FILED
COURT OF APPEALS
JUL 21 2022
John C. Klaehn, Clerk of Courts
Ottawa County, Ohio

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY, OHIO

EDWARD M. URBANEK,	:	
	:	
Defendant-Appellant,	:	**Case No. 2022-OT-A 017A**
	:	
v.	:	**On appeal from the Ottawa County Court of Common Pleas,**
STATE OF OHIO,	:	**Case No. 21-CR-13**
	:	
Plaintiff-Appellee.	:	

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION

Tom Matuszak
Ottawa County Prosecutor's Office
315 Madison St.
Port Clinton, OH 43452
tmatuszak@co.ottawa.oh.us
prosecutor@co.ottawa.oh.us

Attorney for Plaintiff-Appellee State of Ohio

John F. McCaffrey (0039486)
Hannah M. Smith (0090870)
Melissa Z. Kelly (0077441)
TUCKER ELLIS LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
Main: (216) 592-5000
Fax: (216) 592-5009
john.mccaffrey@tuckerellis.com
hannah.smith@tuckerellis.com
melissa.kelly@tuckerellis.com

Attorneys for Defendant-Appellant Edward M. Urbanek

David J. Carey (0088787)
ACLU of Ohio Foundation
1108 City Park Avenue, Suite 203
Columbus, OH 43206
Phone: (614) 586-1972
Fax: (614) 586-1974
dcarey@acluohio.org

Freda J. Levenson (0045916)
ACLU of Ohio Foundation
4506 Chester Avenue
Cleveland, OH 44102
Phone: (614) 586-1972
Fax: (614) 586-1974
flevenson@acluohio.org

Samantha Osaki*
Sophia Lin Lakin*
Jonathan Topaz*
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
sosaki@aclu.org
slakin@aclu.org
jtopaz@aclu.org

Attorneys for Amici Curiae

**Pro hac vice forthcoming*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF INTEREST OF AMICI CURIAE AND REASONS WHY A BRIEF OF AMICI CURIAE IS DESIRABLE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan public interest organization dedicated to defending the civil liberties guaranteed by the Constitution and laws of the United States. The American Civil Liberties Union of Ohio Foundation ("ACLU of Ohio") is an affiliate of the national ACLU. The protection and expansion of voting rights and access, as well as the rights of the accused in criminal proceedings, are of great concern to both organizations, and both have been at the forefront of numerous state and federal cases addressing these rights and interests. *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Commission*, Nos. 2021-1193, 2021-1198, and 2021-1210, 2022 WL 110261, 2022-Ohio-65 (counsel in challenge to General Assembly districting plan); *Adams v. DeWine*, Nos. 2021-1428 and 2021-1449, 2022 WL 129092, 2022-Ohio-89 (counsel in challenge to congressional districting plan); *A. Philip Randolph Inst. Of Ohio v. LaRose*, 493 F. Supp. 3d 596 (N.D. Ohio 2020) (counsel in challenge to restrictions on use of drop boxes for voting); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719 (S.D. Ohio 2020) (counsel in challenge to certain signature-matching requirements for absentee ballots); *State v. Foreman*, 166 Ohio St.3d 204, 2021-Ohio-3409, 184 N.E.3d 70 (argued as amicus in support of challenge to conviction for narcotics "possession" based on presence of metabolites); *State v. Chapman*, 163 Ohio St.3d 290, 170 N.E.3d 6, 2020-Ohio-6730 (argued as amicus in support of challenge to community control restrictions on right to reproduce). These rights are directly threatened by the decisions of the Ottawa County Court of Common Pleas in this case.

This brief provides reasoning and analysis additional to that offered by Appellant Edward Urbanek. In particular, in construing R.C. § 3599.12(A)(2) as a strict liability offense, the trial court ignored the effect of the federal Help America Vote Act of 2002 ("HAVA"), Pub.L. 107–

252. As explained below, HAVA preempts and precludes the trial court's interpretation of § 3599.12(A). A strict liability offense in this context is incompatible with the structure and purpose of the federally-guaranteed right to provisional balloting—as well as Ohio's statutes designed to implement HAVA. The trial court's error broadly infected Mr. Urbanek's trial, in a manner that deprived him of his due process rights under the United States Constitution and the Ohio Constitution.

Per Ohio Rule of Appellate Procedure 17, attached as Exhibit 1 is the written consent of all parties to Amici's submission of this brief.

