IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. DANA SKAGGS, et al.,	:	
Relators,	:	
vs.	:	Case No. 08-2206
JENNIFER L. BRUNNER SECRETARY OF THE STATE OF OHIO, et al.,	:	ORIGINAL ACTION IN MANDAMUS
Respondents.	:	

MERIT BRIEF OF RELATORS DANA SKAGGS AND KYLE FANNIN

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I. INTRODUCTION

> [T]he provisional ballot envelope *shall not be opened, and the ballot shall not be counted* [if]:
>
> * * *
>
> (iii) The *individual* [voter] did not provide . . . [the name and signature] required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.
>
> [R.C. 3505.183(B)(4)(a)(iii) (emphasis added)]

The law could not be more clear: a provisional voter's "name and signature" "*shall* be included in the written [provisional ballot] affirmation in order for the provisional ballot to be eligible to be counted . . . ." R.C. 3505.183(B)(1)(a) (emphasis added). If the "individual [did] not provide" her name and signature, her "provisional ballot envelope *shall not be opened*, and the *ballot shall not be counted* . . . ." R.C. 3505.183(B)(4)(a)(iii) (emphasis added). The General Assembly's use of "shall" makes these provisions mandatory; strict compliance therefore is required. State ex rel. Myles, et al. v. Brunner, 2008 – Ohio – 5097, ¶ 18 (2008).

Nonetheless, in the absence of relief from this Court, Respondents will open and count approximately 1,000 provisional ballots cast in Franklin County in the November 4 election that admittedly do not meet these mandatory requirements. Each is missing either the name or the signature (or both) that the provisional voter is required to fill-in on her affirmation. Ignoring the mandate of R.C. 3505.183(B)(4)(a)(iii) that such ballots "shall not be opened" and "shall not be counted," Respondent Brunner has directed the

Respondent Board of Elections to open and count these facially deficient provisional ballots. Her direction to do so, based on a post-election request by the campaign of Mary Jo Kilroy, the Democratic candidate for the 15th Congressional District, contravenes her pre-election directive to the contrary and may prove to be determinative of three Franklin County elections that are currently too close to call, including that in the 15th Congressional District. If Respondent Brunner's directive to open and count ballots the General Assembly has unequivocally said "shall not be opened" and "shall not be counted" stands, she will not only taint these contests but also make a mockery of Ohio election law.

A writ of mandamus compelling Respondents to act consistent with the mandates of R.C. 3505.183 will correct Respondent Brunner's errant instructions. Although Respondents have a clear legal duty to comply with this controlling statute, should this Court not intervene, they will act *directly contrary* to it.

II. STATEMENT OF FACTS

A. Provisional Ballots In November 4 Election

Initial unofficial returns from the November 4, 2008 election (the "Election") indicate that Republican Steve Stivers leads Democrat Mary Jo Kilroy by nearly 400 votes in the election for the 15th Congressional District seat;[1] Democrat Nancy Garland leads Republican Jim McGregor by 783 votes in the 20th House District race; and, Democrat Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19th House District (the "Undecided Races"). [November 26, 2008 Consolidated Affidavit of Matthew M. Damschroder ¶ 2 ("Damschroder Aff'd").] The outcome of each of these

[1] Based on later returns from Madison and Union Counties which are also part of the 15th Congressional District, Stivers' lead over Kilroy has grown to approximately 597 votes as of the date of the filing of this Brief.

three Undecided Races may be determined by the more than 27,000 provisional ballots the Board of Elections is now reviewing for eligibility but which have not yet been counted. [Id. at ¶¶ 2-3.]

A voter is allowed to cast a provisional ballot pursuant to R.C. 3505.181 if her name does not appear in the poll list; she fails to provide required identification at the polling place on the day of the Election; she previously requested an absentee ballot; and for other specified reasons. [See also id.] To cast a provisional ballot, a voter is provided a provisional ballot envelope prepared by the county Board of Elections[2] and a ballot. [Id. at ¶ 4, Exhibit A to Damschroder Aff'd (Franklin County Provisional Ballot Application).] The envelope sets forth the mandatory written affirmation required of a provisional voter under R.C. 3505.182 and clearly indicates, in capital letters, underscored, and in bold type, that the provisional ballot voter is obligated to complete the affirmation by adding both her name and her signature. The envelope states "CLEARLY PRINT NAME-**(REQUIRED)**" at the top of the required affirmation and, under the signature line at the conclusion of the affirmation, indicates "VOTER'S SIGNATURE-**(REQUIRED)**." [See Exhibit A to Damschroder Aff'd.] After completing the affirmation and providing the required identification information on the

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[2] Respondent Brunner and Intervenor attempt to manufacture support for their position by challenging the form of Provisional Ballot Application used by Franklin County. Their efforts fail for three separate reasons. First, Respondent Brunner has never issued a directive requiring use of Form 12-B. [Damschroder Aff'd ¶ 21.] Second, use of Form 12-B is not otherwise uniform among the counties as suggested; indeed, Cuyahoga County, while under administrative supervision of Respondent Brunner herself, used its own form of provisional ballot application, eschewing Form 12-B. [Damschroder Aff'd ¶ 21.] Third, and most importantly, the Franklin County form of Provisional Ballot Application [Damschroder Aff'd Ex. A] is consistent in all respects with the *statutory* form of application set forth in R.C. 3505.182 ("The form of the written affirmation . . . shall be substantially as follows:"). Since the Franklin County form is "substantially" as mandated in R.C. 3505.182, the challenges Respondent Brunner and Intervenor assert to it are nothing but empty and inaccurate rhetoric.

provisional ballot envelope, the voter inserts her provisional ballot into it and seals the envelope. [Damschroder Aff'd ¶ 4.]

The affirmation set forth on the provisional ballot envelope, mandated by R.C. 3505.182, is Ohio's fundamental safeguard against provisional voter fraud. It requires the provisional voter to "declare, under penalty of election falsification, that her application is accurate" and to acknowledge that "knowingly providing false information is a violation of law and subjects me to possible criminal prosecution." R.C. 3505.182. As detailed in the Affidavit of Franklin County Prosecutor Ron O'Brien, this affirmation is critical to the detection and deterrence of voter fraud. [Affidavit of Ron O'Brien; [see Appendix at Tab 5 ("O'Brien Aff'd).] The provisional voter's signature is not only a deterrent to voter fraud but, in its absence, "[f]raudulent provisional ballots will not be able to effectively be prosecuted. . . ." [O'Brien Aff'd at ¶ 6.] Because poll workers are unlikely to be able to visually identify the culprit among the hundreds of voters passing through the polling place on election day, the signature on the provisional affirmation becomes the principle basis of prosecution of those committing election falsification. [O'Brien Aff'd ¶ 7.] Indeed, the recent Franklin County election fraud prosecution "was possible only because of expert opinion by a handwriting expert that the offender signed the fraudulent registration and absentee ballot forms." [O'Brien Aff'd ¶ 7.] "Without a signature on a provisional ballot form the ability to prosecute fraudulent forms, voters, or schemes would be virtually impossible." [O'Brien Aff'd ¶ 7.]

Despite the clarity of the language on the Franklin County provisional ballot envelope, approximately 1,000 of the provisional ballots cast in Franklin County are facially deficient. [Damschroder Aff'd ¶¶ 9 and 19.] On each, the voter failed to provide

either her name or signature, or both, on the required affirmation or placed her name or signature on the envelope at an improper location so as to not complete the required affirmation. If each of these incomplete provisional ballot envelopes that lacks a properly completed anti-fraud affirmation[3] is counted, the criminal sanctions envisioned in R.C. 3505.182 for voter falsification will be eviscerated.

B. Provisional Ballot Verification And Counting

Upon receiving the sealed provisional ballot envelopes, the Board of Elections is required to use the voter-provided information on the envelope to determine the voter's eligibility to cast a provisional ballot. [Id. at ¶ 5] The voter's information is cross-checked against the information of the Board of Elections, and of other county Boards of Elections, to determine eligibility. [Id.] If, upon completing its review, the Board of Elections determines that a provisional ballot voter is eligible to vote, the envelope is opened and the ballot is removed. [Id. at ¶ 6.]

To maintain secrecy, the provisional ballot envelope is then separated from the ballot it contains and the ballot is commingled with all other provisional ballots. [Id.] Thus, once the envelope is opened, it is impossible to determine the votes of any particular provisional voter, making an after-the-fact assessment of the appropriateness of the determination as to the eligibility of any particular provisional voter impossible. [Id.] Consistent with the Board of Elections' statutory mandate, disputes regarding the eligibility of provisional ballots must be resolved before any of the provisional ballot

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[3] A provisional voter must also provide one of the forms of identification verification listed in R.C. 3505.18(A)(1) or, if she cannot do so, must execute an identification affirmation under R.C. 3505.18(A)(4) and, within ten days after the day of the election, appear at the Board of Elections and "provide . . . any additional information necessary to determine . . . [her] eligibility" . . . to cast the provisional ballot. R.C. 3505.181(A)(12) and (B)(8). This action does not challenge any provisional ballot on the basis of the *identification* affirmation, but is limited solely to facially deficient anti-fraud affirmations under R.C. 3505.183.

envelopes are opened and their enclosed ballots commingled. See R.C. 3503.183(D) ("No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county . . . .).

