Supreme Court of Ohio Clerk of Court - Filed November 19, 2026 - Case No. 2026-1574

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. EDWARD L. SCHIMMEL, Relator, v. LUCAS COUNTY BOARD OF ELECTIONS, et al., Respondents.	:	**ORIGINAL ACTION IN MANDAMUS**

RELATOR'S MEMORANDUM OPPOSING RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND PROPOSED INTERVENOR'S MOTION TO DISMISS

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W. Stuart Dornette (0002955)
Counsel of Record
Philip D. Williamson (0097174)
Dominic Bayer (0104319)
Taft Stettinius & Hollister LLP
301 E. Fourth Street, Suite 2800
Cincinnati, OH 45202
Phone: (513) 381-2838
Fax: (513) 381-0205
dornette@taftlaw.com
pwilliamson@taftlaw.com
dbay@taftlaw.com

Counsel for Relator

Julia Bates, Lucas County Prosecuting Attorney (0013426)
Lucas County Court House
John A. Borell (0016461)
Kevin A. Pituch (0040167)
Counsel of record
Evy M. Jarrett (0062485) Assistant Prosecuting Attorneys
700 Adams St., Suite 250
Toledo, OH 43604-1680
Phone: (419) 213-4700
Fax: (419) 213-2011
lcprosecutors@co.lucas.oh.us
jaborell@co.lucas.oh.us
kpituch@co.lucas.oh.us
dalyle@co.lucas.oh.us

Counsel for Respondents

David J. Carey (0088787)
Counsel of Record
Carlen Zhang-D'Souza (0093079)*
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Avenue, Suite 203
Columbus, Ohio 43206
(380) 215-1972
dcarey@acluohio.org
czhangdsouza@acluohio.org

Freda J. Levenson (0045916)
Amy Gilbert (0100887)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 541-1376 (Levenson)
(216) 770-6704 (Gilbert)
flevenson@acluohio.org
agilbert@acluohio.org

Dayton Campbell-Harris
Juan Ruiz Toro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St. New York, NY 10004
(212) 549-2500
dcampbell-harris@aclu.org
jruiztoro@aclu.org

Counsel for Amici Curiae

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This matter is before the Court on Respondent Lucas County Board of Elections Motion for Judgment on the Pleadings and the Motion to Dismiss filed by proposed Intervening Respondent, Candidate David J. Fournier.

Relator's Complaint seeks enforcement of the statutory conditions governing provisional ballots cast by county-to-county movers. R.C. 3503.16(C) directs those electors to their new county's board of elections office or an authorized designated location. But the Complaint alleges that, in Lucas County, ballots within the Category were instead cast at precinct polling places. Respondents' procedural defenses do not resolve that statutory question or establish a basis for dismissal on these pleadings. Relator objected to the disputed ballots on November 15, before the Board voted to count them. He filed this action and requested immediate preservation relief on November 16, the same day the Board indicated that it would count those ballots. The Court should deny the motions and promptly resolve the factual questions on what effective relief remains available.

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STATEMENT OF FACTS

Relator Edward L. Schimmel is a candidate for the Ohio House of Representatives in House District 44, which includes parts of Lucas, Wood, and Ottawa Counties. On election night, November 3, 2026, he led his opponent by 56 votes, and about 80 percent of the votes cast in the race at that point came from Lucas County. Compl. ¶ 10; Answer ¶¶ 5, 9. At the election, electors whom the statewide database shows as registered in another Ohio county, and who indicated on their affirmations that they had moved to Lucas County without submitting a change of address, cast provisional ballots at Lucas County precinct polling places rather than

at the Board of Elections office or a designated site (the "Category"). Compl. ¶ 20; Answer ¶ 9. The Board has the records that identify those ballots, including the affirmations, poll-book entries, and precinct-official logs. Compl. ¶ 20 & Ex. A at 3–4. The Secretary of State's guidance on voter registration, Directive 2026-31, tells a county-to-county mover to go to "the board office or other designated site in their new county on Election Day," while a within-county mover may use "their new polling location." Compl. ¶ 18 & Ex. B at 4-142 to 4-143.

On Sunday, November 15, 2026, Relator's counsel sent the Board, its Director and Deputy Director, and the Prosecuting Attorney a letter asking the Board, before opening any affected envelope, to identify provisional ballots within the Category by precinct, to segregate and preserve those ballots, to vote on the record to reject them under R.C. 3503.16(C) and 3505.183(B)(4)(a)(ii), and to give notice of the meeting at which it would be considered. Compl. ¶ 21 & Ex. A; Answer ¶ 9. On Monday, November 16, the Board met, voted to open and count provisional ballots in the Category, and approved approximately 2,400 provisional ballots. Compl. ¶ 22; Answer ¶¶ 9, 15. Relator filed this expedited action on November 16 and moved for immediate relief. Compl. ¶ 36 & Prayer; Mot. for Expedited Briefing and Immediate Relief. Respondents allege that their employees began opening and counting those ballots at about 1:00 p.m. that day and continued on November 17. Answer ¶ 15.

