JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 EAST BROAD STREET, 16TH FLOOR
COLUMBUS, OHIO 43215 USA
TEL: 1-877-767-6446 FAX: 1-614-644-0649
WWW.SOS.STATE.OH.US

DIRECTIVE 2008-79
September 5, 2008

TO: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS

RE: Required Procedures in Administering Voter Challenge Statutes, R.C. 3503.24 and 3505.19

The intent of this directive is to prescribe procedures that will limit boards of elections' potential exposure to significant awards of damages and attorneys' fees in suits brought by Ohio voters whose voter registrations have been canceled based on application of Ohio's voter challenge statutes in a manner that conflicts with federal statutory and constitutional law. The Secretary of State issues this directive to harmonize the provisions of R.C. 3503.24 and 3505.19 with the National Voter Registration Act ("NVRA") and the United States Constitution to ensure that boards of elections do not unconstitutionally cancel a voter's registration without the due process guarantees in the United States Constitution and federal law.

The office of the Secretary of State has concluded, based on comprehensive legal research and analysis of Ohio's voter challenge statutes and controlling federal law, that R.C. 3503.24 and 3505.19, if applied in conflict with requirements of federal law, will place boards of elections in a legally vulnerable position. The Ohio challenge statutes authorize, under certain circumstances, the cancellation of an Ohioan's voter registration without first providing the voter due process protections of adequate notice and opportunity to demonstrate that the challenge to his or her status as a qualified registered elector should be denied, and that his or her registration should not be canceled.

The procedures established in this directive include the requirement that, **where a challenge is submitted pursuant to R.C. 3503.24 and 3505.19 asserting that a registered elector is not qualified to vote, a hearing must be held before the next election as a requisite for the board canceling the challenged voter's registration, which may result in disenfranchisement of that voter for that election.**

This directive will:

- Provide procedures for boards of elections to follow in administering voter challenges prior to Election Day to ensure that boards do not unconstitutionally deprive a voter of his or her constitutional rights and to avoid costly litigation.
- Explain the current status of Ohio law regarding voter challenges before Election Day.
- Explain how certain provisions in Ohio law may conflict with federal law and the United States Constitution regarding canceling a voter's registration without due process based on a voter challenge before Election Day.

REQUIRED PROCEDURES TO AVOID AN UNCONSTITUIONAL DEPRIVATION OF A VOTER'S DUE PROCESS RIGHTS

The Secretary of State issues this directive to harmonize the provisions of R.C. 3503.24 and 3505.19 with the NVRA and the United States Constitution to ensure that boards of elections do not unconstitutionally cancel a voter's registration without the due process guarantees required by the United States Constitution and federal law. Under this directive, a board of elections that has received a challenge under R.C. 3503.24 or 3505.19 **may not cancel a voter's registration based solely on the basis of board records unless it has first provided the voter notice and opportunity to appear at a public hearing.** The board's records may be considered at the hearing, which is an administrative proceeding, despite the hearsay nature of the board's records. However, absent having first provided adequate notice to the challenged voter of his or her opportunity to be heard, to confront adverse witnesses and to present evidence, in a manner as described in this directive, information contained in the board's records may not be the sole justification for canceling a voter's registration.

I therefore hereby direct that a board presented with a R.C. 3503.24 or R.C. 3505.19 challenge to a registered voter's status as a qualified elector must follow these procedures:

Challenges Received Under R.C. 3503.24 (Form No. 257 or Form No. 259)

1. When a board receives a R.C. 3503.24 challenge of another elector's right to vote,[1] the board shall first determine whether the person submitting the challenge is an elector in the county and has fully completed either Form No. 257 or Form No. 259. If the person is not an elector of the county, the board shall immediately deny the challenge. If the person has not used either of the prescribed forms, the board shall immediately deny the challenge.

2. If the person submitting the challenge is an elector of the county and has submitted a completed, prescribed form, the board shall prepare a Notice of Hearing that notifies the challenged voter of all of the following:

   a. That the voter's right to vote has been challenged, and the name of the person submitting the challenge, along with a copy of the form filed by the elector who has filed the challenge.

   b. The date, time and place of the hearing.

   c. That the voter has a right to appear and testify at the public hearing and present evidence demonstrating that the challenge should be denied.

   d. That the voter has a right to call and subpoena witnesses to appear at the hearing.

   e. That the voter has a right to be represented by counsel at the hearing and may cross-examine witnesses.

   f. That at the end of the hearing, cancellation of the voter's registration requires a majority vote of the members of the board of elections.