C. Respondent Brunner's Post-Election Flip-Flop

On March 31, 2008, well prior to the November 4 election, Brian Shinn, Assistant General Counsel to Secretary of State Jennifer Brunner, responded to a series of questions from the Board of Elections regarding procedures for counting provisional ballots. [Id. at ¶ 10, Exh. B to Damschroder Aff'd (e-mail).] In response to a question regarding the consequences of a voter's failure to print her name on her provisional ballot affirmation even if she signed it, Mr. Shinn was clear that the ballot was defective and could not be counted:

> 5) Voter did not print his or her name on column 1 but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.
>
> [Emphasis in original.]

This was consistent with the advice Prosecuting Attorney O'Brien provided, [Damschroder Aff'd ¶ 12, Exh. D to Damschroder Aff'd (e-mail chain containing correspondence with Prosecutor's office)], so the Respondent Board of Elections was prepared to disqualify as fatally flawed all provisional ballots that did not comply with Mr. Shinn's conclusion that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ." [Id. at ¶ 13.]

Then, on Monday, November 10, after the Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve Stivers by nearly 400 votes for the 15th Congressional District seat, Respondent Brunner reversed her position. A lawyer for the Kilroy Committee challenged the Secretary's pre-election determination that, under R.C. 3505.181(B)(1)(a), a provisional ballot is ineligible to be counted unless it contains both the name *and* the signature of the provisional voter on the anti-fraud affirmation. [Exh. D to Damschroder Aff'd (e-mail chain containing DeRose e-mail).] The e-mail on behalf of the Kilroy campaign, which was copied to, among others, Mr. Shinn, went so far as to assert that a provisional ballot must be counted even if it lacks both the printed name *and* the signature of the provisional ballot voter. [Id.]

Later that same day, Mr. Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . . ." [Damschroder Aff'd ¶ 15.] Rather, in response to the Kilroy campaign request, Mr. Shinn directed the Board of Elections to deem eligible provisional ballots that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." [Exh. D to Damschroder Aff'd (e-mail chain containing Shinn's November 10 e-mail).] Mr. Shinn went so far as to indicate that if a voter's signature is found on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e., it is not set forth as the voter's execution of the written anti-fraud affirmation), then "the provisional ballot can be counted." [Id.] In a

subsequent e-mail sent November 12, 2008, Mr. Shinn confirmed that Respondent Brunner concurred with and had adopted his change of heart as her own. [Damschroder Aff'd at ¶ 17; Exh. D to Damschroder Aff'd (e-mail chain containing Shinn's November 12, 2008 e-mail).]

Notably, Respondent Brunner's post-election change of view was only communicated to Franklin County where the three tightly contested Undecided Races hang in the balance. Inexplicably, she never disclosed her after-the-fact reconsideration of the requirements of R.C. 3505.183 to any other county. As a result, Respondent Brunner's instruction to the Franklin County Board of Elections to count the flawed provisional ballots appears to be unique in all the state and, if effectuated, will result in unequal rules being applied to provisional ballots by different county boards of election. The 15th District provides a graphic example. It includes portions of three different Ohio counties: Franklin, Union, and Madison. Yet, because Respondent Brunner failed to make the Boards of Election in Union and Madison Counties aware of her post-election about-face, they certified their results consistent with their understanding that R.C. 3505.183(B)(1)(a) and (4)(a)(iii) disqualified ballots if (1) the voter failed to provide her signature executing the affirmation, or (2) failed to provide both her printed name and signature executing the affirmation. [See Affidavit of Timothy A. Ward (Madison County); Affidavit of Robert W. Parrott (Union County).]

D. Secretary Brunner's Tie-Breaking Votes

The Franklin County Board of Elections met on Thursday, November 13, 2008 to consider whether disputed provisional ballots should be considered eligible to be opened

and counted. [Damschroder Aff'd ¶ 17.] Three of the disputed categories of provisional ballots were those involved in this action:

> (1) Those where the voter executed the affirmation with her signature but failed to provide her printed name;
>
> (2) Those where the voter provided her printed name on the affirmation but did not sign the affirmation; and,
>
> (3) Those where the voter printed her name or signed her signature on the provisional ballot envelope but did not do so in the proper location so that the required affirmation is not properly completed.

In light of the conflict between R.C. 3505.183 and the post-election about-face instructions issued by Respondent Brunner, it is not surprising that the Board of Elections tied 2-2 on each of the motions as to whether these three disputed categories of contested provisional ballots were, in fact, eligible to be opened and counted. [See, e.g., id.]

Under Ohio law, the Secretary of State breaks ties of the Board of Elections. R.C. 3501.11(X). She did just that by a letter dated November 20, 2008. [Damschroder Aff'd ¶ 18; Exh. E to Damschroder Aff'd (letter).] In her letter, Respondent Brunner directed that all three of these categories of disputed provisional ballots were, in fact, eligible to be counted, and directed them to be counted, irrespective of their failure to comply with R.C. 3505.183(B)(1)(a) and (4)(a)(iii). [Damschroder Aff'd ¶ 18.]

As a result, in the absence of a writ of mandamus from this Court, approximately 1,000 provisional ballots that are facially invalid will be counted in the official results of the Franklin County election, even though Respondent Brunner never advised the other counties comprising the 15th Congressional District that they should count such ballots. Even more importantly, in the absence of relief from this Court, as many as three elections in which Franklin County electors voted may be decided by provisional ballots

the General Assembly flatly commanded "shall not be opened" and "shall not be counted. . . ." R.C. 3505.183(B)(4)(a)(iii).[4]

III. ARGUMENT AND PROPOSITIONS OF LAW

A. A Writ of Mandamus Should Issue To Compel Respondents To Comply With The Mandatory Proscriptions of R.C. 3505.183.

PROPOSITION OF LAW NO. 1: A Writ of Mandamus Is The Proper Remedy To Correct The Secretary of State's Statutory "Misdirection" To A County Board of Elections.

It is well established that mandamus relief against Secretary Brunner must issue where a relator establishes: (1) "a clear legal right to the requested relief"; (2) "a corresponding clear legal duty on the part of the secretary of state to provide it"; and (3) "the lack of an adequate remedy in the ordinary course of the law." State ex rel. Stokes v. Brunner, 2008-Ohio-5392, ¶ 13 (2008). As this Court has repeatedly held, the Secretary of State has a clear legal duty to "[c]ompel the *observance by election officers in the several counties of the requirements of the election laws*." State ex rel. Melvin v. Sweeney, 2008 – Ohio – 8392, at ¶ 11 (2008) (emphasis added). See also Stokes, 2008-Ohio-5392, at ¶ 14 (same). At the same time, she has a clear legal duty, herself, to comply with the mandates of Ohio's election laws. See, e.g., 15 O Jur. 3d Civil Servants

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[4] Procedurally, Respondent Brunner removed this case to the United States District Court for the Southern District of Ohio (Judge Algenon L. Marbley) on November 14, 2008. On appeal, the United States Court of Appeals for the Sixth Circuit held the removal, and the subsequent proceedings before Judge Marbley, void for lack of federal question jurisdiction, and remanded this case to this Court on November 25, 2008. In doing so, the Sixth Circuit held:

> The threshold question in this case is what Ohio law means.
>
> [Opinion, at 3; attached as ADD-30]

The Sixth Circuit was also clear that the Help America Vote Act of 2002, Pub. L. No. 107-252, Title III, § 302, 116 Stat. 1666, 1706 (codified at 42 U.S.C. § 15301 *et seq.*), "'conspicuously leaves . . . to the States' the determination of 'whether a provisional ballot will be counted as a valid ballot,' Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 577 (6th Cir. 2004); see 42 U.S.C. § 15482(a)(4)." As such, this Court is the appropriate "final arbiter" of the issues presented in this case. [Opinion, at 7.]

§ 378 ("A failure to follow a mandatory provision [such as that in R.C. 3505.183(B)(1)(a)] renders [Secretary Brunner's] act to which it relates illegal and void.").