Respondent Board answered on November 18, admitting the allegations about the Category, the November 15 objection, and the November 16 vote, and moved for

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judgment on the pleadings. Answer ¶ 9; Board Mot. Proposed intervenor David Fournier, Relator's opponent, moved to intervene and to dismiss. Fournier Mot.

ARGUMENT

1. Legal Standard

A party seeking mandamus must prove by clear and convincing evidence: (1) a clear legal right to the requested relief, (2) a clear legal duty on the respondent to provide that relief, and (3) the absence of an adequate remedy in the ordinary course of law. *State ex rel. Jones v. Ohio State House of Representatives*, 168 Ohio St. 3d 634, 635, 2022-Ohio-1909, ¶ 5 (2022).

Under Civ.R. 12(C), judgment on the pleadings is appropriate only when, after construing the pleadings' material allegations and all reasonable inferences in favor of the nonmoving party, the court finds "beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996). The motion presents only questions of law, and the court's review is confined to the pleadings and qualifying written instruments incorporated into them under Civ.R. 10(C). *Id.* at 569–570; *State ex rel. McCarley v. Dept. of Rehab. & Corr.*, 2024-Ohio-2747, ¶ 11–13. Similarly, when considering a Civ.R. 12(B)(6) motion, the court must presume the truth of all factual allegations in the complaint, draw all reasonable inferences in the nonmoving party's favor, and dismiss only when it appears "beyond doubt from the complaint that the plaintiff can prove no facts entitling him to" relief. *Menorah Park Ctr. for Senior Living v. Rolston*, 2020-Ohio-6658, ¶ 18, 164 Ohio St.3d 400, 172 N.E.3d 1178.

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2. The Board's decision to count provisional ballots cast at precinct polling places by electors registered in another Ohio county contravened R.C. 3503.16(C) and R.C. 3505.183.

The Lucas County Board of Elections determined, at its meeting on Monday, November 16, 2026, to count provisional ballots that were cast at precinct polling places by electors registered in another Ohio County. Complaint, ¶¶20, 22; Answer, ¶ 9 (admitting Complaint ¶¶20, 22).

The first question is whether the Board's decision complied with the statutes that govern these ballots. It did not. The General Assembly prescribed where an elector who has moved from one Ohio county to another, and did not register in the new county, may vote in person in the election. And that is not in the precinct polling places.

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a. R.C. 3503.16(C) makes the place of voting a condition of a county-to-county mover's right to vote in the election.

R.C. 3503.16(C) governs "[a]ny registered elector who moves from one county to another county within the state on or prior to the day of a general, primary, or special election and has not registered to vote in the county to which that registered elector moved." Such an elector "may vote in that election if" the elector satisfies division (G), the absent-voter procedure for illness, disability, or infirmity, or

> does ***all*** of the following:
>
> (1) . . . appears on the day of the election ***at the office of the board of elections*** or, if pursuant to division (C) of section 3501.10 of the Revised Code the board has designated another location in the county at which

> registered electors may vote, at that other location instead of the office of the board of elections;[1]
>
> . . . .
>
> (3) Votes a provisional ballot under section 3505.181 of the Revised Code ***at the office of the board of elections*** …
>
> (4) Completes and signs, under penalty of election falsification, a statement attesting that that registered elector has moved from one county to another county within the state on or prior to the day of the election, ***has voted at the office of the board of elections*** ….

R.C. 3503.16(C) (emphases added).

The statute makes compliance the condition of the right: the elector "may vote in that election *if*" the specified acts are done. Division (C) does not authorize a county-to-county mover to vote at a precinct polling place.[2] The structure of R.C. 3503.16 confirms the omission is deliberate. Division (B)(2)(a)(i) addresses "[a]ny registered elector who moves from one precinct to another within a county" and expressly allows that elector to appear on Election Day at "[t]he polling place for the precinct in which that registered elector resides," as well as at the board office or a designated site. R.C. 3503.16(B). Division (C) contains no comparable authorization. *Id.* This Court has refused to add an exception to the provisional-ballot statutes that their text does not contain: "We are not authorized to add an exception that is not

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[1] R.C. 3501.10(C) allows a Board to designate one or more branch offices within a county, but provides that only one office within the county may be designated as a voting location: "The board of elections may maintain permanent or temporary branch offices at any place within the county, provided that, if the board of elections permits electors to vote at a branch office, electors shall not be permitted to vote at any other branch office or any other office of the board of elections." The "designated another location" has no application here.

[2] The Board says in their motion (and not in their Answer) that "Respondents do not allow election day voting at the Board Office," Board Mot. at 3–4. Division (C)(1) provides a board-office route on Election Day and during the 28 days before the election. If the Board declined to offer the Election Day route at its office, that did not turn the precinct into an authorized location.

contained in the express language of these statutory provisions." *State ex rel. Painter v. Brunner*, 2011-Ohio-35, ¶ 35; Compl. ¶ 28.

b. R.C. 3505.183 required the Board to reject the Category.

