly verified and will have their ballots counted.

**A. Provisional Ballots are Likely to be Improperly Rejected Due to Inadequate Data-Matching Procedures**

**1. Ohio's Exact-Match Lookup System is Misidentifying Large Percentages of Voters as Unregistered.**

It is our understanding that Ohio's statewide lookup system for voter registrations by default is highly inflexible and—unless there are express procedures in place to counteract this—will not verify the identity of provisional voters unless there is an exact match in any field entered, including a voter's name, address, and identifying number. It is also our understanding, based on media reports and conversations with Northeast Ohio Voter Advocates (NOVA), an organization led by Professor Norman Robbins that has been analyzing voting data, that absentee ballot applications in counties across the state have been improperly rejected due to unsuccessful data matches. Cuyahoga County, for example,

recently discovered that it had erroneously rejected 1,300 absentee ballot applications because it had been unable to locate the voters in the registration database. (It subsequently sent those initially rejected voters absentee ballots.) NOVA reviewed a sample of 1,200 absentee ballot applications in Franklin County that were rejected on the basis that the voter was unregistered, and discovered that 38-percent of the rejected voters were in fact registered. This analysis suggests that thousands of additional, eligible voters from counties across Ohio were likely incorrectly identified as unregistered and denied absentee ballots because of typos and other minor errors—through no fault of their own.<sup>1</sup>

## **2. Exact-Match Systems are Notoriously Unreliable**

The Ohio statewide voter-registration database by default uses data-matching procedures that are overly stringent and unreliable. Specifically, the system looks for an exact match, character by character, of any information entered into its search fields against the information in the same fields in voter records. As our previous research has shown, exact matching is a notoriously unreliable means of determining whether a record relating to a particular person exists in the database searched.<sup>2</sup> Unduly strict data-matching systems like the default system in place in Ohio do not account for typos, mistakes, or inconsistencies in data format. These are known to produce high rates of “false negatives” as compared with more flexible matching procedures.<sup>3</sup> Thus, even minor mistakes by election officials can lead to the disenfranchisement of eligible and registered voters.

## **3. Ohio’s Exact-Match Lookup System is Likely to Affect County Boards’ Validation of Provisional Ballots.**

We are concerned that a similarly unreliable data-matching system that resulted in improper rejections of absentee ballot applications will also be used by County Boards of Elections in validating provisional ballots. Under Step 3 of Ohio Secretary of State Directive 2012-54, issued on November 2, 2012, Boards of Elections are required to reject the provisional ballots of voters whose identity cannot be verified.<sup>4</sup> Based upon the exact-match

---

<sup>1</sup> Northeast Ohio Voter Advocates, *Thousands of Ohio Voters Likely to Be Disenfranchised Because Secretary of State Husted Fails to Correct Inadequate Database Searches* (Nov. 3, 2012), <http://www.nova-ohio.org/>.

<sup>2</sup> See JUSTIN LEVITT ET AL., BRENNAN CENTER FOR JUSTICE, *MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION 23* (2006), available at [http://brennan.3cdn.net/96ee05284dfb6a6d5d\\_j4m6b1cjs.pdf](http://brennan.3cdn.net/96ee05284dfb6a6d5d_j4m6b1cjs.pdf).

<sup>3</sup> For example, in 2008, Wisconsin had an initial non-match rate of 22 percent. A report from the Wisconsin Government Accountability Board found that 90 percent of its failed matches were due to issues with exact matches of names and driver’s license numbers. See Testimony to Election Assistance Commission of Wendy Weiser (Mar. 17, 2009), available at [http://www.brennancenter.org/content/resource/wendy\\_weiser\\_before\\_the\\_eac/](http://www.brennancenter.org/content/resource/wendy_weiser_before_the_eac/). Exact-match requirements have error rates of up to 20% based on typos made by government officials alone. LEVITT ET AL., *supra* note 2; see also Neil A. Maizlish & Linda Herrera, *A Record Linkage Protocol for a Diabetes Registry at Ethnically Diverse Community Health Centers*, 12 J. AM. MED. INFORMATICS ASS’N 331, 335 (2005); Shaun J. Grannis et al., *Analysis of Identifier Performance Using a Deterministic Linkage Algorithm*, 2002 PROC. AMIA ANNUAL SYMPOSIUM 305, 307-08; Carol Friedman & Robert Sideli, *Tolerating Spelling Errors During Patient Validation*, 25 COMPUTERS & BIOMEDICAL RESEARCH 486, 503-04 (1992).