Thus, where the Secretary advises or instructs local boards of elections (or, in this instance, provides the tie-breaking vote) in a manner inconsistent with the express statutory language, she has a clear legal duty, enforceable in mandamus, to correct her error and to ensure the boards' compliance with the plain and unambiguous statutory language. See State ex rel. Myles v. Brunner, 2008-Ohio-5097, ¶¶ 27 (2008); Stokes, 2008-Ohio-5392, at ¶ 30; State ex rel. Colvin v. Brunner, 2008-Ohio-5041,¶ 20 (2008) (mandamus relief is the proper form of remedy where "the secretary of state 'has, under the law, misdirected the members of the boards of elections as to their duties").[5] The underlying rationale is obvious. "[I]f the secretary's advice [to the board of elections] is an erroneous interpretation of the election laws there must be some remedy to correct the error and to require proper instructions in lieu of those erroneously given. Id. Of course, "[g]iven the proximity of the . . . election" the element requiring a lack of an "adequate remedy in the ordinary course of the law" is easily satisfied. Id. at ¶ 7. See also State ex rel. Heffelfinger v. Brunner, 116 Ohio St. 3d 172, 175 (2007) ("Given the proximity of

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[5] Thus, in Stokes., 2008-Ohio-5392, this Court granted relief in mandamus where the Secretary of State "erroneously advised boards of elections that they are not required to permit duly appointed observers at in-person, absentee-voting locations" based on an incorrect interpretation of, *inter alia*, R.C. 3505.21 of the Revised Code. Id. at ¶¶ 1, 30. So, too, in Myles, 2008-Ohio-5097, the Court granted a writ of mandamus where the secretary of state issued a memorandum to boards of elections that had advised them to reject certain absentee ballot applications that did not contain a "check" in an affirmation box. Because the applicable statutory provision did not "strictly require that the box" be checked, the Secretary of State's interpretation failed to "apply the plain language" of the statute. Id. at ¶¶ 21, 26. Therefore, mandamus relief was appropriate. Id. at ¶ 27.

the November 6 election, relators have established that they lack an adequate remedy in the ordinary course of law.").

Accordingly, with this Court's precedent having established mandamus as the appropriate remedy, the only issue to be resolved is whether a clear legal duty exists for Respondents to reject facially deficient provisional ballots. As explained next, such a legal duty clearly exists.

B. Respondents Have A Clear Legal Duty Precluding The Counting of Facially Deficient Ballots

PROPOSITION OF LAW NO. 2: R.C. 3505.183 Mandates that A Voter Include Both Her Name and Signature on a Provisional Ballot Application.

PROPOSITION OF LAW NO. 3: Where A Provisional Ballot Application Does Not Comply With R.C. 3505.183, The Provisional Ballot Application Shall Not Be Opened and The Vote Shall Not Be Counted.

As Congress made "conspicuously" clear in HAVA, the Help America Vote Act [42 U.S.C. § 15482(a)(4)], "the issue of whether a provisional ballot will be counted as a valid ballot" is left "to the States." Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 577 (6th Cir. 2004). See also State ex rel. Skaggs, et al. v. Brunner, -- F.3d --, 2008 WL 4984973, *7 (6th Cir. Nov. 25, 2008) (same). Consistent with its authority, the Ohio General Assembly has set forth specific, mandatory requirements for determining "whether a provisional ballot will be counted as a valid ballot."

Specifically, R.C. 3505.183(B)(1), which is applicable to county boards of elections, first sets forth the information which a voter is compelled to include her provisional ballot application:

> *To determine whether a provisional ballot is valid and entitled to be counted* ... [t]he board shall examine the

> information contained in the written affirmation executed by the individual who cast the provisional ballot . . . . otherwise, the following information *shall be included* in the written affirmation *in order for the provisional ballot to be eligible to be counted*:
>
> (a) *The individual's name and signature*;
>
> * * *
>
> (2) In addition to the information *required to be included* in an affirmation under division (B)(1) of this section. ...
>
> * * *
>
> (3) *If*, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section., the board determines that *all of the following apply, the provisional ballot envelope shall be opened, and* the ballot shall be *placed in a ballot box to be counted*:
>
> [R.C. 3505.183(B)(1) (emphasis added).]

As plainly stated, a voter is obligated to include *both* her *name and signature* on the required affirmation. That there are two mutually distinct requirements is also made clear by R.C. 35011.011, which defines a signature as "that person's written, cursive-style" or "other legal mark" in "*that person's own hand*." R.C. 3501.011(A) & (B) (emphasis added). Thus, the signature requirement is distinct from the printed "name" requirement and it is clear that it is *the individual voter's duty* to affix both her printed name and signature to the provisional ballot affirmation.

The General Assembly also stated the consequence if these mandatory requirements are not properly satisfied: "[T]he provisional ballot *shall not be opened*, and the ballot *shall not be counted*."

> (4)(a) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that any of the following

applies, the provisional ballot envelope *shall not be opened*, and the ballot *shall not be counted*:

* * *

(iii) The *individual* did not provide *all of the information required under division (B)(1) of this section.* in the affirmation that the individual executed at the time the individual cast the provisional ballot.

[R.C. 3505.183(B)(4)(a)(iii) (emphasis added).]

In sum, R.C. 3505.183(B): (1) imposes a mandatory obligation on county boards of election to *reject* a provisional ballot application where the voter failed to include *both* her *written name and signature* on the required affirmation; and (2) clearly indicates that it is the *voter's* obligation to provide this required information on the provisional ballot application. See also Skaggs, 2008 WL 4984973, *3 ("If the provisional-ballot voter completed an affirmation, the statute provides that his ballot is only 'eligible to be counted' if his 'name and signature' appear on the affirmation.").

This statutory command is clear as the Ohio General Assembly was careful not to leave the interpretation of this important election statute up to the discretion of an elected official. As evidenced by the facts underlying this case, the General Assembly did so for good reason. No election official should be permitted to "change" the rules for counting provisional ballots after the votes are cast.

Rather, the General Assembly, using terms that this Court has expressly recognized as "mandatory," established a clear demarcation that instructs Ohio boards of elections, free of the influence of political partisanship, as to their specific duties in evaluating and counting provisional ballots. The General Assembly made the test simple, having set forth specific objective requirements, including, both the voter's printed name

and signature. This makes the end result simple to determine. A ballot satisfying the statutorily-prescribed objective requirements will be counted. If the ballot does not, it will not be counted. It is black or white. The gray area and uncertainty has been eliminated.

This is exactly the objective criteria and certainty of results the public interest demands and which the General Assembly has created through the mandatory obligations of Section 3505.183.

PROPOSITION OF LAW NO. 4: The Prohibitions of R.C. 3505.183 Are Mandatory and Must Be Strictly Applied.

These mandatory obligations, apparent from the face of the *only* statute that addresses the evaluation and counting of provisional ballots, must be strictly applied under Ohio law. As this Court has explained, it is a "settled rule" that "election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is." Myles, 2008-Ohio-5097, ¶ 18. See also State ex rel. Evergreen Co. v. Board of Elections of Franklin County, 48 Ohio St. 2d 29, 31 (1976) ("It is a basic principle of law that ... election statutes are mandatory and must be strictly complied with.").

Here, substantial compliance is insufficient. Where the legislature uses terms such as "shall contain" or "shall include," such terms are *mandatory* and, pursuant to the general rule, must be strictly applied:

> R.C. 3509.03 specifies that although an absentee-ballot application need not be in any particular form, it "*shall contain*" certain items, including a "statement that the person requesting the ballots is a qualified elector." R.C. 3509.03(G). *"[T]he settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election*

> *provision expressly states that it is.*" ... R.C. 3509.03 demands strict compliance insofar as absentee-ballot applications *must contain* the specified information.
>
> [Myles, 2008-Ohio-5097, ¶ 18 (emphasis added).]

See also State ex rel. Esch v. Lake County Board of Elections, 61 Ohio St. 3d 595, 596 (1991) (election statute with "shall contain" language set forth mandatory requirements, to be strictly applied).

Accordingly, the language of R.C. 3505.183(B)(1) is mandatory, and it expressly recognizes the *voter's* obligation to include both her name and signature on the provisional ballot application affirmation. In the absence of either or both of the required items, the Board of Elections *"shall not"* open the provisional ballot envelope or count the provisional ballot. This statutory language could not be clearer, and when *strictly applied* as it must be, such language is dispositive of Relators' claims in this case.

Secretary Brunner, as Ohio's chief elections official, has a *duty* to act and instruct the Board consistent with this mandatory statute. In instructing—indeed, mandating through her tie-breaking votes—the Board to count provisional ballots where the ballot affirmation does not contain both the voter's name and signature in the correct place, Secretary Brunner failed to fulfill her duty to strictly apply the plain and unambiguous language of R.C. 3505.183. As a result, under Stokes, she now has a clear legal duty to correct her error.

C. Secretary Brunner's Arguments To the Contrary Are Unavailing.

PROPOSITION OF LAW NO. 5: The General Assembly's Use Of Mandatory Language Divested Secretary Brunner Of Any "Discretion" To Interpret R.C. 3505.183.

To date, Secretary Brunner has advanced an assortment of arguments to support her attempt to circumvent the clear command of the General Assembly. Presumably these same arguments will be raised once again in her briefing before this Court. Accordingly, Relators address each in turn.

Let's begin with perhaps the most basic. Secretary Brunner does not have the discretion to "interpret" the mandatory provisions of R.C. 3505.183 to effectuate a rewrite of them. Where an elections statute, such as R.C. 3505.183, contains mandatory language, the rule of strict construction precludes the need to resort to public policy considerations and it divests an elected state official of any discretion to "interpret" the statute's plain terms. Rather, Secretary Brunner is obligated to apply the statute's "plain language," and no deference whatsoever is due her interpretations, irrespective of whether such interpretation is embodied in a directive, email, manual, or otherwise. See, e.g., Stokes, 2008-Ohio-5392, ¶ 29 ("[W]e need not defer to the secretary of state's interpretation because it ... fails to apply the plain language" of the statute.); Myles, 2008-Ohio-5097, ¶ 26 (same).