R.C. 3505.183 establishes the sequence the Board must follow when considering provisional ballots. The Board must keep provisional-ballot envelopes sealed in a secure location in its office "until the validity of those ballots is determined under division (B)." R.C. 3505.183(A). It may open and count a provisional ballot only if it determines that the individual is eligible to cast a ballot "in the precinct and for the election in which the individual cast the provisional ballot." R.C. 3505.183(B)(3). If the individual "is not eligible to cast a ballot in the precinct or for the election," "the provisional ballot envelope shall not be opened, and the ballot shall not be counted." R.C. 3505.183(B)(4)(a)(ii). The use of "shall" leaves the Board no discretion. Compl. ¶ 26.

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The disjunctive phrase "in the precinct or for the election" matters. Under R.C. 3503.16(C), a voter moving from another county—who has not updated his registration in any one of the many ways that the statute provides—is not eligible to cast a vote "for the election" in any location other than the board's office (or a designed authorized location). While a provisional-ballot affirmation operates as a notice of change of residence for future elections, R.C. 3503.16(C)(2); R.C. 3505.182, it does not cure the failure to meet the conditions for voting in the election at issue.

R.C. 3505.183 therefore required the Board to segregate the envelopes of those voters and leave them unopened and uncounted.

c. Respondents' contrary readings of the statute fail.

The Board's motion does develop a contrary statutory construction. Its motion declines to defend its reading on the merits, saying only that the statutes "easily" permit precinct voting and that the question is "outside the scope" of a Civ.R. 12(C) motion. Board Mot. at 4.

Fournier offers that "may" in division (C) is permissive, so the board-office route is merely an "additional" way to vote, and he notes that the General Assembly used "only" in division (A) when it wanted exclusivity. Fournier Mot. at 18–19. The argument reads the word "if" out of the statute. The word "may" grants the privilege, but it is specifically conditioned upon "if the elector … does all of the following." Division (B)(2) uses the same "may" and enumerates the polling place among the permitted locations. If "may" made every listed location optional, the polling-place enumeration in (B)(2)(a)(i) would be unnecessary, since a within-county mover could vote there regardless. And if the (C) acts were optional, the (C)(4) statement that the elector voted at the board office would be a statement no one was required to make. The General Assembly did not need to throw in "only" to make a conditional grant a limit.

Mr. Fournier goes on to argue that R.C. 3505.181 "makes no distinction" between within-county and cross-county movers, and that its general procedures, including that an official "at the polling place" notify the voter and take the affirmation, apply to every provisional voter. Fournier Mot. at 16–17 (citing R.C. 3505.181(A)(6), (B)(1)–(2), (B)(4)). Division (A)(6) entitles a mover to a provisional ballot only if the elector "completes and signs the required forms and statements

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under division (B) or (C) of section 3503.16." The statute thus refers to division (C) and its requirement, for a county-to-county mover, to attest that the elector "has voted at the office of the board of elections." R.C. 3503.16(C)(4). An elector who voted at a precinct polling place cannot make that statement.

The provisions operate together. R.C. 3503.16(C) supplies the location, and R.C. 3505.181 supplies the provisional-ballot procedure. Nothing in those procedures changes the location requirement. It simply is not true that the straightforward reading of R.C. 3503.16 and 3505.181 places the sections "at war" with one another. Fournier Mot. at 19. R.C. 3505.181(A)(6) incorporates R.C. 3503.16(C)(4), R.C. 3503.16(C)(3) invokes R.C. 3505.181, and R.C. 3505.183 supplies the consequence. It is Fournier's reading that would instead make R.C. 3503.16(C)(1)–(4) meaningless, because every elector who qualifies under R.C. 3505.181(A)(6) could ignore them.

Fournier also contends that the counting statute contains no location requirement. He points to R.C. 3505.183(B)(1), which lists the information the affirmation must contain, and to (B)(4)(a), which lists the grounds for rejection, and says neither mentions location. Fournier Mot. at 17–18. Division (B)(4)(a)(ii) is itself an enumerated ground, and it incorporates the substantive eligibility rules elsewhere in the Code. The counting statute need not repeat each of those rules.

Fournier also relies on the provision, as he describes it, that a ballot is not rejected because the voter's current address differs from the database address if the voter indicated a move without a change-of-address notice. R.C. 3505.183(B)(3)(f), (B)(4)(a)(xi); Fournier Mot. at 17. That provision addresses a discrepancy in the

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information on the affirmation. It does not say where the ballot may be cast, and it does not displace the separate requirement in (B)(3)(b) and (B)(4)(a)(ii) that the voter be eligible "for the election." *Painter*, on which Fournier also relies, counsels against reading in an exception. 2011-Ohio-35, ¶ 35. It does not counsel against enforcing an express ground.

Nor does R.C. 3505.183(D) rescue these ballots. Division (D) provides a remedy for certain ballots cast at the correct polling location in the wrong precinct. It does not apply to a voter who is not registered in the county. R.C. 3505.183(D)(3). An election official's acceptance of the ballot at the polling place cannot eliminate the location condition the General Assembly imposed on this class of electors. *Id.*

d. Relator's reading harmonizes the statutes, and policy objections are for the General Assembly.