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[1] R.C. 3503.24 provides that "a challenge of the right to vote of any registered elector may be made by any qualified elector of the county at the office of the board of elections not later than twenty days prior to the election. The applications or challenges, with the reasons for the application or challenge, shall be filed with the board on a form prescribed by the secretary of state and shall be signed under penalty of election falsification."

g. That if the board members tie on the issue of cancellation, the matter shall be submitted to the Secretary of State for final resolution of whether the voter's registration shall be canceled.

3. The director shall send the Notice of Hearing to the challenged voter's address of record by first class **forwardable** U.S. mail. The notice shall be mailed no later than three days prior to the date scheduled for the hearing. R.C. 3503.24(B) provides that the notice may be sent "no later than three days before the day of any scheduled hearing." The Secretary of State strongly encourages boards of elections to send the notice at least eight to ten days prior to the scheduled hearing, as a court may determine that three days is not constitutionally sufficient notice.

4. The director shall provide the person who filed the challenge with written notice of the date and time of the hearing, and of the person's right to call and subpoena witnesses for the hearing.

5. The person challenging an elector's right to vote bears the burden of proving, by "clear and convincing evidence," a higher standard of proof than "preponderance of the evidence" used in typical civil court cases, that the challenged voter's registration is invalid. The return of a R.C. 3501.19 Election Day notice (the 60-day notice) as "undeliverable" by the post office is, by itself, insufficient to cancel a voter's registration under this standard.

6. After receiving all of the evidence at the hearing, the board shall immediately decide whether the challenge should be granted or denied. If the board grants the challenge by deciding that the name of any challenged person is not entitled to be on the official registration list, the person's name shall be removed and the person's registration forms canceled. If the board determines that the name of the challenged person should appear on the registration list, the challenged person's eligibility is confirmed and **poll workers may not challenge the person's eligibility to vote on Election Day.**

7. If the voter does not appear at the hearing, either in person or through the appearance of legal counsel, the board may consider its records to determine whether those records demonstrate, by clear and convincing evidence, that the challenged voter is not qualified to vote. Only then may the board sustain the challenge and cancel the challenged voter's registration by removing his or her name from the official registration list.

8. If the board members tie on the issue of cancellation, the matter shall be submitted to the Secretary of State for final resolution of the issue.

9. Consistent with R.C. 3503.01, the following constitute valid grounds for canceling a voter's registration:

   a. The challenged voter is not a citizen of the United States.
   b. The challenged voter is not of the age of 18 years or over as of the date of the election.
   c. The challenged voter is not a resident of the county in which the challenge was filed.
   d. The challenged voter did not register to vote at least 30 days prior to the day of the election.
   e. Certified proof of the death of the challenged voter exists.
   f. The challenged voter has been convicted of a felony and the conviction has not been reversed or annulled, **and** the felon remains incarcerated as a result of the felony conviction. (Note, a person who is convicted of a felony but is incarcerated for a

misdemeanor violation or on new charges not yet adjudicated, and not as a result of a felony sentence of incarceration, a felony probation or community control violation or a post-release control violation, is eligible to vote if other requirements have been met.) In addition, a person convicted of a felony whose registration was not canceled during his or her period of incarceration, and who has been released, is not subject to cancellation following his release from incarceration based on his felony conviction. (R.C. 3503.21(A)(3) and R.C. 2961.01.) That is, persons who have been convicted of felonies, incarcerated, but have been released, are not disqualified on the basis of their previous felony incarceration status if their registration was not previously canceled. Persons under post-release control supervision or under a non-jail felony community control (probation) sanction are not incarcerated and therefore, if registered, are eligible to vote.

g. The challenged voter has been adjudicated incompetent by a court for the purpose of voting as provided in R.C. 5122.301.
h. The challenged voter has failed to respond to a confirmation notice by the board **and** has failed to vote at least once during a period of four consecutive years, which period shall include two general federal elections.
i. The challenged voter has been mailed a confirmation notice sent by the board **and** has failed to update his or her registration **and** to vote at least once during a period of four consecutive years, which period shall include two general federal elections.

10. The hearing shall be held, and the challenge decided, no later than ten days after the board receives the challenge. Although R.C. 3503.24(D) allows boards of elections to postpone hearings for challenges received within 30 days of an election, the instructions in Secretary of State Directive 2007-06 remain in effect and the Secretary strongly advises against postponing any hearing until after the date of the election (which causes the challenged voter to vote provisionally instead of by regular ballot).