In short, just as it is not the province of a court to rewrite a plain and unambiguous statute, it also is not the province of an elected Secretary of State to do so.

PROPOSITION OF LAW NO. 6: Federal Court Consent Orders, To Which Relators Are Not Parties, Do Not And Cannot Override The Clear Mandate Of R.C. 3505.183.

Furthermore, just as Secretary Brunner cannot unilaterally rewrite the Ohio statutes, any private settlements she struck on the eve of the election and memorialized in consent orders likewise do not trump the mandatory prohibitions imposed on the Secretary of State by the Ohio General Assembly. Nor do they afford Secretary Brunner the means she seeks to rewrite the statutes, as she would now, in the middle of the counting of ballots, purportedly on the basis of complying with consent orders.

Citing consent orders entered by the Southern District of Ohio in a consolidated action involving the Northeast Ohio Coalition for the Homeless ("NEOCH"), Secretary Brunner has, however, advanced this mantra throughout these proceedings. Yet, these consent orders afford her no defense and, indeed, are completely irrelevant to this Court's determination.

First, as the Sixth Circuit expressly recognized, private settlements struck by Secretary Brunner with "putatively opposed parties" on the eve of the election and memorialized in consent orders cannot trump the mandatory prohibitions imposed on the Secretary of State by the Ohio General Assembly. Skaggs, 2008 WL 4984973, *8. Indeed, such agreements, if they are valid at all, are not binding on Relators, who were not parties to the NEOCH case. Rather, "the decrees represent a settlement agreement between the parties to the [NEOCH] case and thus cannot control the outcome of a case involving different parties, *much less insulate a question of Ohio law from review by the one court with a final say over its meaning*." Id. at *7 (emphasis added); see also id. (the

consent orders "have *no* direct bearing on the merits of this lawsuit because they merely reflect an agreement among parties to a different suit") (emphasis in original).

As the Sixth Circuit commented:

> Congress's most recent handiwork concerning provisional ballots, the Help America Vote Act of 2002 ... leaves no doubt which lawmaking body—the federal or state governments—has plenary authority over the counting of provisional ballots. It "conspicuously leaves ... to the States" the determination of "whether a provisional ballot will be counted as a valid ballot," ... *To allow federal courts free rein in determining whether and under what circumstances a partially deficient provisional ballot will count—under state law—would deprive state courts of their long-established role as the "final arbiter on matters of state law,"* ... *If all it takes to transform purely state-law questions into a substantial issue of federal law—sufficient to end state courts' supremacy in interpreting their own statutes—is the agreement of two putatively opposed parties and one federal judge incorporating an interpretation of that law into a consent decree, it is hard to imagine any state-law matter lying outside a federal court's reach.*
>
> [Skaggs, 2008 WL 4984973, at *8 (emphasis added).]

The rule described in Skaggs is hardly unique. Federal courts have consistently held that a "consent judgment" entered into by a state entity or subdivision in federal court "*lack[s] the power to supersede . . . [a state] statute*." City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007) (emphasis added). In other words, a state entity or subdivision may not consent to a judgment that is inconsistent with its statutory obligations. Thus, in City of Warren, the court held: "To the extent that Mich. Comp. Laws § 123.141(2) restricts Detroit's authority to set water rates, *Detroit could not consent to an inconsistent judgment.*" Id. (emphasis added).

The Seventh Circuit emphasized this in Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995): "While parties can settle their litigation with consent decrees, *they cannot agree to 'disregard valid state laws*...." Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995) (emphasis in original) (quoting People Who Care v. Rockford Bd. of Ed. Sch. Dist. No. 205, 961 F.2d 1335, 1337 (7th Cir. 1992)). In Perkins, the court held a proposed consent decree involving the City of Chicago Heights invalid where the parties' proposed agreement would have contradicted an Illinois statute. Id. at 215. In so holding, the court recognized that parties "cannot consent to do something that they lack the power to do individually," including the modification of state statutory requirements. Id. at 216. Specifically, the court noted:

> [S]ome rules of law are designed to limit the authority of public officeholders .... They may chafe at these restraints and seek to evade them, but they may not do so by agreeing to do something state law forbids.
>
> [Id. at 216.][6]

Likewise, in Kasper v. Bd. of Election Comm'rs. of the City of Chicago, 814 F.2d 332 (7th Cir. 1987), the parties filed a proposed consent decree that would have made several changes to the statutory scheme for canvassing invalid voter registrations. The district court rejected the consent decree and the Seventh Circuit affirmed the denial, explaining that the consent decree would require the Board of Election Commissioners to violate state law:

> When it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all, *the*

---

[6] Perkins recognized a limited exception to the general rule, in noting that a federal court may enter a consent order that conflicts with a state statute *only* "upon properly supported findings that such a remedy is *necessary* to rectify a *violation of federal law*." Perkins, 47 F.3d at 216 (emphasis in original). No such findings are found in the Southern District of Ohio's consent orders; rather, such orders were entered pursuant to the "agreement" of the parties.

> *court may not readily approve a decree that contemplates a violation of law.* The Board may not "consent" to a higher budget or a new organic statute. Its Commissioners could not consent to be free of the threat of removal by the circuit court; it is equally outside the power of the Board to agree to violate state law in other ways. Because a consent decree's force comes from an agreement rather than positive law, the decree depends on the parties' authority to give assent. . . . *A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them.*

[Id. at 341-42 (emphasis added) (citations omitted).]

Second, even if such voluntary agreements had some effect, Secretary Brunner lacked the authority to consent to an order requiring the counting of votes which, by statute, are ineligible under Ohio law. It has long been held that an act by a public officer that is directly contrary to a mandatory statute is void. Board of Ed. of New Concord Sch. Dist. v. Best, 52 Ohio St. 138, 151-52 (1894) ("Mandatory statutes are imperative, and must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void."). Secretary Brunner's authority does not extend beyond "such powers and duties relating to . . . the conduct of elections as are prescribed in Title XXXV [35] of the Revised Code." R.C. 3501.04. Such rights do not include the authority to "self-legislate." Necessarily then, Secretary Brunner lacked the authority to agree to any consent order that requires action directly contrary to the mandatory dictates of R.C. 3505.183(B)(1)(a) and (4)(a)(iii). To the degree she purported to do so, her consent is illegal and void. 15 O Jur. 3d Civil Servants § 378 ("A failure to follow a mandatory provision [such as that in R.C. 3505.183(B)(1)(a)] renders [Secretary Brunner's] act to which it relates illegal and void."]).

Finally, we add that the NEOCH consent orders do not contradict the mandate of R.C. 3505.183. As the Sixth Circuit recognized, the first consent order at issue, entered by the District Court on October 27, 2008, resulted in the Secretary's issuance of Directive 2008-101, which simply laid "out general state-wide rules for boards of elections to apply in determining how to count provisional ballots." Skaggs, 2008 WL 4894973, at *3. Such directive "merely restates Ohio law *without offering any elaboration on how it would apply to the ballot-counting problem presented in this case*." Id. at *8 (emphasis added). The second consent order, entered on October 27, 2008, resulted in the issuance of Directive 2008-103, and provided only that provisional ballots may not be rejected for reasons that are attributable to poll worker error. Such order "did not purport to define what constitutes poll worker error." Id. at *3. Rather, Directive 2008-103 "says nothing at all about what constitutes poll-worker error under state (or federal) law, much less about whether a voter's failure to sign a provisional ballot application or include one's name on it constitutes poll-worker error." Id. at *8.

In short, these federal consent orders do not purport to define poll worker or voter duties in completing the required provisional ballot affirmation. R.C. 3505.183(B) does, and it places the obligation to complete the required information *squarely on the voter*: A provisional ballot envelope "*shall not be opened*, and the ballot *shall not be counted* ... [where] [t]he *individual* did not provide *all of the information required under division (B)(1) of this section* in the affirmation that the individual executed at the time the individual cast the provisional ballot." R.C. 3505.183(B)(4)(a)(iii). Because the plain and unambiguous language of this statute places the obligation on the voter, federal consent orders relating to poll worker error are simply irrelevant to the Court's statutory

analysis. Skaggs, 2008 WL 4984973, at *8 ("[T]he interpretation of these consent decrees will not resolve this dispute ... because the decrees offer no specific guidance about how to resolve these disputes, other than by reciting or paraphrasing the relevant language of the state laws . . . .").

PROPOSITION OF LAW NO. 7: R.C. 3505.181 Does Not Impose a Duty on Poll Workers To Assure A Voter Complies With The Mandatory Requirements of R.C. 3505.183.