Fournier adds that there is "no rational reason" to let within-county movers vote at the polling place while requiring cross-county movers to use the board office. Fournier Mot. at 20 n.6. The Court enforces the statute the General Assembly wrote, not the one a litigant would prefer. And his own argument supplies a rationale. He says cross-county movers "can anticipate that need" and may vote at the board office "at any time during regular business hours on or after the twenty-eighth day prior to the election." *Id.* at 19. The General Assembly could reasonably direct a voter registered in another county, whom the precinct's poll book does not list, to the one place where the new county's board can verify the registration and record the change before the ballot is cast.

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e. The Secretary's guidance does not authorize what the statute withholds.

Directive 2026-31 reflects the statutory distinction. It tells a within-county mover that he may go to "their new polling location, the board office, or another site designated by the board on Election Day." It tells a county-to-county mover to "[g]o to the board office or other designated site in their new county on Election Day, update their registration, and vote a provisional ballot." Compl. Ex. B at 4-142 to 4-143. The prior provisional-voting chapter likewise directed these electors to "the board of elections office or … another site designated for early in-person absentee voting." Compl. Ex. D at 242–43. Fournier concedes the point: he acknowledges that the prior chapter directed both within-county and cross-county movers to the board office and "did not mention" polling locations. Fournier Mot. at 6 n.3. A change in the Manual's wording is not a change in the statute, and Respondents identify no amendment to R.C. 3503.16(C) between the earlier Manual and the 2026 edition.

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Directive 2026-35 should be read consistently with the statutory distinction. To the extent its general language is read to authorize the Category, Relator contends that it conflicts with R.C. 3503.16(C). The Directive's lead-in sentence refers to voting "at the board office or early voting site during the established early voting period, or at their polling place on Election Day." The list that follows includes both within-county movers, for whom R.C. 3503.16(B)(2) authorizes the polling place, and county-to-county movers, for whom the cited authority is R.C. 3503.16(C). Compl. Ex. C at 8-301 to 8-302 & nn.15, 18. A sentence grouping voters whose statutory rights differ cannot give one group the right the statute withholds from it. The counting steps in

Chapter 8 address registration and residence. They do not purport to excuse the location condition in R.C. 3503.16(C), which R.C. 3505.183(B)(3)(b) and (B)(4)(a)(ii) make a condition of eligibility "for the election." Compl. ¶ 19B. The Secretary cites R.C. 3505.183(B)(4)(a)(ii) as a ground for rejecting ballots cast at the wrong location. *Id.* & Ex. C at 8-316 n.88.

Respondents argue that boards must follow the Secretary's directives under R.C. 3501.11(P). Fournier Mot. at 11; Board Mot. at 3–4. That provision directs boards to perform their duties under the directives. It does not make a directive prevail over a conflicting statute. "Because administrative agencies possess only such rule-making powers as are delegated to them by statute, an administrative rule which conflicts with a valid, existing statute is invalid." *Kelly v. Accountancy Bd.*, 88 Ohio App.3d 453, 458 (10th Dist. 1993) (citing *Athens Home Tel. Co. v. Peck*, 158 Ohio St. 557, 562 (1953)). A board that relies on a directive that contradicts the statute acts in clear disregard of applicable law. Compl. ¶ 33. This Court has granted relief where instructions to count provisional ballots conflicted with statutory requirements. *State ex rel. Skaggs v. Brunner*, 2008-Ohio-6333, ¶¶ 57–63.

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f. Relator has shown a clear legal right and a clear duty.

Mr. Fournier argues that, because Relator's reading requires the Court to "parse a series of pertinent statutes," the duty is unclear, and mandamus lies only where the duty is clear. Fournier Mot. at 20 (citing *State ex rel. Baughman Twp. v. Underwood*, 2024-Ohio-771, ¶ 23). A party's disagreement with the text does not make the text unclear. The statutes here speak directly to where a county-to-county mover may vote and what the Board must do with a ballot cast elsewhere. The

Secretary's own registration directive reaches the same result as the statute. In a mandamus action, the question is whether the board acted in clear disregard of applicable law. *State ex rel. Lambert v. Medina Cty. Bd. of Elections*, 2023-Ohio-3351, ¶ 12; Compl. ¶ 25. A decision to open and count ballots that R.C. 3505.183(B)(4)(a)(ii) directs the Board to leave unopened and uncounted meets that standard.