INTRODUCTION

HAVA was designed to address a specific problem for voters. Prospective voters could arrive at their polling places, believing in good faith that they were eligible to vote there, only to be turned away by poll workers who might possess imperfect information. In this scenario, an eligible voter, newly uncertain about their eligibility status, might decline to vote for fear of violating the law by doing so. To alleviate this particular brand of disenfranchisement, Congress constructed a safety net for voters: a system of provisional ballots, codified in HAVA and subsequently adopted into Ohio law. Prospective voters whose eligibility cannot be immediately verified may submit a provisional ballot, which is to be counted only if they turn out to be eligible to vote at that location. The purpose of this system is express and obvious: to enable and expand voting access in those particular situations where a prospective voter's eligibility is uncertain at the time when they submit a ballot, and to prevent a voter from having to decide between disenfranchisement and the risk of criminal prosecution.

This case threatens to turn that layer of protection on its head—and to reduce the submission of a provisional ballot in Ohio to the status of high-stakes gamble. Edward Urbanek

was convicted of illegal voting merely for submitting a provisional ballot in a precinct where he turned out to be ineligible. His conviction arises in large part from one glaring error of law: the trial court's ruling that illegal voting is a strict liability offense in Ohio, in spite of HAVA's express guarantee of provisional voting in situations just like this one. The upshot of that ruling is that anyone who submits a provisional ballot in Ohio under a good-faith belief that they are eligible—that is, anyone who employs the very system that Congress designed to protect their vote in that situation—*had better turn out to be right*. If they are not, they will have committed a felony, regardless of their intentions or any precautions they may have taken. Such an outcome cannot be reconciled with HAVA, which was enacted with the express purpose of improving voting access in the face of uncertain eligibility, nor with Ohio's provisional balloting statutes.

The trial court also failed to recognize until too late that the offense of *attempted* illegal voting would require a finding of purpose. Though it grappled with the issue throughout trial and ultimately issued a jury instruction to that effect, it had already excluded any evidence of Mr. Urbanek's motive or intentions. It thus deprived him of his due process right to defend himself against an essential element of the offense.

The trial court's rulings should be reversed, and Mr. Urbanek's conviction vacated.

STATEMENT OF THE CASE AND FACTS

Amici incorporate by reference Appellant Edward Urbanek's Statement of the Case. A few points warrant particular emphasis here.

First, the trial court ruled in pretrial proceedings that R.C. § 3599.12(A)(2), which provides that no person shall "vote or attempt to vote more than once at the same election by any means," is a strict liability offense. It excluded as irrelevant any evidence of Mr. Urbanek's motive and intent. *See* January 7, 2022 Order at 4, 6 (citing *State v. Arent*, 2012-Ohio-5263, 981 N.E.2d 307

(6th Dist.)). Such evidence might have included, for example, Mr. Urbanek's contemporaneous statements that he was uncertain about his proper polling place, *see* December 6, 2021 Hearing Transcript at 6:16–18 (summary by defense counsel), a Summit County poll worker's instructions to Mr. Urbanek to complete and submit a provisional ballot, *id.* at 6:21–22, Mr. Urbanek's understanding that the provisional ballot was not a vote and would not be counted as such, *id.* at 6:23–7:2, and evidence that Mr. Urbanek had voted in Summit County for many years, *id.* at 6:9–11.

Second, the issue arose during trial as to whether the state would be required to elect either a theory that Mr. Urbanek voted illegally, or that he merely attempted to do so, both of which are encompassed by R.C. § 3599.12(A)(2). The trial court did not require such an election, but did note in passing the obvious contradiction between strict liability, which has no *mens rea* requirement, and attempt, which necessarily does. The court appeared to try to resolve the contradiction on the fly, stating: "I don't care if [the state] makes the election, but if he elects to, to speak about that it is a strict liability case, he'll be held to vote, not attempt to vote." Trial Transcript ("Tr.") at 223:21-24.

Third, the trial court rejected the defense's request to define the terms "vote" and "provisional ballot" for the jury. January 7, 2022 Decision and Judgment Entry at 5. It also excluded any evidence that Mr. Urbanek's vote was not actually counted, *id.* at 7, and instructed the jury that it was irrelevant whether Mr. Urbanek's vote was actually counted. *Id.* at 6; Tr. at 510:11–13 ("The jury shall not consider for any purpose whether the defendant's ballots were actually counted or tallied"). The court gave no instruction on the nature of provisional ballots.

Finally, after the presentation of evidence, the trial court partially reversed course on its previous rulings. At the outset of its jury instructions on the elements of the offense, the court

informed the jury that motive and intent were irrelevant. Confusingly, it then instructed the jury that a finding of "attempt" would require a finding of purpose, *despite having excluded any evidence on that exact point.* For the offense of completed illegal voting, the court maintained a strict liability instruction. The result was a convoluted and contradictory series of instructions:

- "The State is not required to prove the Defendant acted with a particular motive or intent. You must not consider whether the Defendant acted with a particular motive or intent." Tr. 506:23–507:1.
- "Illegal voting is a strict liability offense. Therefore, it is not required to prove that the Defendant acted with any culpable mental state." Tr. 507:14–16; *see also* Tr. 508:6–9 ("If you are considering the question of whether or not the Defendant voted more than once, you needn't consider his intent. That is the strict liability offense.").
- "Purpose is an essential element of the crime of attempt to vote ... It must be established in this case that at the time in question, there was present in the mind of the Defendant a specific intention to attempt to vote." Tr. 508:19–25.

