

November 16, 2018

The Honorable Jon Husted
Secretary of State
180 East Broad Street, 16th Floor
Columbus, Ohio 43215

SYLLABUS:

2018-030

1. The Ohio Revised Code does not require a county to acquire a certain number of hybrid voting machines when a hybrid voting system is the primary voting system in the county.
2. A county board of elections may reasonably exercise discretion to determine the quantity of paper ballots to furnish to each precinct when a hybrid voting system is the primary voting system in the county and paper ballots are provided only as necessary to accommodate provisional voters.
3. A county board of elections may reasonably exercise discretion to determine the quantity of ballot stock to furnish to each precinct when a hybrid voting system is the primary voting system in the county.
4. The Ohio Revised Code permits a county to implement a combination of a hybrid voting system and a precinct count optical scan (PCOS) voting system to enable a voter to decide whether to cast his vote under the hybrid voting system or the PCOS voting system. A county that implements a combination of a hybrid voting system and a PCOS voting system shall furnish each precinct the percentage of paper ballots that is required by R.C. 3505.11(A) or (B), as appropriate, and may reasonably exercise discretion to determine the quantity of hybrid voting machines and ballot stock to furnish to each precinct.



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OPINION NO. 2018-030

The Honorable Jon Husted
Secretary of State
180 East Broad Street, 16th Floor
Columbus, Ohio 43215

Dear Secretary of State Husted:

You have requested an opinion about the authority of a county board of elections to adopt a voting system that includes the use of hybrid voting machines. You have explained that a hybrid voting machine functions like a combination of a direct recording electronic voting system (DRE) and a precinct count optical scan voting system (PCOS). As described in your letter, when DRE voting machines are used, the ballot is displayed on a touchscreen for a voter to select prompts to cast his votes. Each DRE voting machine includes a voter verified paper audit trail (VVPAT), which allows a voter to view the voter's selections before the ballot is cast and records the selections on a paper tape. When a PCOS voting system is used, voters are provided a paper ballot, which can be marked in pen to reflect the voter's selections. The voter's ballot is cast by feeding it through an optical scanner. A hybrid voting machine operates initially like a DRE in that a ballot is presented to a voter on a touchscreen. A hybrid voting machine then resembles a PCOS voting system in that the voter's selections are recorded on a card and the ballot is cast by inserting the card into an optical scanner located at the precinct for the vote to be tabulated.

You have asked us to consider the following questions:

1. Does Ohio law¹ require a county to acquire a certain number of hybrid voting machines if the county opts to implement a hybrid voting system?
2. What is the percentage of paper ballots or ballot stock that a county must furnish to a precinct if the county is utilizing a hybrid voting system?
3. Does Ohio law permit a county to implement a combination of two different voting systems (*e.g.*, a voting system that includes hybrid voting machines and precinct count optical scan voting machines) and allow a voter to decide which

¹ In answering your questions, we have understood your use of the term "Ohio law" to mean the Ohio Revised Code.

voting machine to use? If so, are there constitutional concerns that a county should consider?

Question 1: Number of Hybrid Voting Machines

Your first question asks whether Ohio law requires a county to provide a certain number of hybrid voting machines. If a county has adopted the use of DRE voting machines as the primary voting system to be used in the county, the county is required to provide the minimum number of DRE voting machines that the Secretary of State has established pursuant to R.C. 3506.22(B).² R.C. 3506.22(B) sets forth the following formula for the Secretary of State to use to determine the minimum number of DRE voting machines in a county:

(1) The total number of registered voters in the county as of the October deadline for voter registration for the last presidential election or the average of the total number of registered voters in the county as of the October deadline for voter registration for the last two presidential elections, whichever number is higher, minus the total number of absent voter's ballots cast and counted at the last presidential election, shall be determined.

(2) The number resulting from the determination under division (B)(1) of this section shall be divided by one hundred seventy-five.

(3) Any fraction resulting from the calculation under division (B)(2) of this section shall be rounded up to the next whole number.