3. The Complaint's timeline does not establish laches.

Laches requires unreasonable delay, the absence of an excuse, actual or constructive knowledge of the injury or wrong, and material prejudice. *State ex rel. Ohio Democratic Party v. LaRose*, 2024-Ohio-4953, ¶ 22. Even in election cases, the party asserting laches must establish prejudice attributable to the delay. *State ex rel. Derrig v. LaRose*, 2026-Ohio-3989, ¶¶ 19–21.[3]

The admitted allegations of the Complaint demonstrate that Relator took prompt action. Relator's counsel sent the Board a written objection on November 15, asking for the Category to be identified and segregated before any affected envelope was opened, and the Board had not responded. Compl. ¶ 21 & Ex. A. The Board voted to count those ballots on November 16. Compl. ¶ 22. The Board admits all of that. Answer ¶ 9 (admitting Compl. ¶¶ 21–22). Relator filed this action that same day and

[3] "Laches is an equitable doctrine and it is fundamental that he who comes into equity must come with clean hands." *State ex rel. Mallory v. Public Emps. Ret. Bd.*, 82 Ohio St.3d 235, 244 (1998). Respondents ask the Court to find prejudice, and mootness, in the opening and counting of the Category. By their own account, they began counting at about 1:00 p.m. on November 16, Relator filed his Complaint and motion for immediate relief after their meeting concluded, and they "finished counting the provisional ballots on November 17." Answer ¶ 15(d)–(f). The Court need not find bad faith to conclude that a party that completed the very act the Relator challenged, after the challenge and the request to preserve the status quo were filed, is poorly placed to invoke equity against him. Any prejudice Respondents claim is of their own making. *See Derrig*, 2026-Ohio-3989, ¶¶ 19–20 (prejudice must be avoidable through prompt filing).

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simultaneously sought immediate relief preserving the envelopes. Compl. ¶ 36; Mot. for Expedited Briefing and Immediate Relief, at 1–3.

Both the Board and Mr. Fournier argue that Relator should have anticipated, weeks or months earlier, that the Board would violate the law on November 16. Thus, the Board points to its release of unofficial results on November 4, Board Mot. at 8, while Mr. Fournier goes all the way back to the publication of Directive 2026-35 in August 2026. Fournier Mot. at 10–11. But there was no ripe claim against the Board until it voted on November 16, and Relator filed this action the same day. Compl. ¶¶ 22, 36; Answer ¶ 9. *See State ex rel. Cook v. Bowling Green City Sch. Dist. Bd. of Educ.*, 160 Ohio St.3d 371, 2020-Ohio-3252, ¶ 19 (rejecting laches where the relator's claim "became ripe, at the earliest, on May 6, when the school board failed to take action by the special-election certification deadline," and the relator "filed his complaint two days later").

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Relator could not have known, at any time before the Board took its November 16 vote, that the Board would not follow the statutes. *Cook*, 2020-Ohio-3252, ¶ 18 (a board "can act only through a resolution adopted at a properly noticed public meeting," so the relator "could not have known with any certainty" earlier that the board would ultimately reject the petition). The "laches standard focuses on delay in the assertion of a right, not on whether a relator contributed to a delay in a cause of action becoming ripe." *Id.* (quoting *State ex rel. Dunn v. Plain Local School Dist. Bd. of Edn.*, 159 Ohio St.3d 139, 2020-Ohio-339, ¶ 8). The Board's Election Day

instructions and its posting of unofficial results were not the determination of validity that R.C. 3505.183 requires of it. That determination came on November 16.

Moreover, Mr. Fournier's reliance upon *State ex rel. Ohio Democratic Party v. LaRose*, 2024-Ohio-4953, ¶ 23, and his selection of the publication of Directive 2026-35 as the date Relator should have filed this action, ignore that *Ohio Democratic Party* was a challenge to a directive, not to a board's vote. How the Board would vote could not have been known before it voted. And the August publication he points to was part of the same Manual release as Directive 2026-31, which expressly directs county-to-county movers to "the board office or other designated site in their new county on Election Day." Compl. Ex. B at 4-143; Fournier Mot. at 6 & n.3; Amici Br. at 3 n.3. Official guidance in August did not tell Relator that the Board would count the Category—especially since the relevant statutory language has not changed. Relator could not anticipate that the Board would ignore the law and count the Category.

Nothing in the Complaint suggests that Relator previously knew the Board had instructed these voters to vote at precinct polling places. See Compl. ¶¶ 20–23, 36. Respondents' contrary assertion in their motion, Board Mot. at 3–4, cannot be treated as an undisputed fact. *See State ex rel. Leneghan v. Husted*, 154 Ohio St.3d 60, 2018-Ohio-3361, ¶ 13.

Nor can the Court presume that the Board (or Mr. Fournier) was prejudiced. *Derrig* requires the party asserting laches to establish its own material prejudice, and that prejudice must have been avoidable through prompt filing. 2026-Ohio-3989, ¶¶ 19–20. Relator requested segregation before the Board's vote and judicial

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preservation immediately after. Compl. ¶¶ 21–22, 36 & Ex. A; Mot. for Expedited Briefing and Immediate Relief at 1–3. Respondents' reliance on subsequent opening and counting does not, without resolving the disputed timeline, establish prejudice caused by unreasonable delay. *See* Board Mot. at 8–9. Nor does the mere pre-election publication of the Directive establish Fournier's claim that voters relied on it or his resulting prejudice. *See* Fournier Mot. at 11–12. If anything, voters would have been relying upon Directive 2026-31 which lays out the many ways that county-to-county movers can update their registration prior to election day and then expressly directs them to the board office or another designated site on election day.