LAW AND ARGUMENT

The trial court erred in at least two respects: (1) by construing R.C. § 3599.12 as a strict liability offense in the context of provisional voting; and (2) by excluding any evidence of Mr. Urbanek's lack of motive or intent, while simultaneously instructing the jury that motive or intent was an element of the offense of attempted illegal voting.

This Court's review is *de novo*. *E.g.*, *State v. Belton*, 149 Ohio St.3d 165, 184, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 100 (legal rulings in suppression context are reviewed de novo); *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 22

("[t]he question of whether a jury instruction is legally correct and factually warranted is subject to de novo review").

I. HAVA Preempts the Trial Court's Reading of R.C. § 3599.12

A. HAVA Preempts State Laws That Conflict With It.

The Elections Clause of the United States Constitution empowers state legislatures to prescribe the "Times, Places and Manner" of congressional elections, but also allows Congress to "make or alter such Regulations." U.S. Const. Art. 1, § 4, cl. 1. Federal statutes governing the administration of congressional elections preempt any conflicting state or local laws. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 7–8 (2013). The Elections Clause's "substantive scope is broad," *id.* at 8 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)), and in the event of any conflict with federal legislation within that scope, the state law, "so far as the conflict extends, ceases to be operative." *Id.* at 9. Ohio courts are to construe statutes liberally in order to avoid such a conflict, employing "every reasonable presumption" to construe state statutes in a manner that would render them constitutional. *Wilson v. Kennedy*, 151 Ohio St. 485, 492, 86 N.E.2d 722 (1949) (internal citation omitted); *accord State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 10.

Conflict preemption may occur where "state law 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress' as reflected in the language, structure, and underlying goals of the federal statute at issue." *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 562–63 (6th Cir. 1998) (quoting *Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). Express congressional authorization to displace state law is unnecessary, and the "relative importance to the State of its own law" is immaterial; if there is a conflict, the federal law prevails. *de la Cuesta*, 458 U.S. at 153–54 (internal citations omitted).

B. The Trial Court's Interpretation of R.C. § 3599.12 In The Context Of Provisional Voting Conflicts With HAVA.

HAVA "was passed in order to alleviate 'a significant problem voters experience[, which] is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.'" *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (quoting H.R. Rep. 107–329 at 38 (2001)) (editing marks in original). Congress's solution to that problem, and the resulting disenfranchisement of eligible voters, was "a system of provisional balloting ... under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote." *Id.* HAVA creates a right to cast such a provisional ballot, *see id.* at 572, upon a person's declaration that they are (1) "a registered voter in the jurisdiction," and (2) "eligible to vote in an election for Federal office[.]" 52 U.S.C. § 21082(a).

The provisional ballot system is intended to account for human or clerical error; if such error may have occurred, it serves as "the ultimate safeguard to ensuring a person's right to vote." H.R. Rep. 107–329 at 37 (2001); *see also* Trial Transcript ("Tr.") at 467:19 (testimony of Summit County Board of Elections official that a provisional ballot "is a fail safe for voters"). If a prospective voter's eligibility cannot be ascertained immediately, then—rather than simply denying them a vote outright, on the questionable assumption that the poll worker possesses perfect information at that moment—a provisional ballot provides a means for the vote to be "[o]n further review ... counted or not, depending on whether the person was indeed entitled to vote at that time and place." *Sandusky Cty. Democratic Party*, 387 F.3d at 572 (quoting *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079–80 (N.D. Fla. 2004)).

HAVA expressly contemplates that Mr. Urbanek's *precise* situation will arise—that is, that some individuals will submit a provisional ballot under the good-faith belief that they are eligible

to vote at a particular polling place, but will turn out to be incorrect. HAVA accordingly spells out the government's response. First, a provisional ballot is only to be counted if the individual who submitted it was actually eligible to vote. Whether that is the case is expressly left to state law. *See* 52 U.S.C. § 21082(a)(4); *Sandusky Cty. Democratic Party*, 387 F.3d at 568 ("ballots cast in a precinct where the voter does not reside and which would be invalid under state law for that reason are not required by HAVA to be considered legal votes"); *Hood*, 342 F. Supp. 2d at 1077 (provisional ballots are "counted if and only if the person was later determined to have been entitled to vote"). Second, it requires state and local election officials to set up a toll-free hotline or website, through which they are to explain to the prospective voter "whether [their vote] was counted, and, if the vote was not counted, the reason that the vote was not counted." 52 U.S.C. § 21082(a)(5)(B). Third, the existence of the hotline or website must be conveyed to the prospective voter when they cast their provisional ballot. 52 U.S.C. § 21082(a)(5)(A).