Secretary Brunner has also sought to circumvent the flat prohibition against counting incomplete provisional ballots under R.C. 3505.183 by arguing that R.C. 3505.181(B)(2) should somehow be read to impose a duty on poll workers to confirm the completeness of the application before signing it themselves. Even if poll worker error were somehow pertinent to this Court's consideration (and it is not),[7] the Secretary's attempt to manufacture a poll worker duty that somehow trumps the plain language of R.C. 3505.183 fails to get past the plain language of R.C. 3505.181. It reads, in pertinent parts:

> An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows:
>
> * * *
>
> (2) The individual shall be permitted to cast a provisional ballot at that polling place *upon the execution of a written affirmation* by the individual *before an election official* at that polling place stating that the individual is both of the following:
>
> (a) A registered voter in the jurisdiction in which the individual desires to vote;

[7] Given the inapplicability of the NEOCH consent orders in this case, the issue of poll worker error is irrelevant, because nothing in the Ohio statutes at issue establishes poll worker error as an exception to the mandatory requirements set forth in R.C. 3505.183(B)(1)(a) and (4)(a)(iii).

(b) Eligible to vote in that election.

[R.C. 3505.181 (emphasis added.]

Of course, nothing in this language imposes a duty on a poll worker to verify or otherwise check to ensure that a provisional ballot voter has fulfilled his or her obligations in completing the provisional ballot application affirmation. Indeed, the express wording of the statute doesn't even expressly direct the poll worker to provide a verification; it merely mandates how the voter executes her anti-fraud affirmation. Yet Secretary Brunner's requested re-write would result in the following newly minted legislation:

> The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official, who shall ensure that the voter correctly writes his or her name on and executes the affirmation in the appropriate place.

But that is not what the statute says. And, as this Court has recognized, the Court's duty is enforce the law "as written." State v. Lowe, 112 Ohio St. 3d 507, 509 (2007).

PROPOSITION OF LAW NO. 8: R.C. 3505.181(B)(2) Cannot Be Construed To Impose An Implied Duty On Ohio's Poll Workers That The Legislature Did Not Expressly Impose.

Nor, in an effort to turn every provisional vote defect into a so-called "poll worker error," may some "implied" duty be imposed upon poll workers to check, or to become the guarantor of, every provisional ballot application. Such a contention runs headlong into multiple hornbook propositions of statutory construction. *First*, obviously a statute is to be enforced according to its plain terms. Courts may not delete words used or insert words not used in a statute. Columbia Gas Transmission Corp. v. Levin, 117 Ohio St. 3d

122, 125 (2008). Indeed, a proffered statutory construction must be rejected where such construction could have been conveyed by "very simple and concise language," which the legislature did not employ. See State ex rel. Darby v. Hadaway, 113 Ohio St. 658 (1925). If it "would have been simple" for the legislature to use certain, clear language, and if the legislature chose not to, it must have "had some different meaning in mind." State ex rel. Pickrel v. Industrial Commission, 1988 WL 35809, *2 (10th Dist. March 24, 1988) (ADD-18).

Thus, R.C. 3505.181(B)(1) may not be extended by implication beyond the clear import of the words it contains. See, e.g., United States v. Stewart, 311 U.S. 60 (1940). It does not impose *any* duty on a poll worker. Rather, it merely says a voter must cast a provisional ballot "*before* an election official" at the polling place. (Emphasis added.) The statute prescribes conduct by a voter; it does not mandate conduct of a poll worker. As such, R.C. 3505.181(B)(2) cannot be extended by implication beyond the clear import of its words as the Secretary seeks.

Second, it is equally well settled that where the legislature uses specific language in one statutory provision, its failure to use the same language in another provision must be deemed intentional. Thus, where the General Assembly uses clear language in one portion of a statute or act, but excludes it from another, "it must be assumed that [the exclusion] was so intended by the law-making body." State v. Johnson, 97 N.E.2d 54, 55 (2d Dist. 1950). See also O'Toole v. Denihan, 118 Ohio St. 3d 374, 383-84 (2008) ("[i]f the legislature had wanted agencies to immediately cross-report to law enforcement, it could have explicitly so stated, just as it did" in a related provision).

Here, when the Ohio legislature seeks to create mandatory obligations, it knows how to do so, as reflected in its use of terms such as "shall" and "require" in instructing county boards of election as to their duties under R.C. 3505.183(B). In fact, the legislature expressly utilized such mandatory language in identifying poll worker duties in *other portions of R.C. 3505.181*. In R.C. 3505.181(B)(6), for example, the legislature expressly imposed certain obligations on poll workers as they relate to voter identification requirements, which are distinct from the affirmation required of the voter in R.C. 3505.181(B)(2). In doing so, the legislature used the same mandatory language found in R.C. 3505.183(B)(1):

> If, at the time that an individual casts a provisional ballot, the individual provides identification in the form of a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address, or provides the last four digits of the individual's social security number, or executes an affirmation that the elector does not have any of those forms of identification or the last four digits of the individual's social security number because the individual does not have a social security number, or declines to execute such an affirmation, *the appropriate local election official **shall** record the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section.* If the individual declines to execute such an affirmation, *the appropriate local election official **shall** record the individual's name*

> and include that information with the transmission of the ballot under division (B)(3) of this section.
>
> [R.C. 3505.181(B)(6) (emphasis added).]

This express language, contained in another part of R.C. 3505.181, clearly reveals that when the legislature seeks to impose mandatory duties on poll workers, with respect to provisional ballots, it knows how to do so. *However, it did not use such language in R.C. 3505.181(B)(2).* And, thus, the legislature did not intend to impose a duty on poll workers to make sure that voters correctly complete the provisional ballot affirmation required thereunder.[8]

Finally, it has been long the rule in Ohio that "[w]here under one possible construction [such as that the Secretary proposes] two statutes would appear to be irreconcilable, but under another possible construction they would not, the construction will be adopted which harmonizes the statutes and gives effect to each." Franklin Township v. Village of Marble Cliff, 4 Ohio App. 3d 213, 217 (10th Dist. 1982). Accord: Benjamin v. Ernst & Young, LLP, 2007 WL 2325812, *4-5 (10th Dist. Aug. 16, 2007) (ADD-20) (citing Franklin Township and adopting construction of R.C. 3903.04 in a manner which "also allows R.C. Chapter 2743 to be fully effective")). This maxim of statutory interpretation is equally applicable to the construction of Ohio's Election Laws. See Zweber v. Montgomery County Board of Elections, 2002 WL 857857, *3 (2d Dist. April 25, 2002) ("A well-recognized principle of statutory construction requires us to construe two seemingly conflicting statutes, when possible, to give effect to both. ... In

---

[8] These same basic principles of statutory construction also defeat any argument that the "substantial compliance" language contained in R.C. 3505.182 of the Ohio Revised Code, which relates only to the form of the provisional ballot application, should also apply to R.C. 3505.183(B). Clearly, under the canons of construction discussed above, the substantial compliance language in one statute cannot be read into R.C. 3505.183(B)(1), which contains *mandatory* language, as expressly recognized by this Court. Had the General Assembly intended to include a substantial compliance element in R.C. 3505.183(B), it knew how to do so.

accordance with these principles, the trial court properly construed R.C. 3501.01(F) and R.C. 3517.01(A) in the only way that avoids an irreconcilable conflict and gives effect to both provisions as written.").

Here, a construction of R.C. 3505.181(B)(2) that, on the basis of "poll worker error", would require the counting of all provisional ballots, *even where the voter fails to complete the required affirmation information*, would make R.C. 3505.181(B)(2) directly irreconcilable with the mandatory language of R.C. 3505.183(B)(1)(a) and (4)(a)(iii). In other words, a construction of R.C. 3505.181(B)(2) that requires the counting of provisional ballots even where the affirmation does not contain *a name and signature* would directly conflict with R.C. 3505.183(B)(1)(a) and (4)(a)(iii), which provide, unequivocally, that *no such ballots are to be counted*. As such, the Court is bound to construe R.C. 3505.181 to avoid the irreconcilable conflict Secretary Brunner's proffered construction would create (again, assuming the federal consent orders were otherwise applicable).

PROPOSITION OF LAW NO. 9: Assuming, Arguendo, That R.C. 3505.181(B)(2) Imposed An Implied Duty On Ohio's Poll Workers To Assure Voter Compliance With R.C. 3505.183, R.C. 3505.181 Does Not Override R.C. 3505.183.

Nevertheless, even if a duty could be implied on poll workers under R.C. 3505.181 to assure the completion of every provisional ballot, defective provisional ballots missing the voter's name *and* signature still would not be eligible to be counted. Simply put, the specific provisions of R.C. 3505.183 prevail over the general provisions of R.C. 3505.181.

Both Sections were adopted as part of the same legislation. [2006 H.B. 3.] The General Assembly established "procedures" for casting provisional ballots in R.C.

3505.181, and then established the rules for counting—and rejecting—provisional ballots in R.C. 3505.183. When it comes to determining eligibility for a provisional ballot to be *counted*, R.C. 3505.183 is applicable—and R.C. 3505.181's procedures for casting a provisional ballot are not. That is, R.C. 3505.183 is a special statute that contains specific mandatory requirements that the General Assembly imposes on the eligibility of any provisional ballot to be counted, while R.C. 3505.181 imposes no such specific mandatory obligations. As such, R.C. 3505.183 is the more specific and controlling statute.