The General Assembly has defined a DRE voting machine as “a voting machine that records votes by means of a ballot display provided with mechanical or electro-optical components that can be actuated by the voter, that processes the data by means of a computer program, and that records voting data and ballot images in internal or external memory components.” R.C. 3506.01(F). A tabulation of the voting data that is produced by a DRE voting machine is required to be stored in “a removable memory component and in printed copy.” R.C. 3506.01(F); *see also* R.C. 3506.10(P) (“[o]n and after the first federal election that occurs after January 1, 2006, unless required sooner by the Help America Vote Act of 2002, if the voting machine is a direct recording electronic voting machine, it shall include a voter verified paper audit trail”). The “physical paper printout on which the voter’s ballot choices, as registered by a [DRE] voting machine, are recorded” is a “voter verified paper audit trail.” R.C. 3506.01(H). A voter shall be given an opportunity to inspect and accept or reject the contents of the voter verified paper audit trail before the voter’s ballot is recorded. *Id.*

Although a hybrid voting machine uses a touchscreen like a DRE voting machine, the hybrid voting machine does not constitute a DRE voting machine as defined in R.C. 3506.01(F). The

² R.C. 3506.22 applies to counties that have adopted DRE voting machines as the primary voting system for the county, but does not apply to a county that provides DRE voting machines only to individuals with disabilities in compliance with R.C. 3506.19. R.C. 3506.22(A).

General Assembly has expressly provided that a “voting machine that captures votes by means of a ballot display but that transfers those votes onto an optical scan ballot or other paper record for tabulation” does not constitute a DRE voting machine. R.C. 3506.01(F). Moreover, as you have explained, a hybrid voting machine does not tabulate votes internally and a voter cannot cast his vote on a hybrid machine. Accordingly, the minimum number of DRE voting machines that a county is required to provide does not apply to the number of hybrid voting machines that a county must provide. No other statute specifies the number of voting machines that a county must provide. Therefore, the Ohio Revised Code does not require a county to acquire a certain number of hybrid voting machines if a hybrid voting system is implemented.

Although a hybrid voting machine does not satisfy the definition of a DRE voting machine, as set forth in R.C. 3506.01(F), a hybrid voting machine is comprised of a “marking device” and “automatic tabulating equipment.” A “marking device” is “an apparatus operated by a voter to record the voter’s choices through the marking of ballots enabling them to be examined and counted by automatic tabulating equipment.” R.C. 3506.01(A). “Automatic tabulating equipment” has been defined as “a machine or electronic device, or interconnected or interrelated machines or electronic devices, that will automatically examine and count votes recorded on ballots.” R.C. 3506.01(C). Furthermore, “[a]utomatic tabulating equipment may allow for the voter’s selections to be indicated by marks made on a paper record by an electronic marking device.” *Id.* Accordingly, the touchscreen and printing components of a hybrid voting machine constitute an electronic “marking device.” The optical scanner that is used with a hybrid voting machine constitutes “automatic tabulating equipment.”

The General Assembly has conferred the authority to adopt voting machines, marking devices, and automatic tabulating equipment upon a county board of elections, a board of county commissioners based upon the recommendation of the county board of elections, or the electors of the county. R.C. 3506.02; 2005 Op. Att’y Gen. No. 2005-006, at 2-61 to 2-62. In addition, a county board of elections shall provide for the purchase of equipment used in elections and shall “[c]ause the polling places to be suitably provided with voting machines, marking devices, [and] automatic tabulating equipment[.]” R.C. 3501.11(C), (I). Although the responsibility to acquire such equipment rests with a board of county commissioners, R.C. 3506.03, the authority to determine the number of voting machines, marking devices, and automatic tabulating equipment that is necessary to adequately conduct elections in the county is a duty and power of the county board of elections that shall be exercised by majority vote, R.C. 3501.11. R.C. 3506.12(A) states, in pertinent part:

In counties where marking devices, automatic tabulating equipment, voting machines, or any combination of these are in use or are to be used, the board of elections ... [m]ay combine, rearrange, and enlarge precincts; but *the board shall arrange for a sufficient number of these devices to accommodate the number of electors in each precinct* as determined by the number of votes cast in that precinct at the most recent election for the office of governor, taking into consideration the size and location of each selected polling place, available parking, handicap accessibility and other accessibility to the polling place, and the number of candidates and issues to be voted on. (Emphasis added.)