Evidence excluded from his trial purportedly would have shown that Mr. Urbanek submitted a provisional ballot in good faith, under instruction from a Summit County poll worker. December 6, 2021 Hearing Transcript at 6:8–7:9 (defense counsel summary). Once it was confirmed that he was ineligible to vote in Summit County, the proper remedy was not to count the vote. HAVA provides nothing more. To be sure, HAVA is not a criminal statute and does not specify how a state may regulate or punish unlawful voting—at least, not as a general matter. The state still may not enact or apply criminal punishments in a manner that defeats Congress's purposes as reflected in the "language, structure, and underlying goals" of the federal statute. *Bibbo*, 151 F.3d at 562–63.

Yet the trial court did just that, by construing R.C. § 3599.12(A)(2) as a strict liability offense in the context of provisional voting. *See* January 7, 2022 Order at 3 (citing *State v. Arent*,

2012-Ohio-5263, 981 N.E.2d 307, ¶ 11–15 (6th Dist.)). Under that reading, any individual who submits a provisional ballot that is ultimately rejected, regardless of good-faith intent or reasonable mistake, will be at risk of prosecution under subsection (A)(1).[1] Further, if that individual subsequently discovers an error and votes in a precinct where they are eligible, as Mr. Urbanek did, they will be at risk of prosecution for double voting under R.C. § 3599.12(A)(2). Provisional ballots in such a statutory regime would become a gamble, where prospective voters—acting in good faith but with imperfect information—must decide whether to place their liberty at stake in order to exercise their right to vote.

That interpretation of § 3599.12 conflicts with HAVA's structure and function directly in several respects, and so is preempted by it. First, HAVA places the burden for determining voter eligibility on the *state*, but the trial court's construction of § 3599.12 places it on the *voter*. Provisional ballots, by their nature, are submitted only when the prospective voter's eligibility is uncertain. By submitting one, the prospective voter is exercising a federally guaranteed right to have the *state* ascertain the individual's voting eligibility, and to report back its findings and the disposition of the ballot. *See* 52 U.S.C. § 21082(a)(5). The trial court's construction of R.C. § 3599.12 turns that right on its head; it shifts the burden back to *voters* to determine their own eligibility status, and threatens them with felony charges if the state determines them to be ineligible. That is the opposite of Congress's intent, as expressed in HAVA's basic framework. *See Bibbo*, 151 F.3d at 562–63 (Congress's intent for preemption purposes is discerned by "language, structure, and underlying goals").

[1] Mr. Urbanek was charged under R.C. § 3599.12(A)(2), but nothing in the trial court's reasoning would distinguish that subsection from illegal voting under R.C. § 3599.12(A)(1).

Second, HAVA ensures voters a right to cast provisional ballots so long as they have a *good-faith belief* in their eligibility, but the trial court's interpretation of § 3599.12 raises the bar. Under the latter view, the voter must be *actually correct*. HAVA requires only that a voter "declare" themselves to be eligible. *See* 52 U.S.C. § 21082(a). Even presuming that such a declaration bears the penalty of perjury, "perjury must be shown to be willful, and it must be shown that the testifier did not believe his responses to be true." *United States v. DeZarn*, 157 F.3d 1042, 1049 (6th Cir. 1998); *cf.* R.C. § 2921.11(A) (defining perjury offense as carrying a "knowingly" standard). At most, HAVA thus requires only verification to the best of prospective voters' knowledge. Once they provide that, they have a "right" to cast a provisional ballot, one that is not subject to the further condition of their declaration proving to be actually correct. *See, e.g.*, *Sandusky Cty. Democratic Party*, 387 F.3d at 572; 52 U.S.C. § 21082(a) ("If an individual declares ... such individual shall be permitted to cast a provisional ballot as follows").

To be sure, HAVA does leave to state law the question of whether a prospective voter is actually eligible, and thus whether their provisional ballot will be counted. That is distinct, though, from identifying the conditions and requirements merely to lawfully submit a provisional ballot in the first place. HAVA specifies those conditions, *see* § 21082(a), and states may not obstruct Congress's intent by adding their own conditions on the right to submit a provisional ballot, and then criminally punishing failure to meet them. The trial court's construction does just that, by adding a requirement of actual correctness.