It is, of course, a basic proposition of statutory construction that a specific provision trumps a general provision. Thus, as in Andrianos v. Community Traction Co., 155 Ohio St. 47, syllabus ¶1 (1951), the specific provision mandating the eligibility of provisional ballots to be counted was "controlling over a [more] general statutory provision," [such as R.C. 3505.181], that "might otherwise be applicable." See also Exemption of Real Property From Taxation v. County of Franklin, 167 Ohio St. 256, 261 (1958) ("a special statutory provision which relates to the specific subject matter involved in litigation [here R.C. 3505.183] is controlling over a general statutory provision [here R.C. 3505.181] which might otherwise be applicable").

The plain and unambiguous language of R.C. 3505.183(B) makes clear that, except where a voter expressly *declines* to execute an affirmation, a provisional ballot *shall not* be counted where the required affirmation does not include *both* the provisional voter's name *and* signature. No provision is made for poll worker error in this *mandatory* provision.

PROPOSITION OF LAW NO. 10: The Declination Exception of R.C. 3505.183 Cannot Be Construed to Render The Statute a Nullity.

R.C. 3505.183(B)(1) does permit a voter to "decline to execute . . . an affirmation" for religious reasons or otherwise, and thus, on its face, the statute creates a limited exception for the "name and signature" requirement where the voter specifically declines. Secretary Brunner, of course, would have the Court twist this language to completely eliminate the signature requirement.

The statute reads just the opposite.

> . . . If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; *otherwise, the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted*:
>
> (b) *The individual's name and signature*;
>
> [Ohio Rev. Code § 3505.183(B)(1) (emphasis added).]

Thus, if a voter "declines" (as opposed to "fails") to execute the affirmation, first either the voter or an election official must note the voter's name pursuant to R.C. 3503.183(B)(1), and, second, "the election official shall record . . . the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot." Ohio Rev. Code § 3505.181(B)(6). Here, of course, there is no evidence that any of the disputed provisional ballots involve an affirmative declination by the voter to sign. In fact, those ballots (if any) falling within this limited exceptions are not at issue.

Rather, the provisional ballots at issue here are simply defective; that is why Secretary Brunner has sought to compare a decision by a voter to "decline" to execute the affirmation with a "refusal" to do so. But if the voter fails to sign the affirmation but does not "decline" to do so as indicated by the poll worker's notation on the ballot envelope, R.C. 3505.183(B)(1) expressly states the name and signatures are required, and absent this information, the ballot cannot be counted: *"otherwise, the following information shall be included . . . the individual's name and signature."*

As such, Secretary Brunner is wrong in suggesting that ballots without signatures are the functional equivalent to ballots on which the provisional voter's declination is noted. Indeed, if accepted, Secretary Brunner's argument would render the "signature" requirement of R.C. 3505.183 a complete nullity inasmuch as every defective ballot missing a signature would somehow be transformed into a declination. This would then become the proverbial case of the exception (no signature required if voter declines and so noted) swallowing the rule (name and signature required).

C. No Federal Law Issues Are Implicated.

The Ohio Democratic Party has intervened and filed an answer asserting, as affirmative defenses, purported federal issues. Presumably, these are the same arguments it advanced, as an amicus, before the Sixth Circuit. If so, each of these theories was similar in one significant respect: the lack of any factual or case law support for the argument advanced. At least before the Sixth Circuit, the Ohio Democratic party interjected a series of issues and offered conclusions, but precious little analysis, if any, was provided. Thus, for example, Section 1971 of the Voting Rights Act of 1964 is claimed to have been implicated, even though the Sixth Circuit has held that no private

cause of action exists. McKay v. Thompson, 226 F.3d 752 (6th Cir. 2000). Otherwise, it is difficult to speculate as to the basis for the intervenor's arguments, other than that the Ohio Democratic party, generally, objects to the requirements established by the General Assembly for the consideration and counting of provisional ballots—a choice, again, specifically vested in it by Congress under the Help America Vote Act.[9]

CONCLUSION

For these reasons, the Court should issue a writ of mandamus or such other relief: (1) compelling Ohio Secretary of State Jennifer Brunner to correct her office's erroneous instruction to the Franklin County Board of Elections, based on an erroneous interpretation of R.C. 3505.183(B)(1)(a) and (B)(4)(a)(iii), and compelling her to advise the county boards of elections that any Provisional Ballot Application cast in the November 4, 2008 election must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted; and (2) compelling the Secretary of State and the Franklin County Board of Election to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter affirmation as required by R.C. 3505.183(B)(1)(a) and (B)(4)(a)(iii).

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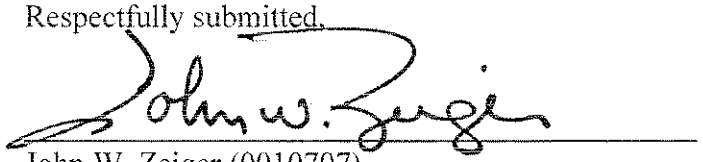
[9] On Wednesday, November 26, the Plaintiff in Northeast Ohio Coalition for the Homeless ("NEOCH") v. Brunner, Case No. C2-06-896, United States District Court for the Southern District of Ohio, filed a "Motion to Enforce" the October 27, 2008 Consent Order. NEOCH seeks an order "directing Defendant Brunner to vote in favor of counting the Disputed Ballots" (i.e., those involved in this case). Motion at 11. Should Respondent Brunner use the NEOCH motion to claim she is caught in a catch-22 between the unambiguous prohibitions of R.C. 3505.183(B) and the federal consent order, she is simply wrong. First, the Sixth Circuit, as explained at pages 17-22, has already held that the consent order cannot be determinative of the issues before this Court. Second, the relief requested in the NEOCH motion is moot: Respondent Brunner already voted "in favor of counting the Disputed Ballots." And, since the Sixth Circuit has already ruled that this Court is the "final arbiter" of these issues (subject only to an appeal to the Supreme Court of the United States), Opinion at 7 and 9, no "catch-22" can exist.

Respectfully submitted,



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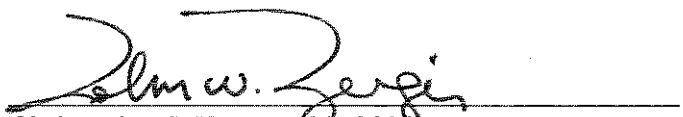

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ADDENDUM

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§ 15482. Provisional voting and voting information requirements

(a) Provisional voting requirements

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is—

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

(5)

(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

States described in section 1973gg-2 (b) of this title may meet the requirements of this subsection using voter registration procedures established under applicable State law. The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.

(b) Voting information requirements

(1) Public posting on election day

The appropriate State or local election official shall cause voting information to be publicly posted at each polling place on the day of each election for Federal office.

(2) Voting information defined

In this section, the term "voting information" means—

(A) a sample version of the ballot that will be used for that election;

(B) information regarding the date of the election and the hours during which polling places will be open;

(C) instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;

(D) instructions for mail-in registrants and first-time voters under section 15483 (b) of this title;

(E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and

(F) general information on Federal and State laws regarding prohibitions on acts of fraud and misrepresentation.

(c) Voters who vote after the polls close

Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a) of this section. Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.

(d) Effective date for provisional voting and voting information

Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2004.

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C

Effective: October 29, 2002

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 146. Election Administration Improvement
Subchapter I. Payments to States for Election Administration Improvements and Replacement of Punch Card and Lever Voting Machines

§ 15301. Payments to States for activities to improve administration of elections

(a) In general

Not later than 45 days after October 29, 2002, the Administrator of General Services (in this subchapter referred to as the "Administrator") shall establish a program under which the Administrator shall make a payment to each State in which the chief executive officer of the State, or designee, in consultation and coordination with the chief State election official, notifies the Administrator not later than 6 months after October 29, 2002 that the State intends to use the payment in accordance with this section.

(b) Use of payment

(1) In general

A State shall use the funds provided under a payment made under this section to carry out one or more of the following activities:

(A) Complying with the requirements under subchapter III of this chapter.

(B) Improving the administration of elections for Federal office.

(C) Educating voters concerning voting procedures, voting rights, and voting technology.

(D) Training election officials, poll workers, and election volunteers.

(E) Developing the State plan for requirements payments to be submitted under subpart 1 of part D of subchapter II of this chapter.

(F) Improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes.

(G) Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.

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(H) Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.

(2) Limitation

A State may not use the funds provided under a payment made under this section--

(A) to pay costs associated with any litigation, except to the extent that such costs otherwise constitute permitted uses of a payment under this section; or

(B) for the payment of any judgment.

(c) Use of funds to be consistent with other laws and requirements

In order to receive a payment under the program under this section, the State shall provide the Administrator with certifications that--

(1) the State will use the funds provided under the payment in a manner that is consistent with each of the laws described in section 15545 of this title, as such laws relate to the provisions of this Act; and

(2) the proposed uses of the funds are not inconsistent with the requirements of subchapter III of this chapter.