4. Respondents' disputed account of opening and commingling does not establish mootness.

On both Civ.R. 12(C) and 12(B)(6) motions, the Court must read the Complaint's material allegations and reasonable inferences in Relator's favor. Judgment on the pleadings is appropriate only when no material factual issue remains and the movant is entitled to judgment as a matter of law. *Leneghan*, 2018-Ohio-3361, ¶ 13. Dismissal by motion is appropriate only when the allegations of the complaint show no set of facts upon which relief could be granted. An affidavit outside the pleadings is not a proper basis for granting that motion. *Id.* at ¶ 17.

The Complaint alleges that a final count was scheduled for November 24. Compl. ¶ 23. Respondents deny that allegation and assert that the provisional envelopes have already been opened and the ballots counted. Answer ¶¶ 10, 15. Their motion further asserts that the ballots have been commingled. Board Mot. at 4–5, 9. But Respondents' assertion does not conclusively establish the current status of every

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ballot within the Category or whether any affected ballots can be separately identified. Indeed, Fournier's motion states that, absent relief from this Court, the Board "will count the ballots in question on November 24." Mot to Dismiss at 8. These competing accounts underscore why this Court does not accept one party's version as an undisputed fact supporting judgment on the pleadings.

Completed opening and counting do not, on these pleadings, conclusively foreclose any effective relief. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12–13 (1992) (a case is not moot if "a court can fashion some form of meaningful relief"); *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (even a "partial remedy" may suffice). Relator did not seek only an order keeping envelopes closed. He asked the Court to compel the Board to perform four statutory duties: (1) identify, from its own records, the provisional ballots in the Category; (2) determine under R.C. 3505.183(B)(4)(a)(ii) that they are ineligible; (3) record each rejection and its reason under R.C. 3505.183(C); and (4) preserve the envelopes and related records under R.C. 3505.183(E). He also asked for notice of, and an opportunity to observe, the determination. Compl. ¶¶ 30, 34 & Prayer ¶¶ (C)–(D). Only the request to keep the envelopes unopened depended on timing. The others do not.

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Relator still seeks that relief. The Board holds the records that identify the Category: the affirmations, poll-book entries, and precinct-official logs. Compl. ¶ 20 & Ex. A at 3–4. R.C. 3505.183(C) and (E) impose recording and preservation duties, and the broader ballot-preservation framework requires boards to retain provisional-ballot envelopes. 2011 Ohio Op. Att'y Gen. No. 2011-012, at 2-103 to 2-105. A writ can

therefore still compel the Board to identify the Category, to make and record the determination the statute requires, and to preserve those records. If the Board's batch, precinct, or tabulation records show that the Category's votes can be separated, the Court can order correction of the canvass—not due until November 24, 2026[4]—under Prayer ¶ (F). Relator does not ask the Court to trace any voter's choices. He asks it to enforce the Board's duty to determine eligibility, record the result, and preserve the evidence, and then to correct the totals to the extent the Board's own records allow. Those requested remedies defeat Respondents' theory of mootness. *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 410 (2010) ("[I]f an actual controversy exists because it is possible for a court to grant the requested relief, the case is not moot, and a consideration of the merits is warranted."); *Maurent v. Spatny*, 181 Ohio St. 3d 189, 191, 2025-Ohio-5002, ¶11 ("[W]hen events occur that make it impossible for a court to grant 'any effectual relief whatever,' a case is moot.").

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Respondents say that the ballots were "commingled" and that Relator "concedes" no remedy remains. Board Mot. at 4–5, 9. These are motions to dismiss and motions for judgment on the pleadings, and the "commingling" is neither alleged in the Complaint or even in the Answer, which alleges only that the envelopes were opened and the ballots counted. Answer ¶¶ 3, 10, 15. The word appears in the Board's memorandum, supported by a general statement from *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 507 (2008), about how provisional ballots are mixed. It does not appear in any sworn statement about these ballots.

[4] R.C. 3505.32(A); *see* Fournier Mot. at 7.

Nor did Relator concede, as the Board argues, anything about a lack of remedy if commingling occurred. Paragraph 32 of the Complaint warns of "the irreversibility of commingling counted ballots." It does not say that commingling occurred, and it certainly does not say that, even if commingling occurred, no remedy remains. Compl. ¶ 32. On a Civ.R. 12(C) or 12(B)(6) motion, the Court must read the Complaint in Relator's favor and may not accept an unsworn assertion as an undisputed fact. *State ex rel. Leneghan v. Husted*, 154 Ohio St.3d 60, 2018-Ohio-3361, ¶¶ 13, 17.

The record shows that processing was not finished when Relator filed. Respondents allege that counting continued into November 17, the day after Relator filed the Complaint. Answer ¶ 15(f). Their own exhibit shows a November 18 special-meeting agenda to "re-make provisional ballots counted November 16–17, if necessary." Board Mot. at 5 & Ex. 1. Relator had asked the Board before its vote to identify the Category and to segregate and preserve it. He filed suit and sought immediate preservation relief the same day. Compl. ¶ 36; Mot. for Expedited Briefing and Immediate Relief at 1–3.[5] Respondents have not said when the Category was opened, whether it was processed separately, or whether any precinct, batch, or ballot-level record of it survives.