Challenges Received under R.C. 3505.19

1. When a board receives a challenge of an elector's right to vote under R.C. 3505.19,[2] the board shall first determine whether the person submitting the challenge is an elector in the state of Ohio. If neither the challenger nor the person challenged is an elector, the board shall immediately deny the challenge. A challenge under R.C. 3505.19 may be made by a qualifying elector who appears in person at the office of the board of elections, or by letter addressed to the board, challenging the right of another registered elector to vote. Any such challenge must state the ground upon which the challenge is made, and must be signed by the challenger giving the challenger's address and voting precinct.

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[2] R.C. 3505.19 provides: "Any person registered as an elector may be challenged by any qualified elector as to the registered elector's right to vote prior to the nineteenth day before the day of an election. Such qualified elector may, either by appearing in person at the office of the board of elections, or by letter addressed to the board, challenge the right of such registered elector to vote. Any such challenge must state the ground upon which the challenge is made, and must be signed by the challenger giving the challenger's address and voting precinct. If the board is satisfied, in accordance with division (B) of section 3503.24 of the Revised Code, that the challenge is well-taken, the director shall so indicate on the registration cards and shall so notify in writing the judges of the precinct. If such challenged person offers to vote at such election, the challenged person shall be examined as in the case of an original challenge. If such person establishes, to the satisfaction of the judges, that the person's disabilities have been removed and that the person has a right to vote, the person shall be permitted to vote."

2. If the person submitting the challenge is an elector of the state of Ohio, the board shall prepare a Notice of Hearing that notifies the challenged voter of all of the following:
   a. That the voter's right to vote has been challenged, and the name of the person submitting the challenge, along with a copy of the any letter or form filed by the elector who has filed the challenge.
   b. The date, time and place of the hearing.
   c. That the voter has a right to appear and testify at the public hearing and present evidence demonstrating that the challenge should be denied.
   d. That the voter has a right to call and subpoena witnesses to appear at the hearing.
   e. That the voter has a right to be represented by counsel at the hearing and may cross-examine witnesses.
   f. That at the end of the hearing, a decision that the challenge is "well-taken" requires a majority vote of the members of the board of elections.
   g. That, if the board members tie on the issue, the matter shall be submitted to the Secretary of State for final resolution of whether the challenge is "well-taken."

3. The director shall send a Notice of Hearing to the challenged voter's address of record by first class **forwardable** U.S. mail. The notice shall be mailed no later than three days prior to the date scheduled for the hearing. R.C. 3503.24(B), which is incorporated into R.C. 3505.19, provides that the notice may be sent "no later than three days before the day of any scheduled hearing." The Secretary of State strongly encourages boards of elections to send the notice at least eight to ten days prior to the scheduled hearing, as a court may determine that three days is not constitutionally sufficient notice.

4. The director shall provide the person who filed the challenge with written notice of the date and time of the hearing, and of the person's right to call and subpoena witnesses for the hearing.

5. The person challenging an elector's right to vote bears the burden of proving, by "clear and convincing evidence," a higher standard of proof than "preponderance of the evidence" used in typical civil court cases, that the challenged voter's registration is invalid. The return of a R.C. 3501.19 Election Day notice (the 60-day notice) as "undeliverable" by the post office is, by itself, insufficient to cancel a voter's registration under this standard.

5. After receiving all of the evidence at the hearing, the board shall immediately decide whether the challenge is well-taken. If the board members tie on the issue whether to grant or deny the challenge, the matter shall be submitted to the Secretary of State for final resolution.

6. If the board grants the challenge by determining that it is well-taken,[3] the board shall NOT cancel the challenged voter's registration by removing his or her name from the

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[3] The board's decision should be based on one of the following determinations:
   a. The challenged voter is not a citizen of the United States.
   b. The challenged voter is not of the age of 18 years or over as of the date of the election.
   c. The challenged voter is not a resident of the county in which the challenge was filed.
   d. The challenged voter did not register to vote at least 30 days prior to the day of the election.
   e. Certified proof of the death of the challenged voter exists.

official registration list. Instead, the director shall notify the poll workers in the challenged elector's precinct of the board's decision and mark the elector's name in the poll book, including the reason the board finds the challenge to be well-taken. If the challenged voter offers to vote on Election Day, the poll workers shall challenge the elector pursuant to R.C. 3505.20, and the board's decision that a challenge is well-taken is final (R.C. 3505.20). In all cases, including when a challenge has been well-taken by a board of elections, poll workers who are unable to determine that the person who offers to vote on Election Day has a right to vote, the person shall be permitted to vote a provisional ballot. In cases where the board has not determined a challenge under R.C. 3505.19 and poll workers are satisfied after examining the challenged elector under R.C. 3505.20 that the elector has a right to vote, the elector shall be permitted to vote a regular ballot.