In carrying out its duties under R.C. 3501.11 and R.C. 3506.12, a county board of elections shall exercise reasonable discretion to determine the number of hybrid voting machines that shall be acquired in a county that has adopted a hybrid voting system. Given the similarity between a DRE voting machine and a hybrid voting machine, the practical concerns that led to the General Assembly's adoption of a minimum required number of DRE voting machines may apply with equal force to counties that have adopted hybrid voting systems. Accordingly, in a county that has adopted a hybrid voting system as the primary voting system in the county, it may be reasonable for a board of elections to apply the formula that determines the minimum number of DRE voting machines that shall be provided to determine the number of hybrid voting machines to acquire.³

Question 2: Quantity of Paper Ballots and Ballot Stock

Your second question asks what percentage of paper ballots or ballot stock a county must provide to a precinct if the county uses a hybrid voting system. A member of your office has explained that "paper ballots" are ballots that are printed on paper in advance of an election either by a vendor pursuant to a contract with a county board of elections, or a county board of elections with the capability of printing ballots on demand. Additionally, the term "ballot stock" refers to the blank cards that are fed into a hybrid voting machine and on which a voter's selections are recorded.

R.C. 3505.11 sets forth the quantity of pre-printed ballots that must be provided by a county board of elections to each precinct. R.C. 3505.11 applies to the provision of pre-printed paper ballots when the primary voting system in the county is a PCOS voting system. *See* Secretary of State Directive 2016-22, at p. 4-21 (Aug. 5, 2016). A county board of elections may contract with a third-party vendor to print paper ballots for an election. *See* R.C. 3501.11(F) (a county board of elections shall "contract for the printing of all ballots and other supplies used in registrations and elections"); R.C. 3505.13-.15 (provisions regarding ballots printed pursuant to contract). Division (A) of R.C. 3505.11 sets forth the quantity of ballots that shall be provided when paper ballots are printed pursuant

³ If the use of a voting machine is the primary means by which votes are cast in a county, and the number of voting machines in a precinct or at a polling location is insufficient to accommodate in a timely manner the number of electors that may wish to vote at one time, an elector's fundamental right to vote may be unconstitutionally infringed or denied. *See Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665 (6th Cir. 2016) ("[i]n assessing the burden imposed on voters by a state's electoral mechanisms, courts may undoubtedly consider whether the state's practices will cause long lines and delays at polling places and how these lines and delays may impact the right of a voter to cast his or her ballot"); *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008); *see also State ex rel. Spencer v. Montgomery Cnty. Bd. of Elections*, 102 Ohio App. 51, 61, 141 N.E.2d 195 (Montgomery County 1956) ("every means should be employed by the election officials to see to it that adequate accommodations are provided to care for the 'peak load' which comes in the last several hours before closing of the polls. Election officials should make every effort to assist the voters in the exercise of their franchise").

to a contract. R.C. 3505.11(A) states, in pertinent part, “[t]he ballots, with the stubs attached, shall be bound into tablets for each precinct, which tablets shall contain at least one per cent more ballots than the total registration in the precinct, except as otherwise provided in [R.C. 3505.11(B)].”