Finally and more broadly, the purpose of HAVA's provisional balloting is to facilitate and expand legitimate voting access where a person's eligibility cannot be verified instantly, *see Sandusky Cty. Democratic Party*, 387 F.3d at 569 (purpose is to "alleviate" the problem of uncertain eligibility). Yet were the trial court's construction of § 3599.12 to hold, that statute would

inflict an enormous chilling effect on provisional voting. Under the trial court's reading, if a prospective voter's eligibility is in question, they would be forced to anticipate the possibility that—even if they have a firm basis for believing themselves eligible, or a poll worker advises them to submit a provisional ballot—their safest choice would be *not to submit a ballot at all* rather than roll the dice. For prospective voters in that position, the existence of the provisional ballot serves as little more than a potential trap. In fact, in cases like Mr. Urbanek's, where the prospective voter does prove to be unknowingly ineligible, they would have been better positioned if the provisional balloting system did not exist at all. That would be a perverse twist for a system that is designed to "alleviate" voting impediments in that exact circumstance.

In the 2020 election, 154,675 Ohioans submitted provisional ballots. Megan A. Gall & Kevin R. Stout, *Too Many Ballots of Last Resort – Disparities in Provisional Ballot Use in Ohio's 2020 Election* at 2, 5, 6 (April 2021), available at https://allvotingislocal.org/wp-content/uploads/2021/04/042921_OH-Provisional-Ballot-Report.pdf (accessed July 14, 2022). More than 15% of those ballots—24,369 of them—ultimately were not counted. *Id.* at 3, 6. Under the trial court's strict liability reading of § 3599.12, those 24,369 prospective voters may have each committed a felony, regardless of their intentions, knowledge, or any honest basis for declaring themselves eligible. For those individuals, the right to a provisional ballot would be reduced to a theoretical concept; by attempting to actually exercise it, they would have subjected themselves to prosecution.

That result cannot be reconciled with HAVA's purpose. *See Bibbo*, 151 F.3d at 562–63 (Congress's intent derived from the "underlying goals" of the federal statute in preemption analysis). Ohio courts are instructed to construe statutes in order to preserve them. *See supra* Section I-A. Interpreting R.C. § 3599.12(A) to create a strict liability offense in the context of

provisional balloting does the opposite, setting a state law on a collision course with the language, structure, and express purposes of HAVA. The trial court's decision should be reversed.

II. The Trial Court's Interpretation of R.C. § 3599.12(A) Violates the Rule of Lenity

Even beyond its conflict with HAVA itself, which warrants reversal on its own, the trial court's application of § 3599.12(A) creates a conflict with Ohio's existing statutory provisional voting procedures, which were adopted to implement HAVA. *See* R.C. § 3505.181 *et seq.* Those procedures instruct poll workers to invite a prospective voter to submit a provisional ballot even if that individual declares, or is informed by the poll worker upon review, that they are not eligible to vote at that location:

> If an individual declares that the individual is eligible to vote in a precinct other than the precinct in which the individual desires to vote, or if, upon review ... an election official at the precinct at which the individual desires to vote determines that the individual is not eligible to vote in that precinct, the election official shall direct the individual to the precinct and polling place in which the individual appears to be eligible to vote, ***explain that the individual may cast a provisional ballot at the current location but the ballot or a portion of the ballot will not be counted if it is cast in the wrong precinct***, and provide the telephone number of the board of elections in case the individual has additional questions.

R.C. § 3505.181(C)(1) (emphasis added).

The rule of lenity provides that ambiguities or conflicts involving criminal statutes are to be "strictly construed against the state, and liberally construed in favor of the accused." R.C. § 2901.04(A); *e.g.*, *State v. Arnold*, 61 Ohio St.3d 175, 178, 573 N.E.2d 1079 (1991); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). There is an obvious conflict between the plain language of R.C. § 3505.181 and the trial court's interpretation of R.C. § 3599.12(A) as it pertains to criminal liability and provisional voting. Simply put, if the trial court's interpretation holds, then

§ 3505.181(C)(1) instructs poll workers that they "shall ... explain" to prospective voters that they "may" commit a likely felony.

Far more likely, of course, is that the Ohio General Assembly did not intend the state's poll workers to instruct unsuspecting voters that they "may" take illegal action. *Cf. Arnold* at 178 (declining to apply the rule where statutory language indicated the legislature "intended both [statutes] to apply"); *see also generally State v. White*, 142 Ohio St.3d 277, 285, 2015-Ohio-492, 29 N.E.3d 939, ¶ 29 ("[S]tatutes will be construed to avoid unreasonable or absurd consequences.") (internal quotation marks omitted). Under the rule of lenity, this Court must construe § 3599.12(A) in Mr. Urbanek's favor, to provide that submitting a provisional ballot that turns out to be invalid, absent sufficient *mens rea* on the voter's part, is not punishable under that statute.