(d) Amount of payment

(1) In general

Subject to section 15303(b) of this title, the amount of payment made to a State under this section shall be the minimum payment amount described in paragraph (2) plus the voting age population proportion amount described in paragraph (3).

(2) Minimum payment amount

The minimum payment amount described in this paragraph is--

(A) in the case of any of the several States or the District of Columbia, one-half of 1 percent of the aggregate amount made available for payments under this section; and

(B) in the case of the Commonwealth of Puerto Rico, Guam, American Samoa, or the United States Virgin Islands, one-tenth of 1 percent of such aggregate amount.

(3) Voting age population proportion amount

The voting age population proportion amount described in this paragraph is the product of--

(A) the aggregate amount made available for payments under this section minus the total of all of the minimum payment amounts determined under paragraph (2); and

(B) the voting age population proportion for the State (as defined in paragraph (4)).

(4) Voting age population proportion defined

The term "voting age population proportion" means, with respect to a State, the amount equal to the quotient of--

(A) the voting age population of the State (as reported in the most recent decennial census); and

(B) the total voting age population of all States (as reported in the most recent decennial census).

CREDIT(S)

(Pub.L. 107-252, Title I, § 101, Oct. 29, 2002, 116 Stat. 1668.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2002 Acts. House Report No. 107-329(Part I), see 2002 U.S. Code Cong. and Adm. News, p. 1086.

References in Text

This subchapter, referred to in text, originally read "this title'', meaning Title I of Pub.L. 107-252, Title I, § 101 et seq., Oct. 29, 2002, 116 Stat. 1668, which enacted this subchapter.

Subchapter III of this chapter, referred to in text, originally read "title III", meaning Title III of Pub.L. 107-252, Title III, § 301 et seq., Oct. 29, 2002, 116 Stat. 1704, which enacted subchapter III of this chapter, 42 U.S.C.A. § 15481 et seq., and amended 42 U.S.C.A. § 405.

Subpart 1 of part D of subchapter II of this chapter, referred to in text, originally read "part 1 of subtitle D of title II", meaning Pub.L. 107-252, Title II, Subtitle D, Part 1, § 251 et seq., Oct. 29, 2002, 116 Stat. 1692, which enacted subpart 1 of part D of subchapter II of this chapter, 42 U.S.C.A. § 15401 et seq.

This Act, referred to in subsec. (c)(1), is the Help America Vote Act of 2002, Pub.L. 107-252, Oct. 29, 2002, 116 Stat. 1666, which enacted this chapter and chapter 1526 of Title 36 (36 U.S.C.A. §§ 152601 to 152612), amended 2 U.S.C.A. § 438, 5 U.S.C.A. §§ 3132 and 7323, 5 U.S.C.A. App. § 8G, 10 U.S.C.A. § 1566, and 42 U.S.C.A. §§ 405, 1973ff, 1973ff-1, 1973ff-3, 1973gg-6 and 1973gg-7, and enacted provisions set out as notes under 5 U.S.C.A. App. § 8G, and 42 U.S.C.A. §§ 1973ff-1 and 1973ff-3.

Short Title

2002 Acts. Pub.L. 107-252, § 1(a), Oct. 29, 2002, 116 Stat. 1666, provided that: "This Act [enacting this chapter and chapter 1526 of Title 36 (36 U.S.C.A. §§ 152601 to 152612), amending 2 U.S.C.A. § 438, 5 U.S.C.A. §§ 3132 and 7323, 5 U.S.C.A. App. § 8G, 10 U.S.C.A. § 1566, and 42 U.S.C.A. §§ 405, 1973ff, 1973ff-1, 1973ff-3, 1973gg-6 and 1973gg-7, and enacting provisions set out as notes under 5 U.S.C.A. App. § 8G, and 42 U.S.C.A. §§ 1973ff-1 and 1973ff-3] may be cited as the 'Help America Vote Act of 2002'."

LAW REVIEW COMMENTARIES

3505.181 Eligibility to cast provisional ballot - procedure.

(A) All of the following individuals shall be permitted to cast a provisional ballot at an election:

(1) An individual who declares that the individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote;

(2) An individual who has a social security number and provides to the election officials the last four digits of the individual's social security number as permitted by division (A)(2) of section 3505.18 of the Revised Code;

(3) An individual who has but is unable to provide to the election officials any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code and who has a social security number but is unable to provide the last four digits of the individual's social security number as permitted under division (A)(2) of that section;

(4) An individual who does not have any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code, who cannot provide the last four digits of the individual's social security number under division (A)(2) of that section because the individual does not have a social security number, and who has executed an affirmation as permitted under division (A)(4) of that section;

(5) An individual whose name in the poll list or signature pollbook has been marked under section 3509.09 or 3511.13 of the Revised Code as having requested an absent voter's ballot or an armed service absent voter's ballot for that election and who appears to vote at the polling place;

(6) An individual whose notification of registration has been returned undelivered to the board of elections and whose name in the official registration list and in the poll list or signature pollbook has been marked under division (C)(2) of section 3503.19 of the Revised Code;

(7) An individual who is challenged under section 3505.20 of the Revised Code and the election officials determine that the person is ineligible to vote or are unable to determine the person's eligibility to vote;

(8) An individual whose application or challenge hearing has been postponed until after the day of the election under division (D)(1) of section 3503.24 of the Revised Code;

(9) An individual who changes the individual's name and remains within the precinct, moves from one precinct to another within a county, moves from one precinct to another and changes the individual's name, or moves from one county to another within the state, and completes and signs the required forms and statements under division (B) or (C) of section 3503.16 of the Revised Code;

(10) An individual whose signature, in the opinion of the precinct officers under section 3505.22 of the Revised Code, is not that of the person who signed that name in the registration forms;

(11) An individual who is challenged under section 3513.20 of the Revised Code who refuses to make the statement required under that section, who a majority of the precinct officials find lacks any of the qualifications to make the individual a qualified elector, or who a majority of the precinct officials find is not

affiliated with or a member of the political party whose ballot the individual desires to vote;

(12) An individual who does not have any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code, who cannot provide the last four digits of the individual's social security number under division (A)(2) of that section because the person does not have a social security number, and who declines to execute an affirmation as permitted under division (A)(4) of that section;

(13) An individual who has but declines to provide to the precinct election officials any of the forms of identification required under division (A)(1) of section 3501.18 of the Revised Code or who has a social security number but declines to provide to the precinct election officials the last four digits of the individual's social security number.

(B) An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is both of the following:

(a) A registered voter in the jurisdiction in which the individual desires to vote;

(b) Eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual, the voter information contained in the written affirmation executed by the individual under division (B)(2) of this section, or the individual's name if the individual declines to execute such an affirmation to an appropriate local election official for verification under division (B)(4) of this section.

(4) If the appropriate local election official to whom the ballot or voter or address information is transmitted under division (B)(3) of this section determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election.

(5)(a) At the time that an individual casts a provisional ballot, the appropriate local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under division (B)(5)(b) of this section whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(b) The appropriate state or local election official shall establish a free access system, in the form of a toll-free telephone number, that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted. The free access system established under this division also shall provide to an individual whose provisional ballot was not counted information explaining how that individual may contact the board of elections to register to vote or to resolve problems with the individual's voter registration.

The appropriate state or local election official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under this division. Access to information about an individual ballot shall be restricted to the individual who cast the ballot.

(6) If, at the time that an individual casts a provisional ballot, the individual provides identification in the form of a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address, or provides the last four digits of the individual's social security number, or executes an affirmation that the elector does not have any of those forms of identification or the last four digits of the individual's social security number because the individual does not have a social security number, or declines to execute such an affirmation, the appropriate local election official shall record the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section.

(7) If an individual casts a provisional ballot pursuant to division (A)(3), (7), (8), (12), or (13) of this section, the election official shall indicate, on the provisional ballot verification statement required under section 3505.182 of the Revised Code, that the individual is required to provide additional information to the board of elections or that an application or challenge hearing has been postponed with respect to the individual, such that additional information is required for the board of elections to determine the eligibility of the individual who cast the provisional ballot.

(8) During the ten days after the day of an election, an individual who casts a provisional ballot pursuant to division (A)(3), (7), (12), or (13) of this section shall appear at the office of the board of elections and provide to the board any additional information necessary to determine the eligibility of the individual who cast the provisional ballot.

(a) For a provisional ballot cast pursuant to division (A)(3), (12), or (13) of this section to be eligible to be counted, the individual who cast that ballot, within ten days after the day of the election, shall do any of the following:

(i) Provide to the board of elections proof of the individual's identity in the form of a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address;

(ii) Provide to the board of elections the last four digits of the individual's social security number;

(iii) In the case of a provisional ballot executed pursuant to division (A)(12) of this section, execute an affirmation as permitted under division (A)(4) of section 3505.18 of the Revised Code.

