

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

<b>DEREK HAMILTON, et al.,</b>	:	
	:	<b>CASE NO. 08-4439</b>
<b>Plaintiffs-Appellants,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>ASHLAND COUNTY</b>	:	
<b>BOARD OF ELECTIONS, et al.,</b>	:	
	:	
<b>Defendants-Appellees.</b>	:	

**EMERGENCY MOTION FOR DELIVERY OF PROVISIONAL  
BALLOTS TO PLAINTIFFS-APPELLANTS AND TO EXPEDITE  
APPEAL**

Plaintiffs-Appellants are in jeopardy of losing their fundamental right to vote. Pursuant to FRAP 8, Appellants move this Court to order Defendant-Appellee Ashland County Board of Elections to supply Appellants with provisional ballots before 5:00 p.m. on Monday, November 3, 2008, so that each Appellant's vote will be lawfully preserved while the appeal process is underway in this matter. Further, pursuant to 6 Cir. R. 27(f) Appellants move to expedite this appeal. A Memorandum of Law in support of this Motion is attached. A proposed Order is also attached as Exhibit G.

Respectfully submitted,

/s/ David A. Singleton

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## MEMORANDUM IN SUPPORT

### **I. Introduction**

This case presents an urgent, time sensitive issue requiring immediate action by the Court. Unless the Court acts promptly, Appellants, who are 16 eligible, young voters confined at the Mohican Juvenile Correctional Facility (“Mohican”) (See First Amended Complaint ¶2 attached as Exhibit A), will be unlawfully disenfranchised and prevented from voting in their first election.

Appellants timely and lawfully registered to vote in Ashland County where Mohican is located. *Id.* However, on October 24, 2008, at a hearing Appellants were unable to attend due to unlawfully late notice, Appellee Ashland County Board of Elections (“the Board”) cancelled Appellants’ registrations. *Id.* at ¶¶ 4, 55-63. The Board did so after a local resident challenged their registrations on the grounds that Appellants, by virtue of their confinement, were only temporary residents of Ashland County and, therefore, were not residents for voting purposes. *Id.* at ¶¶ 3, 53-4.

On October 27, 2008, after securing counsel, Appellants brought suit in federal district court alleging that the Board deprived them of their First Amendment right to vote and violated their rights to due process and equal protection under the law. *Id.* Appellants sought a temporary restraining

order and preliminary injunction requiring the Board to restore their registrations and to provide them with absentee ballots in time for them to vote in the November 4, 2008 election. (See Plaintiffs' Motion for a Temporary Restraining Order and Memorandum in Support, attached as Exhibit B). The district court held a hearing on October 31, 2008 and later that evening denied relief and dismissed the case. (See Memorandum Opinion and Order, attached as Exhibit C). Appellants then moved the district court to stay its decision and to order the Board to provide provisional ballots to Appellants pending appeal. (See Motion for Stay, attached as Exhibit D). The district court denied the motion. (See Order, attached as Exhibit E). Appellants then filed an emergency appeal. (See Notice of Appeal, attached as Exhibit F).

Appellants now move this Court to order the Board to provide them with provisional ballots no later than 5 p.m. today. Provisional ballots are the only way that Appellants can preserve their votes pending the outcome of this appeal. Further, Appellants request an expedited review of this appeal since their votes must be counted with ten days of the election if they are found eligible to vote in Ashland County.

## II. LEGAL ARGUMENT

### **A. This appeal should receive expedited review because Appellants' votes must be counted within ten days of the election or they will lose their right to vote in this election.**

This case implicates significant constitutional issues. The Board and the district court applied an interpretation of Ohio's voter residency statutes that denied Appellants the right to vote. Moreover, the Board made its decision to deprive Appellants of this fundamental right without providing Appellants a meaningful opportunity to be heard. There is good cause to expedite this appeal because if the issue is not decided within ten days of the election, Appellants will lose their right to vote.

#### **a. The action of the Board deprived Appellants of their right to vote and their right to due process.**

Ohio Revised Code § 3503.04 provides:

Persons who are inmates of a public or private institution who are citizens of the United States and have resided in this state thirty days immediately preceding the election, and who are otherwise qualified as to age and residence with the county **shall have their lawful residence in the county city, village and township in which said institution is located** provided, that the lawful residence of a qualified elector who is an inmate in such an institution for temporary treatment only, shall be the residence from which he entered such institution.

For this reason and at the instruction of the Secretary of State's office, Appellants registered to vote in Ashland County. (See First Amended Complaint at ¶¶ 65-67). The Board and the district court found

that Appellants were not properly registered in Ashland County based on Ohio Revised Code § 3503.02(C), which states:

A person shall not be considered to have gained a residence in any county of this state into which the person comes for temporary purposes only, without the intention of making such county the permanent place of abode. *Id.* at ¶ 4 and Memorandum Opinion and Order.

Ohio Revised Code § 3503.02(C) sets forth general rules regarding residency while R.C. § 3503.04 is a specific statute controlling the unique circumstances of Appellants' situation. Instead of adhering to well-established principles of statutory interpretation, the district court instead interpreted R.C. § 3503.02 to control. In doing so, the district court rendered R.C. § 3503.04 superfluous in contravention of one of the cardinal rules of statutory construction. *See Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 769 (6th Cir. 2005); *see D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. Of Health*, 96 Ohio St.3d 250, 773 N.E.2d 536 (Ohio 2002); *see also* 2A Sutherland Statutory Construction s46:6 (7th ed.) ("effect must be given, if possible, to every word, clause and sentence of a statute"). This interpretation deprives Appellants of their First Amendment rights.

Additionally, the Board failed to provide Appellants with an opportunity to be heard at a meaningful time and in a meaningful manner as required by the constitution. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Board waited four days after it received the challenge to send

Appellants written notice of the hearing. (See First Amended Complaint at ¶¶3, 53, 55-56) Appellants did not receive written notice of the Board's hearing until the day before it was scheduled to occur. (See First Amended Complaint at ¶¶ 3, 56). In light of the time-sensitive nature of the circumstances, the Board's notice was not reasonably calculated to apprise Appellants of the pendency of the hearing. *See Dusenbery v. United States*, 534 U.S. 161, 168, 122 S.Ct. 694 (2002). Because Appellants are confined to a secure facility, they were unable to secure counsel or to make arrangements to attend the hearing, consequently, they were denied due process before being stripped of their voting rights.

**B. This court should order the Board to deliver provisional ballots to Appellants because that is the only way their voting rights will be preserved pending the outcome of this appeal.**

Because this matter implicates the fundamental right to vote, ensuring that Appellants' votes are preserved during the appeal process is particularly crucial. Ohio law allows individuals who are challenged at the polls to cast provisional ballots. See R.C. § 3505.181(A)(7). There are safeguards in place pursuant to R.C. §§ 3505.181(B)(4), 3505.181(B)(7), and 3505.181(B)(8)(b), to ensure that provisional ballots are only counted after the individual is determined to be eligible within a ten days following the

election. In this case, the statutory ten-day period will allow this Court to determine whether Plaintiffs' vote will lawfully count.

Providing Plaintiffs with provisional ballots pending the outcome of this appeal presents no risk of diluting the voting pool or other harm to the electoral process because there are stringent procedural safeguards in place that will prevent the provisional ballots from being counted until this matter is resolved on appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Emergency Motion was served via electronic mail on the following this 3<sup>rd</sup> day of November, 2008:

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