<sup>4</sup> Ohio SOS Directive 2012-54, *Determining the Validity of Provisional Ballots and the Modified NEOCH Consent Decree 3–4* (Nov. 2, 2012) (requiring Boards of Elections to verify the identity of provisional voters by, in part, running a search of the statewide voter registration database).

error rate that Ohio counties have already experienced, thousands and possibly tens of thousands of provisional ballots could be wrongly rejected across Ohio. In 2004 and 2008, more than 200,000 provisional ballots were cast in Ohio.<sup>5</sup> In 2012, the number of provisional ballots could be even higher, especially given the fact that as of November 2, 238,678 absentee ballots had been mailed out but not returned.<sup>6</sup>

**B. The Board Can Take Affirmative Steps to Mitigate the Effects of the Inflexible and Unreliable Lookup System and Ensure Eligible Provisional Voters' Ballots are Properly Verified.**

To prevent the record look-up system from creating problems, we strongly urge the Board to take the following steps in validating provisional ballots:

- (1) Implement a more flexible data-match protocol, using multiple searches with wildcards to identify whether provisional voters are in fact registered. NOVA recommends one set of search protocols that significantly reduce false-negatives, and we urge you to use their model or develop similarly flexible data-match protocols.<sup>7</sup>
- (2) Where possible, manually check registration records for provisional ballot voters whose identity cannot be verified using the statewide voter-registration database.
- (3) Instruct poll workers to request that voters fill out the form on the back of the provisional-ballot envelope,<sup>8</sup> which contains fields for the voter's date of birth and address, to increase the likelihood of a positive match during the provisional-ballot-counting procedure.

These steps will help ensure that provisional voters are not disenfranchised due to preventable errors—errors that have already occurred recently in the absentee ballot application check process and that have a high risk of occurring again absent remedial action. In doing so, they will protect voters' rights under the Due Process Clause of the U.S. Constitution, which protects against disenfranchisement on the basis of systemic and avoidable errors on the part of election officials,<sup>9</sup> and under the Voting Rights Act, which prohibits denying the right to vote on the basis of immaterial errors or omissions in paperwork.<sup>10</sup>

---

<sup>5</sup> In 2008, 204,651 provisional ballots were submitted in Ohio. U.S. ELECTION ASSISTANCE COMM'N, 2008 ELECTION ADMINISTRATION AND VOTING SURVEY at Table 35 (2009). Assuming a 38% error rate, *see* Northeast Ohio Voter Advocates, *supra* note 1, approximately 76,000 ballots would be wrongly rejected.

<sup>6</sup> *See* Ohio Secretary of State, *Voting in Ohio: By the Numbers*, [http://www.sos.state.oh.us/SOS/Upload/news/2012/AbsenteeNumbers\\_11022012.pdf](http://www.sos.state.oh.us/SOS/Upload/news/2012/AbsenteeNumbers_11022012.pdf).

<sup>7</sup> *See* Example of Model Search Protocol, available at <http://www.nova-ohio.org/Provisional%20ballot%20search%20protocol%20as%20of%2011-2-12%20vers3.pdf>.

<sup>8</sup> The back of the provisional ballot form currently notes, "Failure to complete this form will not cause your provisional ballot to be rejected." For voters who recently moved to a new polling place or County, this statement is incorrect. *See* Ohio Rev. Code Ann. §§ 3503.16(B)(2)(a)-(d), 3503.16(C)(1)-(4). But in any event, voters who fill out the back of the form, thus providing the Board with additional information to use during the provisional-ballot-validation process, increase the likelihood that they will be correctly matched.

<sup>9</sup> *Northeast Ohio Coal. for Homeless v. Husted*, --- F.3d ---, 2012 WL 2839033, \*13-14 (Oct. 11, 2012).

<sup>10</sup> 42 U.S.C. § 1971(a)(2)(B).

Please do not hesitate to contact us if we can be of assistance to you in this matter.

Respectfully Submitted,

Wendy Weiser  
Vishal Agraharkar  
Brennan Center for Justice  
161 Avenue of the Americas  
New York, NY 10013

Robert Kengle  
Co-Director, Voting Rights Project  
Lawyer's Committee for Civil Rights Under Law  
1401 New York Avenue N.W., Suite 400  
Washington, DC 20005