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5. The Complaint seeks enforcement of specific statutory duties, not just an injunction against counting votes.

Mr. Fournier argues and the Board suggests that mandamus is not the proper remedy here because the action "actually seeks to prevent, rather [than] compel,

[5] The Board's only opposition to the Motion for Expedited Briefing and Immediate Relief is its mootness argument. Mot. for J. on Pleadings at 9.

official action." *State ex rel. Florio v. Sandusky Cnty. Bd. of Elections*, 2026-Ohio-4090, ¶ 11; Board Mot. 2 ("Relator . . . actually has asserted a prohibition claim"); Fournier Mot. 8–10. But the Complaint expressly addresses that distinction and identifies the affirmative statutory duties that Relator seeks to enforce on the Board: to keep provisional-ballot envelopes separate and sealed until their validity is determined, R.C. 3505.183(A); to determine, for each ballot, whether the voter was eligible "in the precinct and for the election," R.C. 3505.183(B)(3)–(4); to count no provisional ballot in the county until those determinations are made for all of them, R.C. 3505.183(F); to record, for each ballot not counted, the voter's name, the envelope number, the officials who decided, the date and time, and the reason, R.C. 3505.183(C); and to preserve rejected ballots unopened in their envelopes. R.C. 3505.183(E). Compl. ¶¶ 5, 14–16, 30, 34. Relator also asked that the determinations be made in a properly noticed public meeting that he and his counsel could observe. Compl. ¶ 21 & Prayer ¶ (D); R.C. 3505.21.

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Each of these duties is an act the Board "shall" perform. None is an injunction against a duty the Board is required to carry out. In *Florio*, the requested order would have prevented counting votes for a candidate whose name remained on the ballot. The Court concluded that the real object was a declaration of the candidate's ineligibility and an injunction against counting votes, not performance of an official act the statute required. 2026-Ohio-4090, ¶¶ 12–13, 21. Here, by contrast, the statute requires an eligibility determination before a provisional ballot may be opened. Compl. ¶¶ 14–16, 26. Relator asks the Court to compel the Board to make that

determination in accordance with R.C. 3503.16(C), to record it, and to preserve the ballots and records that follow from it. Compl. ¶ 34 & Prayer ¶ (C).

Fournier answers that Relator challenges the *content* of the Board's determination, not any failure to act, and that mandamus will not issue to compel an act "in a particular way." Mot. to Dismiss at 9–10. The statute leaves no discretion. A ballot cast by a voter who was not eligible "in the precinct or for the election" "shall not be opened, and the ballot shall not be counted." R.C. 3505.183(B)(4)(a)(ii). In mandamus this Court reviews a board's determination for fraud or corruption, abuse of discretion, or clear disregard of applicable law. *State ex rel. Lambert v. Medina Cty. Bd. of Elections*, 2023-Ohio-3351, ¶ 12; Compl. ¶ 25. The question in this case is whether the Board acted in clear disregard of the statute when it approved the Category, not whether it exercised a particular judgment.

To be sure, keeping affected envelopes unopened has a prohibitory effect. But that effect is the statutory consequence of the affirmative determination Relator seeks and of the Board's existing duties under R.C. 3505.183(A) and (F). It is not a freestanding injunction against the Board's performance of its counting duties. Compl. ¶ 35 & Prayer ¶¶ (B)–(C). And the affirmative duties of determination, recording, and preservation remain capable of performance now. They are the relief Relator still seeks—pled in the complaint and still available even if ballots in the Category have been commingled.

6. Constitutional merits arguments do not warrant dismissal.

Mr. Fournier and amici League of Women Voters and Common Cause present constitutional arguments that certainly do not require dismissal on these pleadings.

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Both invoke official instructions, supposed voter reliance, and claimed longstanding statewide practice. Fournier Mot. at 13–16; Amici Br. at 3–7. But the Complaint identifies contemporaneous official guidance pointing county-to-county movers to their new county's board office or other designated site. Compl. ¶¶ 18–19A & Ex. B at 4-143. Given these conflicting pieces of evidence, the factual predicates for any asserted constitutional defenses cannot be established on the pleadings.

The county-by-county disparity argument likewise does not establish that Lucas County must count ballots contrary to R.C. 3503.16(C) merely because other counties are claimed to have done so. Mr. Fournier's position assumes that those counties are treating materially identical ballots differently and that they would continue to do so after this Court resolves the statutory question. *See* Fournier Mot. at 13–14. Neither assumption follows simply from the relief sought against this Board. While the Supreme Court has cautioned against selectively changing reasonable instructions for one county after an election, it has granted relief where instructions to count provisional ballots conflicted with statutory requirements. *State ex rel. Skaggs v. Brunner*, 2008-Ohio-6333, ¶¶ 57–63. The constitutional interest in uniform treatment warrants consideration, but claims about the practices of other counties do not resolve the statutory question or establish that dismissal is required on these pleadings.