A county board of elections may also elect to provide ballots on demand. R.C. 3505.11(B)(1). R.C. 3506.20(B) prohibits a county board of elections from using a ballots on demand voting system unless each ballot that is printed by the system includes a tracking number. For the purpose of R.C. 3506.20, a “ballots on demand voting system” is “a system that utilizes ballots printed as needed by election officials at the board of elections for distribution to electors, either in person or by mail.” R.C. 3506.20(A). Division (B) of R.C. 3505.11 sets forth the quantity of paper ballots that must be provided when paper ballots are printed on demand by the county board of elections. R.C. 3505.11(B) states:

(1) A board of elections may choose to provide ballots on demand. If a board so chooses, the board shall have prepared for each precinct at least five per cent more ballots for an election than the number specified below for that kind of election:

(a) For a primary election or a special election held on the day of a primary election, the total number of electors in that precinct who voted in the primary election held four years previously;

(b) For a general election or a special election held on the day of a general election, the total number of electors in that precinct who voted in the general election held four years previously;

(c) For a special election held at any time other than on the day of a primary or general election, the total number of electors in that precinct who voted in the most recent primary or general election, whichever of those elections occurred in the precinct most recently.

(2) If, after the board complies with the requirements of division (B)(1) of this section, the election officials of a precinct determine that the precinct will not have enough ballots to enable all the qualified electors in the precinct who wish to vote at a particular election to do so, the officials shall request that the board provide additional ballots, and the board shall provide enough additional ballots, to that precinct in a timely manner so that all qualified electors in that precinct who wish to vote at that election may do so.⁴ (Footnote added.)

Insofar as R.C. 3505.11 applies to a PCOS voting system, the quantity of pre-printed paper ballots set forth in the statute does not apply when a county has adopted a hybrid voting system as the

⁴ In calculating the number of ballots to be provided pursuant to R.C. 3505.11, either under division (A) or (B), “[e]lectors who have failed to respond within thirty days to any confirmation notice shall not be counted[.]” R.C. 3505.11(A).

primary voting system in the county. However, in the event that a hybrid voting machine is incapable of providing and tabulating an appropriate provisional ballot in accordance with R.C. Chapter 3505, it may be necessary for a county board of elections to have on-hand at each precinct a sufficient quantity of paper ballots for use as provisional ballots.⁵ A county board of elections may reasonably exercise discretion to determine the quantity of provisional paper ballots to furnish to each precinct. The Secretary of State may also provide guidance to county boards of elections in this regard. *See* R.C. 3501.04 (“[t]he secretary of state is the chief election officer of the state, with such powers and duties relating to ... the conduct of elections as are prescribed in [R.C. Title 35]”); R.C. 3501.05(B) (the Secretary of State shall “[i]ssue instructions by directives and advisories ... to members of the boards [of elections] as to the proper methods of conducting elections”); R.C. 3501.05(M) (the Secretary of State shall “[c]ompel the observance by election officers in the several counties of the requirements of the election laws”); R.C. 3501.30(B) (a county board of elections shall “follow the instructions and advisories of the secretary of state in the production and use of polling place supplies”); *see generally* R.C. 3501.30(A) (ballots are among the supplies that a county board of elections is required to provide). Therefore, when a county has adopted a hybrid voting system as the primary voting system in the county, and paper ballots are provided only so far as necessary to accommodate provisional voters, a county board of elections may reasonably exercise discretion to determine the quantity of paper ballots to provide to each precinct.⁶

We now consider the quantity of ballot stock that a county board of elections is required to provide when the county has adopted a hybrid voting system. No provision of the Ohio Revised Code sets forth the percentage of ballot stock that a county board of elections is required to provide. A county board of elections has a duty to provide to each polling place ballots and adequate supplies for

⁵ If an elector is unable to provide the identification required by R.C. 3505.18(A)(1) to precinct officials, the elector shall be permitted to cast a provisional ballot in accordance with R.C. 3505.181. R.C. 3505.18(A)(2). More than one precinct may be assigned to a single polling location. If an elector casts a provisional ballot in a precinct in which he was not registered and eligible to vote, but in the polling location for the correct precinct, and elections officials did not direct the elector to the correct precinct, a county board of elections shall remake the provisional ballot on a ballot that is appropriate for the correct precinct. R.C. 3505.183(D)(1). The ballot shall be remade “to reflect the offices, questions, and issues for which the individual was eligible to cast a ballot and for which the individual attempted to cast a provisional ballot” and “shall be counted for each office, question, and issue for which the individual was eligible to vote.” R.C. 3505.183(D)(2). It is our understanding that a hybrid voting machine may not be capable of accommodating a provisional ballot cast under those circumstances.