7. If the board denies the challenge by determining that the challenge is not well-taken, the director shall instruct the poll workers that the challenged voter's eligibility is confirmed and **the voter may not be challenged by the poll workers on Election Day.**

8. The hearing shall be held, and the challenge decided, no later than ten days after the board receives the challenge. Although R.C. 3503.24(D) allows boards of elections to postpone hearings for challenges received within 30 days of an election, the instructions in Secretary of State Directive 2007-06 remain in effect and the Secretary strongly advises against postponing any hearing until after the election (which causes the challenged voter to vote provisionally instead of a regular ballot).

Boards of elections are encouraged to contact their county prosecutor for additional advice concerning notice and opportunity to be heard at a constitutionally required hearing.

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f. The challenged voter has been convicted of a felony and the conviction has not been reversed or annulled, **and** the felon remains incarcerated as a result of the felony conviction. (Note, a person who is convicted of a felony but is incarcerated for a misdemeanor violation or on new charges not yet adjudicated, and not as a result of a felony sentence of incarceration, a felony probation or community control violation or a post-release control violation, is eligible to vote if other requirements have been met.) In addition, a person convicted of a felony whose registration was not canceled during his or her period of incarceration, and who has been released, is not subject to cancellation following his release from incarceration based on his felony conviction. (R.C. 3503.21(A)(3) and R.C. 2961.01.) That is, persons who have been convicted of felonies, incarcerated, but have been released, are not disqualified on the basis of their previous felony incarceration status if their registration was not previously canceled. Persons under post-release control supervision or under a non-jail felony community control (probation) sanction are not incarcerated and therefore, if registered, are eligible to vote.

g. The challenged voter has been adjudicated incompetent by a court for the purpose of voting as provided in R.C. 5122.301.

h. The challenged voter has failed to respond to a confirmation notice by the board **and** has failed to vote at least once during a period of four consecutive years, which period shall include two general federal elections.

i. The challenged voter has been mailed a confirmation notice sent by the board **and** has failed to update his or her registration **and** to vote at least once during a period of four consecutive years, which period shall include two general federal elections.

No Due Process Hearing Required for Election Day Poll Worker Challenges pursuant to R.C. 3505.20

A challenge made by a poll worker at a polling place on Election Day pursuant to R.C. 3505.20 does not require advance notice and opportunity to be heard, nor are the procedures set forth above required for a poll worker challenge on Election Day. Where poll workers find an individual not qualified to vote when at a polling location, that individual shall be provided the opportunity to vote a provisional ballot.

If you have questions concerning this directive, please contact your assigned elections attorney.

Sincerely,

Jennifer Brunner

APPENDIX—SUPPORTING LEGAL ANALYSIS

OHIO LAW ON VOTER CHALLENGES PRIOR TO ELECTION DAY

R.C. 3503.24

R.C. 3503.24 allows any elector to challenge the right to vote of another elector in that county no later than the 20th day before an election. The challenge shall be filed using one of the forms prescribed by the Secretary of State (Form No. 257 or Form No. 259). The law provides that when a board of elections receives a challenge, it shall promptly review its records. If the board is able to determine that a challenge should be granted based *solely* on the basis of the board's records, the board may immediately vote to grant the challenge and thereby cancel the challenged voter's registration without notice to or opportunity to be heard by the challenged voter.

If the board is not able to determine whether a challenge should be granted or denied based solely on the board's records, the director shall promptly set a time and date for a public hearing. The director shall then notify the challenged voter of the hearing, and the hearing shall be held, and the challenge decided, no later than ten days after the board receives the challenge. If the board determines that the challenge should be granted, the board shall remove the person's name from the official registration list and cancel the voter's registration.

If the challenge is filed within 30 days of an election, the board, in its discretion, may postpone the hearing, and any notifications of that hearing, until after the day of the election. Any hearing postponed shall be conducted not later than ten days after the day of the election. Any elector who is the subject of a challenge with a hearing postponed until after the election shall be permitted to vote a provisional ballot at the election. The provisional ballot shall not be counted unless the hearing conducted within ten days after the election results in the elector's inclusion in the official voter registration list.

R.C. 3505.19

R.C. 3505.19 allows any elector in the state of Ohio to challenge the right to vote of any other elector prior to the 19th day before an election. The challenger shall either send a letter to the board of elections or appear in person. Similar to a challenge under R.C. 3503.24, when the board receives the challenge, it shall promptly review the board's records. If the board is able to determine that a challenge should be granted solely on the basis of the board's records, it may immediately grant the challenge and thereby cancel the challenged voter's registration without notice or an opportunity to be heard by the challenged voter.