III. *State v. Arent* Is Inapplicable, Or In The Alternative, Should be Overruled

In finding R.C. § 3599.12(A) to create a strict liability offense in this case, the trial court relied on this Court's decision in *State v. Arent*, 2012-Ohio-5263, 981 N.E.2d 307, ¶ 11–15 (6th Dist.). In *Arent*, this Court reasoned that the absence of a specified culpable mental state in the statutory language, combined with the presence of a "knowingly" mens rea element in the false registration statute, R.C. § 3599.11(A), "[c]learly ... is a plain indication the General Assembly wanted to make a distinction between the two offenses and intended for R.C. 3599.12(A)(2) to be a strict liability offense." *Arent* at ¶ 11.

Arent is inapposite here, for the plain reason that it makes no mention of provisional voting. Nor has any other Ohio case expressly applied a strict liability construction of § 3599.12(A) to provisional voting, or examined the question of HAVA preemption. Two of the Ohio Court of Appeals cases cited in *Arent* predate HAVA entirely. *State v. Workman*, 126 Ohio App.3d 422, 425–26, 710 N.E.2d 744 (5th Dist. 1998) (holding that "[n]o person shall" language, in the absence

of specified *mens rea*, supported a strict liability construction on its own); *but see Arent* at ¶ 12 (questioning *Workman*'s reasoning); *State v. Hull*, 133 Ohio App. 3d 401, 407–08 (12th Dist. 1999). The third, like *Arent* itself, makes no mention of provisional voting, HAVA, or the preemption issues raised in this case. *See State v. Worrell*, 9th Dist. Summit Nos. 23378 & 23409, 2007-Ohio-7058, ¶¶ 13–14. Similarly, later cases in the same line make no mention of HAVA or provisional voting. *See State v. Schulman*, 10th Dist. Franklin No. 19-AP-566, 2020-Ohio-4146; *State v. Schmuhl*, 6th Dist. Lucas No. L-06-1061, 2007-Ohio-744; *City of Perrysburg v. Bush*, 6th Dist. Wood No. WD-98-072, 1999 WL 173558, at *4–5.

The trial court, in other words, did not merely apply *Arent* faithfully, but extended its holding to the novel context of provisional voting. Nothing in *Arent* compelled that decision, and indeed, that extension created a conflict with HAVA and Ohio's implementing statutes. This Court should not replicate that error.

The Sixth Circuit, meanwhile—in a case that analyzed HAVA at length—described § 3599.12(A)(1) in passing as making it a crime to vote in the wrong precinct under a "knowingly" standard, suggesting that a strict liability reading would be inappropriate in the context of provisional ballots. *Sandusky Cty. Democratic Party*, 387 F.3d at 576, 578.

Should this Court find that *Arent* is indistinguishable from this case—which it need not do—then it should overrule *Arent*, at least to the extent of its application to provisional balloting. "[A]n appellate court 'not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors.'" *State v. Burton*, 10th Dist. Franklin No. 06AP-690, 2007-Ohio-1941, ¶ 22 (quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 43). This Court has not shied away from doing so in the past. *E.g.*, *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus.*, 6th Dist. Wood No.

WD-05-091, 2006-Ohio-475, ¶ 23; *In re Estate of Sneed*, 166 Ohio App.3d 595, 2006-Ohio-1868, 852 N.E.2d 234, ¶ 18 (6th Dist.); *Cincinnati Ins. Co. v. Jarvis*, 98 Ohio App. 3d 155, 160, 648 N.E.2d 30 (6th Dist. 1994).

The Supreme Court of Ohio in *Galatis* established a three-part test for overturning its own rulings. It will do so when (1) the prior case was wrongly decided at the time *or* changes in circumstances no longer justify adherence to it, (2) the prior decision "defies practical workability," and (3) overturning the prior case would not create undue hardship for any who have relied on it. *Galatis* at ¶ 48. This Court has never required such a showing, however, and *Galatis* itself does not bind appellate courts to follow its three-part inquiry. *See Int'l Bhd. of Elec. Workers* at ¶ 23 (this Court's post-*Galatis* reversal of a prior ruling without applying the three-part test); *Sneed* at ¶ 18 (same); *cf. State ex rel. E. Ohio Gas Co. v. Bd. Of Cty. Comm. of Stark Cty.*, 2012-Ohio-4533, 980 N.E.2d 1056, ¶ 20 (5th Dist.) (noting that *Galatis* pertained to Supreme Court decisions, and opining that appellate courts "may" follow it).

Even if this Court did adopt the *Galatis* test, however, overruling *Arent* would satisfy all three factors. First, *Arent* was wrongly decided to the extent it applies to provisional voting, for the reasons noted in Sections I and II. Second, it has proven unworkable, because its construction of § 3599.12(A) renders the statute incompatible with both federal and state law. Third, there is no reason to think overruling *Arent* would prejudice any who would rely on it; the state's inability to punish future voters for good-faith errors in the course of attempting to exercise a fundamental right cannot constitute "undue hardship."