⁶ Certainly, a county board of elections may also consider the need to provide paper ballots as a contingency in the event that the voting machines in the county’s hybrid voting system become inoperable during an election.

the operation of voting machines, marking devices, and automatic tabulating equipment. *See* R.C. 3501.11(H) (a county board of elections shall “[p]rovide for the delivery of ballots, pollbooks, and other required papers and material to the polling places”); R.C. 3501.11(I) (a county board of elections is required to “[c]ause the polling places to be suitably provided with voting machines, marking devices, automatic tabulating equipment, stalls, and other required supplies”); R.C. 3501.30(A) (“[t]he board of elections shall provide for each polling place ... all other supplies necessary for casting and counting the ballots and recording the results of the voting at the polling place”); R.C. 3505.08(A) (“[b]allots shall be provided by the board of elections for all general and special elections”). The provision of a sufficient quantity of ballot stock for hybrid voting machines in each precinct is part of a county board of elections’ responsibility to suitably provide a polling location with voting machines, marking devices, automatic tabulating equipment, and other required supplies. *See* R.C. 3501.30(A) (paper is among the supplies that a county board of elections is required to provide). Insofar as a county board of elections is statutorily required to provide supplies for each polling location, but the means of doing so is not specified, the board may reasonably exercise discretion to determine the amount of ballot stock that is necessary to adequately supply hybrid voting machines at the county’s polling locations. The Secretary of State may provide guidance to county boards of elections regarding the quantity of ballot stock to provide to each precinct.⁷ Therefore, when a county has adopted a hybrid voting system as the primary voting system in the county, a county board of elections may reasonably exercise discretion to determine the quantity of ballot stock that a county board of elections shall provide to each precinct.⁸

⁷ Providing ballot stock for hybrid voting machines is akin to printing ballots on demand. Even as equipment of the county board of elections is used to print ballots on demand, equipment of the county board of elections is used to print the ballot and the votes that an elector casts using a hybrid voting machine. Accordingly, it may be reasonable for a county board of elections to provide ballot stock to each precinct in the same quantity as the board is required to provide paper ballots if it were printing paper ballots on demand pursuant to R.C. 3505.11(B).

⁸ In making decisions about the quantity of voting machines, paper ballots, and ballot stock, county boards of elections should keep in mind the importance of having a sufficient amount of each to permit all eligible electors to cast votes who appear at a polling location during its hours of operation. Courts have held election results void when a polling location does not have sufficient ballots for the number of eligible electors who wish to cast a vote during an election prior to the closing of the polls. *In re Gorham-Fayette Local Sch. Dist.*, 20 Ohio Misc. 222, 250 N.E.2d 104 (C.P. Fulton County 1969) (syllabus, paragraph 3) (“[a]n election at which there were an insufficient number of ballots available for all electors who sought to vote violates the rights of those denied their franchise assured by [Ohio Const., art. V, § 1], and will be declared void upon a petition filed by certain of such electors”); *In re Election of Council*, 57 Ohio Op. 426, 118 N.E.2d 694 (C.P. Ottawa County 1953) (syllabus, paragraph 1) (R.C. 3505.11 “sets up a mandatory minimum requirement and the failure to comply therewith will void the election irrespective of the number of people refused the right to vote by a failure to provide the prescribed number of ballots”). Moreover, the failure to

Question 3: Combining Hybrid Voting Machines and other Means of Voting

Your third question asks whether a county board of elections may adopt a hybrid voting system in combination with another type of voting system. As an example, you ask whether a county may adopt a hybrid voting system and offer voters the choice of voting with a hybrid voting machine or a PCOS voting system. The decision whether to use particular types of voting equipment is made at the county level. 2005 Op. Att’y Gen. No. 2005-006, at 2-57. To that end, R.C. 3506.02 provides, in pertinent part:

Voting machines, marking devices, and automatic tabulating equipment may be adopted for use in elections in any county in the following manner:

- (A) By the board of elections;
- (B) By the board of county commissioners of such county on the recommendation of the board of elections;
- (C) By the affirmative vote of a majority of the electors of such county voting upon the question of the adoption of such equipment in such county.