If the board is not able to determine whether a challenge should be granted or denied based solely on the board's records, the director shall promptly set a time and date for a hearing. The director shall then notify the challenged voter of the hearing, and the hearing shall be held, and the challenge decided, no later than ten days after the board receives the challenge.

If the board determines that the challenge is well-taken, the board shall notify the precinct poll workers of that determination. If the challenged person appears to vote on Election Day, the poll workers shall examine the elector as in the case of an original challenge. If the elector establishes, to the satisfaction of the poll workers, that the person's disabilities have been removed and that the person has a right to vote, the person shall be permitted to vote.

If the challenge is filed within 30 days of an election, the board, in its discretion, may postpone the hearing, and any notifications of that hearing, until after the day of the election. Any hearing postponed shall be conducted not later than ten days after the day of the election. Any elector who is the subject of a challenge with a hearing postponed until after the election shall be permitted to vote a provisional ballot at the election. The provisional ballot shall not be counted unless the hearing conducted within ten days after the election results in the elector's inclusion in the official voter registration list.

Secretary of State Directive 2007-06

Secretary of State Directive 2007-06, issued April 4, 2007, advises boards against postponing the challenge hearing and to consider **all** challenges submitted pursuant to R.C. 3503.24 and 3505.19 **at one or more hearings held prior to the election.** It is the Secretary of State's position that voters who believe they have been disenfranchised are more likely to sue the boards of elections, resulting in court challenges that will be time-consuming for the board and the county prosecutor at what will already be a busy election time. In the event the board chooses not to hold a hearing before the election, Directive 2007-06 provides that it may serve as evidence against a board in resulting litigation. This instruction remains in effect.

Secretary of State Directive 2007-11

Secretary of State Directive 2007-11, issued July 13, 2007, provided instructions concerning maintenance of a general voter records maintenance program as mandated by the National Voter Registration Act (the "NVRA") and included instructions to ensure that cancellations of voters' registrations complied with specific requirements of that federal law. This directive complements and supplements the instructions contained in 2007-11 concerning the administration of a general program that makes a reasonable effort to remove the names of ineligible voters as described in the NVRA.

FEDERAL AND CONSTITUTIONAL LAW REGARDING CANCELLATION OF A VOTER'S REGISTRATION

The National Voter Registration Act

The NVRA, commonly referred to as the "motor voter law" (see 107 Stat. 77, 42 U.S.C. 1973gg), was signed into law on May 20, 1993. The purposes of the NVRA are to increase the number of voter registrations for eligible citizens, to enhance the participation of eligible citizens in the voting process, to protect the integrity of the electoral process, and to ensure accurate and current voter registration rolls are maintained. The provisions of this federal law became effective on January 1, 1995. Following passage of the NVRA, the Ohio General Assembly enacted Substitute Senate Bill No. 300 to incorporate the requirements of the federal law into Ohio law. The provisions of the state law became effective January 1, 1995.

Under the federal NVRA, a county board of election may legally 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 respond to a particular notice sent by boards of elections and failed to vote at two general elections for federal office.[4]

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

Thus, under the NVRA, a board may remove the name of a voter from its rolls where the voter confirms in writing that he 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

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"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—

"(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)*

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 fails to respond to that notice; and the voter does not vote during the next two general elections for federal office. See Directive 2007-11 for additional instructions to assure board compliance with the NVRA.

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 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.))

Legal Conclusions: Potential Conflicts between State and Federal Law

1. R.C. 3503.24 and 3505.19 must be read *in pari materia* with the provisions of the NVRA and the United States Constitution.

2. Where a voter has not confirmed in writing that he or she has moved outside the county, R.C. 3503.24 and 3505.19 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 voter 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. 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, secured by the United States Constitution, of adequate notice and an opportunity to be heard.

4. A board of elections would be vulnerable in a 42 USC § 1983 action should it receive a challenge on an elector's right to vote and, 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 solely on "the records maintained by the board."

5. An 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, by providing notice and holding an adequate hearing that gives a challenged voter

the opportunity to be heard and to confront adverse witnesses. This is true even though R.C. 3503.24 on its face permits removal from the rolls without those protections. Providing notice and a hearing prior to depriving a voter of his or her fundamental liberty interest in having the right to vote provides the voter constitutional due process. That is, R.C. 3503.24 is not unconstitutional on its face, although it would be unconstitutional as applied if a board canceled a voter's registration without providing prior notice and an opportunity for a challenged voter to appear at a hearing.