IV. The Trial Court's Exclusion of Intent Evidence Violated the Due Course of Law and Due Process Provisions of the Ohio and United States Constitutions

The trial court further erred by excluding any evidence that Mr. Urbanek might offer on his intent, despite simultaneously instructing the jury that purpose was an element of the charged

offense. In conjunction with each other, those decisions stripped Mr. Urbanek of a meaningful opportunity to present a complete defense, violating his due process and due course of law rights under the United States Constitution and the Ohio Constitution.

A criminal defendant's right to due process requires "a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (quoting *Sandstrom v. Montana*, 442 U.S. 510, 520-521 (1979)); *State v. Swann*, 119 Ohio St.3d 552, 555, 2008-Ohio-4837, 895 N.E.2d 821, ¶ 12 (quoting *Chambers*). Defendants are deprived "a meaningful opportunity to present a complete defense" when "the State [is] permitted to exclude competent, reliable evidence" that "is central to the defendant's claim of innocence." *Crane v. Kentucky, 476* U.S. 683, 690 (1986) (citations omitted). Due process also requires that "the state must prove, and the jury must agree on, each element of the charged offense" beyond a reasonable doubt. *State v. Gardner*, 118 Ohio St.3d 420, 427, 889 N.E. 2d 995, 2008-Ohio-2787, ¶ 40. Ohio courts may go beyond federal requirements to "recognize enhanced due-process protections contained within Article 1, Section 16 of the Ohio Constitution." *State v. Anderson*, 148 Ohio St. 3d 74, 83, 2016-Ohio-5791, 68 N.E.3d 790, ¶ 48 (Lanzinger, J., concurring); *see generally Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993) ("the Ohio Constitution is a document of independent force" under which "state courts are unrestricted in according greater civil liberties and protections" than the United States Constitution provides).

At least two flaws in the proceedings below violated Mr. Urbanek's due process rights, infecting both the "vote" and "attempt to vote" facets of R.C. § 3599.12(A)(2). First, as to the attempt aspect, the trial court improperly excluded evidence of Mr. Urbanek's motives and intent. January 7, 2022 Order at 4, 6. As the trial court correctly but belatedly conceded, purpose is an essential element of attempted illegal voting under § 3599.12(A). Tr. 495:19-24 (modifying jury

instructions to acknowledge that if Mr. Urbanek is to be charged with a second "attempt to vote, then his state of mind is an issue"); Tr. 508:19–25 (instructing the jury that purpose is an essential element of the offense of attempting to vote illegally); *see also* R.C. § 2923.02(A); *State v. Nolan*, 141 Ohio St. 3d 454, 455, 2014-Ohio-4800, 25 N.E.3d 1016, ¶ 7 ("a person cannot commit an attempt offense unless he or she has acted purposely or knowingly"). It would be difficult to imagine a more glaring example of a due process violation than finding that intent is an "element of the charged offense," *Gardner*, 118 Ohio St.3d at 427, while also precluding the jury from hearing Mr. Urbanek's evidence on that element. Mr. Urbanek was denied a "fair opportunity to defend against the State's accusations," *Chambers*, 410 U.S. at 294, by presenting any evidence of his uncertainty about where he was registered to vote, the poll worker's instructions to submit a provisional ballot, or any other evidence relating to his intent.

Second, in order to convict Mr. Urbanek of the completed offense of illegal voting, the State was required to prove a mental element. *See supra* Sections I–II. The trial court, however, instructed the jury that "[t]he State is not required to prove the Defendant acted with a particular motive or intent" and that "[i]f you are considering the question of whether or not the Defendant voted more than once, you needn't consider his intent." Tr. 506:23–507:1; 508:6–16. Those instructions excused the jury from finding any degree of culpability. When combined with the court's exclusion of any evidence on motive or intent, the state was effectively relieved of its burden to prove each element of the offense, in violation of due process. *See Gardner* at ¶ 40.

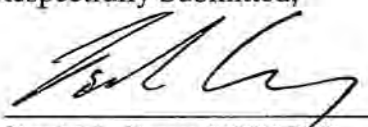
Where, as here, an inconsistent or deficient jury instruction "so infect[s] the entire trial that the resulting conviction violates due process," the conviction must not stand. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (internal citation and quotation marks omitted); *see also, e.g., State v. Carswell*, 6th Dist. Sandusky No. S-20-001, 2012-Ohio-3379, ¶ 83 (applying the same standard).

Mr. Urbanek's conviction must be overturned. *United States v. Palazzolo*, 71 F.3d 1233, 1238 (6th Cir. 1995) ("Because [the charge at issue] was submitted under an instruction that permitted the jury to convict without requiring the government to prove all the elements of the offense, it would be a violation of the defendants' due process rights to permit such a verdict to stand.").