Accordingly, “the decision as to which type of voting method is to be used in a particular county is delegated to the county board of elections, acting independently or with its board of county commissioners, or to the voters of the county.” 2005 Op. Att’y Gen. No. 2005-006, at 2-61 to 2-62.

The Ohio Revised Code does not prohibit the use of more than one type of voting machine, marking device, and automatic tabulating equipment or the use of a voting machine in combination with paper ballots tabulated by optical scanners. *Cf.* R.C. 3506.12(A) (authorizing the combination, rearrangement, and enlargement of precincts “[i]n counties where marking devices, automatic tabulating equipment, voting machines, *or any combination of these* are in use or are to be used” (emphasis added)). A county board of elections that has adopted a combination of voting systems has a duty to ensure that sufficient numbers of voting machines, marking devices, and automatic tabulating equipment are provided to accommodate the number of electors that may vote at a polling location. R.C. 3506.12(A) (“the board [of elections] shall arrange for a sufficient number of [marking devices, automatic tabulating equipment, and voting machines] to accommodate the number of electors in each precinct as determined by the number of votes cast in that precinct at the most recent election for the office of governor, taking into consideration the size and location of each selected polling place, available parking, handicap accessibility and other accessibility to the polling place, and the number of candidates and issues to be voted on”).

Therefore, the Ohio Revised Code permits a county to implement a combination of a hybrid voting system and a precinct count optical scan voting system and to enable a voter to decide whether

maintain adequate and sufficient equipment at a polling location may constitute a violation of equal protection and substantive due process under the United States Constitution. *See League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008).

to cast his vote under the hybrid voting system or the precinct count optical scan voting system. A county that implements a combination of a hybrid voting system and a precinct count optical scan voting system has, essentially, adopted two separate voting systems. In that situation, the county board of elections shall comply with statutory requirements that govern each system as if that system were the only system adopted in the county. Accordingly, when a county offers voters a choice between using a hybrid voting system or a PCOS voting system, the county board of elections shall provide each precinct with the percentage of paper ballots that is required by R.C. 3505.11(A) or (B), as appropriate. A county board of elections may reasonably exercise discretion to determine the quantity of hybrid voting machines and ballot stock to provide to each precinct.

We now consider the second part of your third question, which asks whether a county board of elections should consider any constitutional issues before implementing a combination of a hybrid voting system and a precinct count optical scan voting system. Voters who cast a vote in a county that has implemented a combination of a hybrid voting system and a precinct optical scan voting system are entitled to the same constitutional protections as they would have if the county implemented either of those voting systems individually, including protections afforded by the Fourteenth Amendment to the United States Constitution.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. The Ohio Revised Code does not require a county to acquire a certain number of hybrid voting machines when a hybrid voting system is the primary voting system in the county.
2. A county board of elections may reasonably exercise discretion to determine the quantity of paper ballots to furnish to each precinct when a hybrid voting system is the primary voting system in the county and paper ballots are provided only as necessary to accommodate provisional voters.
3. A county board of elections may reasonably exercise discretion to determine the quantity of ballot stock to furnish to each precinct when a hybrid voting system is the primary voting system in the county.
4. The Ohio Revised Code permits a county to implement a combination of a hybrid voting system and a precinct count optical scan (PCOS) voting system to enable a voter to decide whether to cast his vote under the hybrid voting system or the PCOS voting system. A county that implements a combination of a hybrid voting system and a PCOS voting system shall furnish each precinct the percentage of paper ballots that is required by R.C. 3505.11(A) or

(B), as appropriate, and may reasonably exercise discretion to determine the quantity of hybrid voting machines and ballot stock to furnish to each precinct.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General