Nor does due process make official guidance conclusive merely because voters may have relied on it. Taken that far, the argument would allow election officials to insulate an unlawful counting rule from reviewing by communicating it to voters

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before an election. Ohio law instead recognizes that official misdirection concerning election duties may be corrected through mandamus. *Skaggs*, 2008-Ohio-6333, ¶ 29.

Nor is there a categorical constitutional right to have every provisional ballot counted despite noncompliance with a statutory location requirement. The Sixth Circuit addressed the specific burden imposed by rejecting right-location, wrong-precinct ballots caused by poll-worker error; it did not invalidate voting-location requirements generally. *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 593–97 (6th Cir. 2012).

The Sixth Circuit has also distinguished voters who reach the correct polling ***location*** from those who vote at the wrong one. When a district court extended relief to wrong-location ballots, the Sixth Circuit stayed that injunction, finding Ohio "quite likely to demonstrate on appeal that plaintiffs failed to show a strong likelihood of success on the merits" of those claims. *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012). The court explained that, "[w]hile poll-worker error may contribute to the occurrence of wrong-place/wrong-precinct ballots, the burden on these voters certainly differs" from the burden on voters who are at the right location but in the wrong precinct. *Id.* When the appeal later became moot, the court declined to vacate that stay opinion. *Serv. Emps. Int'l Union Local 1 v. Husted*, 531 F. App'x 755, 756 (6th Cir. 2013). Amici's extension of *NEOCH*'s presumption of poll-worker error to wrong-location ballots therefore finds no support in the Sixth Circuit's own treatment of that category.

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Relator seeks application of an existing statutory condition, not adoption of a new post-election rule—and has identified contemporaneous official guidance reflecting that condition. Compl. ¶¶ 12–13, 18–19A, 27–28 & Ex. B at 4-143. Whether enforcing that condition here would impose an unjustified burden requires consideration of the particular requirement, the State's justification, and the circumstances of affected voters—not just a glib observation that rejection would prevent their votes from being counted. *See NEOCH*, 696 F.3d at 592–97.

CONCLUSION

Relator asks this Court to deny Respondents' motion for judgment on the pleadings and Fournier's proposed motion to dismiss, to grant Relator's Motion for Immediate Relief:

- To the extent any provisional-ballot envelope in the Category remains sealed and unopened, order the Board to keep it sealed, unopened, and uncounted until the Court decides this action. R.C. 3505.183(A), (E), (F).
- Order the Board immediately to preserve, and not alter, destroy, or discard, every record that identifies the Category or the processing of it. That includes the provisional-ballot affirmations and envelopes, poll-book entries, precinct-official logs, the Board's November 16 meeting records, and all batch, precinct, scanner, tabulation, and ballot-remake records for provisional ballots opened or counted on and after November 16, 2026.
- Order the Board to file, within two days, a sworn statement from a person with personal knowledge that states: (a) the number of provisional ballots in the Category, by precinct; (b) when and how each was opened and counted; (c) whether the Category was processed separately from other provisional ballots; (d) whether any precinct, batch, or ballot-level record of the Category's votes exists; and (e) whether any Category envelope remains sealed.
- Set an expedited schedule for evidence and merits briefing that permits a decision before the canvass becomes final. Compl. Prayer ¶ (A).

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Respectfully submitted,

/s/ william stuart dornette
W. Stuart Dornette (0002955)
Counsel of Record
Philip D. Williamson (0097174)
Dominic Bayer (0104319)
Taft Stettinius & Hollister LLP
301 E. Fourth Street, Suite 2800
Cincinnati, OH 45202
Phone: (513) 381-2838
Fax: (513) 381-0205
dornette@taftlaw.com
pwilliamson@taftlaw.com
dbayer@taftlaw.com

Counsel for Relator

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CERTIFICATE OF SERVICE

I certify that on November 19, 2026, I served a copy of the foregoing Relator's Memorandum Opposing Respondents' Motion for Judgment on the Pleadings and Proposed Intervenor's Motion to Dismiss by electronic mail on the following:

Kevin A. Pituch (0040167)
Counsel of Record
John A. Borell (0016461)
Evy M. Jarrett (0062485)
Assistant Lucas County Prosecuting Attorneys
700 Adams Street, Suite 250
Toledo, Ohio 43624
kpituch@co.lucas.oh.us
jaborell@co.lucas.oh.us
dalyle@co.lucas.oh.us

Counsel for Respondents

John Corey Colombo (0072398)
McTigue & Colombo LLC
545 East Town Street
Columbus, Ohio 43215
ccolombo@electionlawgroup.com

Counsel of Record for David J. Fournier

David J. Carey (0088787)
Counsel of Record
Carlen Zhang-D'Souza (0093079)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Avenue, Suite 203 Columbus, Ohio 43206
dcarey@acluohio.org
czhangdsouza@acluohio.org

Freda J. Levenson (0045916)
Amy Gilbert (0100887)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
flevenson@acluohio.org
agilbert@acluohio.org

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Dayton Campbell-Harris
Juan Ruiz Toro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
dcampbell-harris@aclu.org
jruiztoro@aclu.org

Counsel for Amici Curiae

/s/ william stuart dornette
W. Stuart Dornette

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