CONCLUSION

For the foregoing reasons, Amici respectfully submit that this Court should vacate Edward Urbanek's conviction under R.C. § 3599.12(A), and should remand with instructions that § 3599.12(A) cannot be construed as a strict liability offense, at minimum in the context of submission of a provisional ballot that is ultimately rejected.

Respectfully Submitted,



David J. Carey (0088787)
ACLU of Ohio Foundation
1108 City Park Avenue, Suite 203
Columbus, OH 43206
Phone: (614) 586-1972
Fax: (614) 586-1974
dcarey@acluohio.org

Freda J. Levenson (0045916)
ACLU of Ohio Foundation
4506 Chester Avenue
Cleveland, OH 44102
Phone: (614) 586-1972
Fax: (614) 586-1974
flevenson@acluohio.org

Samantha Osaki*
Sophia Lin Lakin*
Jonathan Topaz*
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
sosaki@aclu.org
slakin@aclu.org
jtopaz@aclu.org

**Pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email on July 20, 2022 upon the following:

Tom Matuszak
Ottawa County Prosecutor's Office
315 Madison St.
Port Clinton, OH 43452
tmatuszak@co.ottawa.oh.us
prosecutor@co.ottawa.oh.us

Attorney for Plaintiff-Appellee State of Ohio

John F. McCaffrey (0039486)
Hannah M. Smith (0090870)
Melissa Z. Kelly (0077441)
TUCKER ELLIS LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
Main: (216) 592-5000
Fax: (216) 592-5009
john.mccaffrey@tuckerellis.com
hannah.smith@tuckerellis.com
melissa.kelly@tuckerellis.com

Attorneys for Defendant-Appellant Edward M. Urbanek

David J. Carey (0088787)

Exhibit 1

From: Smith, Hannah M.
To: David Carey
Subject: RE: Amicus Brief in Urbanek v. State (6th Dist.)
Date: Thursday, July 14, 2022 2:54:15 PM
Attachments: image001.png

Afternoon,

On behalf of Mr. Urbanek, I provide my written consent for the ACLU of Ohio and the national ACLU to submit an amicus brief in support of Mr. Urbanek in this pending appeal.

Thank you,

Hannah M. Smith |Attorney | Tucker Ellis LLP
950 Main Avenue, Suite 1100 | Cleveland, OH 44113
Direct: 216-696-2566 | Fax: 216-592-5009
Hannah.Smith@tuckerellis.com
tuckerellis.com

This e-mail is sent by the law firm of Tucker Ellis LLP and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and notify us immediately by return email.

From: David Carey <dcarey@acluohio.org>
Sent: Thursday, July 14, 2022 2:52 PM
To: Smith, Hannah M. <Hannah.Smith@tuckerellis.com>
Subject: Amicus Brief in Urbanek v. State (6th Dist.)

<<< EXTERNAL EMAIL >>>

Ms. Smith,

The ACLU of Ohio, and the national ACLU, anticipate submitting an amicus brief in support of Mr. Urbanek in this pending appeal. Per Ohio Rule of Appellate Procedure 17, I'm writing to request your consent to our filing such a brief.

Could you please respond with your written consent?

Regards,
David Carey

David J. Carey | Deputy Legal Director
ACLU of Ohio
1108 City Park Avenue, Suite 203
Columbus, OH 43206
(614) 586-1972 x2004
dcarey@acluohio.org

Pronouns: he, him

ACLU

Ohio

Become a card-carrying member of the ACLU today!

From: Thomas Matuszak
To: David Carey; James VanEerten
Subject: Re: Amicus Brief in Urbanek v. State (6th Dist.)
Date: Wednesday, June 1, 2022 8:03:55 AM
Attachments: image001.png

David,

The State has no objection to the Ohio ACLU or the national ACLU filing amicus briefs in this matter.

Regards,
Tom

On Thu, May 26, 2022 at 9:23 AM David Carey <dcarey@acluohio.org> wrote:

> Mr. Matuszak,
>
> The ACLU of Ohio, and the national ACLU, anticipate submitting an amicus brief in support of Mr. Urbanek in this pending appeal. Per Ohio Rule of Appellate Procedure 17, I'm writing to request your consent to our filing such a brief, in order to avoid the necessity of a motion.
>
> Could you please let me know whether your office will consent? I presume that you'll be representing the state in this appeal, but if not, I'd appreciate it if you could direct me to the correct person.
>
> Regards,
>
> David Carey
>
> **David J. Carey** | Deputy Legal Director
>
> **ACLU of Ohio**
>
> 1108 City Park Avenue, Suite 203
>
> Columbus, OH 43206
>
> (614) 586-1972 x2004
>
> dcarey@acluohio.org
>
> *Pronouns: he, him*

ACLU
Ohio

Become a card-carrying member of the ACLU today!