(b) For a provisional ballot cast pursuant to division (A)(7) of this section to be eligible to be counted, the individual who cast that ballot, within ten days after the day of that election, shall provide to the board of elections any identification or other documentation required to be provided by the applicable challenge questions asked of that individual under section 3505.20 of the Revised Code.

(C)(1) If an individual declares that the individual is eligible to vote in a jurisdiction other than the jurisdiction in which the individual desires to vote, or if, upon review of the precinct voting location guide using the residential street address provided by the individual, an election official at the polling place at which the individual desires to vote determines that the individual is not eligible to vote in that jurisdiction, the election official shall direct the individual to the polling place for the jurisdiction 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 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.

(2) If the individual refuses to travel to the polling place for the correct jurisdiction or to the office of the board of elections to cast a ballot, the individual shall be permitted to vote a provisional ballot at that jurisdiction in accordance with division (B) of this section. If any of the following apply, the provisional ballot cast by that individual shall not be opened or counted:

(a) The individual is not properly registered in that jurisdiction.

(b) The individual is not eligible to vote in that election in that jurisdiction.

(c) The individual's eligibility to vote in that jurisdiction in that election cannot be established upon examination of the records on file with the board of elections.

(D) The appropriate local election official shall cause voting information to be publicly posted at each polling place on the day of each election.

(E) As used in this section and sections 3505.182 and 3505.183 of the Revised Code:

(1) "Jurisdiction" means the precinct in which a person is a legally qualified elector.

(2) "Precinct voting location guide" means either of the following:

(a) An electronic or paper record that lists the correct jurisdiction and polling place for either each specific residential street address in the county or the range of residential street addresses located in each neighborhood block in the county;

(b) Any other method that a board of elections creates that allows a precinct election official or any elector who is at a polling place in that county to determine the correct jurisdiction and polling place of any qualified elector who resides in the county.

(3) "Voting information" means all of the following:

(a) A sample version of the ballot that will be used for that election;

(b) Information regarding the date of the election and the hours during which polling places will be open;

(c) Instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;

(d) Instructions for mail-in registrants and first-time voters under applicable federal and state laws;

(e) General information on voting rights under applicable federal and state laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated;

(f) General information on federal and state laws regarding prohibitions against acts of fraud and misrepresentation.

Effective Date: 05-02-2006; 2008 HB562 09-22-2008

3505.182 Provisional ballot affirmation -- verification.

Each individual who casts a provisional ballot under section 3505.181 of the Revised Code shall execute a written affirmation. The form of the written affirmation shall be printed upon the face of the provisional ballot envelope and shall be substantially as follows:

"Provisional Ballot Affirmation

STATE OF OHIO

I, ... (Name of provisional voter), solemnly swear or affirm that I am a registered voter in the jurisdiction in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot.

I understand that, if the above-provided information is not fully completed and correct, if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, or if the board of elections determines that I have already voted in this election, my provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution.

I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief.

.....

(Signature of Voter)

.....

(Voter's date of birth)

The last four digits of the voter's social security number

.....

(To be provided if the voter is unable to provide a current and valid photo identification, a military identification , or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the voter's name and current address but is able to provide these last four digits)

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

Additional Information For Determining Ballot Validity

(May be completed at voter's discretion)

Voter's current address:

.....

Voter's former address if photo identification does not contain voter's current address

Voter's driver's license number or, if not provided above, the last four digits of voter's social security number

.....

(Please circle number type)

(Voter may attach a copy of any of the following for identification purposes: a current and valid photo identification, a military identification , or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the voter's name and current address.)

Reason for voting provisional ballot (Check one):

..... Requested, but did not receive, absent voter's ballot

..... Other

Verification Statement

(To be completed by election official)

The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this ..... day of ..... (Month), ... (Year).

(If applicable, the election official must check the following true statement concerning additional information needed to determine the eligibility of the provisional voter.)

..... The provisional voter is required to provide additional information to the board of elections.

..... An application or challenge hearing regarding this voter has been postponed until after the election.

(The election official must check the following true statement concerning identification provided by the provisional voter, if any.)

..... The provisional voter provided a current and valid photo identification.

..... The provisional voter provided a current valid photo identification, other than a driver's license or a state identification card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.

..... The provisional voter provided a military identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address.

..... The provisional voter provided the last four digits of the voter's social security number.

..... The provisional voter is not able to provide a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does have one of these forms of identification. The provisional voter must provide one of the foregoing items of identification to the board of elections within ten days after the election.

..... The provisional voter is not able to provide a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does have one of these forms of identification. Additionally, the provisional voter does have a social security number but is not able to provide the last four digits of the voter's social security number before voting. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

..... The provisional voter does not have a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or a social security number, but has executed an affirmation.

..... The provisional voter does not have a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or a social security number, and has declined to execute an affirmation.

..... The provisional voter declined to provide a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or the last four digits of the voter's social security number but does have one of these forms of identification or a social security number. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

(Signature of Election Official)"

In addition to any information required to be included on the written affirmation, an individual casting a provisional ballot may provide additional information to the election official to assist the board of elections in determining the individual's eligibility to vote in that election, including the date and location at which the individual registered to vote, if known.

If the individual declines to execute the affirmation, an appropriate local election official shall comply with division (B)(6) of section 3505.181 of the Revised Code.

Effective Date: 05-02-2006; 2008 HB562 09-22-2008

3505.183 Testing and counting of provisional ballots - rejection.

(A) When the ballot boxes are delivered to the board of elections from the precincts, the board shall separate the provisional ballot envelopes from the rest of the ballots. Teams of employees of the board consisting of one member of each major political party shall place the sealed provisional ballot envelopes in a secure location within the office of the board. The sealed provisional ballot envelopes shall remain in that secure location until the validity of those ballots is determined under division (B) of this section. While the provisional ballot is stored in that secure location, and prior to the counting of the provisional ballots, if the board receives information regarding the validity of a specific provisional ballot under division (B) of this section, the board may note, on the sealed provisional ballot envelope for that ballot, whether the ballot is valid and entitled to be counted.

(B)(1) To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; otherwise, the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

(a) The individual's name and signature;

(b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted;

(c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

(2) In addition to the information required to be included in an affirmation under division (B)(1) of this section, in determining whether a provisional ballot is valid and entitled to be counted, the board also shall examine any additional information for determining ballot validity provided by the provisional voter on the affirmation, provided by the provisional voter to an election official under section 3505.182 of the Revised Code, or provided to the board of elections during the ten days after the day of the election under division (B)(8) of section 3505.181 of the Revised Code, to assist the board in determining the individual's eligibility to vote.

(3) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that all of the following apply, the provisional ballot envelope shall be opened, and the ballot shall be placed in a ballot box to be counted:

(a) The individual named on the affirmation is properly registered to vote.

(b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot.

(c) The individual provided all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.

(d) If applicable, the individual provided any additional information required under division (B)(8) of section 3505.181 of the Revised Code within ten days after the day of the election.

(e) If applicable, the hearing conducted under division (B) of section 3503.24 of the Revised Code after the day of the election resulted in the individual's inclusion in the official registration list.

(4)(a) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that any of the following applies, the provisional ballot envelope shall not be opened, and the ballot shall not be counted:

(i) The individual named on the affirmation is not qualified or is not properly registered to vote.

(ii) The individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot.

(iii) The individual did not provide all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.

(iv) The individual has already cast a ballot for the election in which the individual cast the provisional ballot.

(v) If applicable, the individual did not provide any additional information required under division (B)(8) of section 3505.181 of the Revised Code within ten days after the day of the election.

(vi) If applicable, the hearing conducted under division (B) of section 3503.24 of the Revised Code after the day of the election did not result in the individual's inclusion in the official registration list.

(vii) The individual failed to provide a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address, or the last four digits of the individual's social security number or to execute an affirmation under division (A) of section 3505.18 or division (B) of section 3505.181 of the Revised Code.

(b) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board is unable to determine either of the following, the provisional ballot envelope shall not be opened, and the ballot shall not be counted:

(i) Whether the individual named on the affirmation is qualified or properly registered to vote;

(ii) Whether the individual named on the affirmation is eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot.

(C)(1) For each provisional ballot rejected under division (B)(4) of this section, the board shall record the

name of the provisional voter who cast the ballot, the identification number of the provisional ballot envelope, the names of the election officials who determined the validity of that ballot, the date and time that the determination was made, and the reason that the ballot was not counted.

(2) Provisional ballots that are rejected under division (B)(4) of this section shall not be counted but shall be preserved in their provisional ballot envelopes unopened until the time provided by section 3505.31 of the Revised Code for the destruction of all other ballots used at the election for which ballots were provided, at which time they shall be destroyed.

(D) Provisional ballots that the board determines are eligible to be counted under division (B)(3) of this section shall be counted in the same manner as provided for other ballots under section 3505.27 of the Revised Code. No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election. Observers, as provided in section 3505.21 of the Revised Code, may be present at all times that the board is determining the eligibility of provisional ballots to be counted and counting those provisional ballots determined to be eligible. No person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot.

(E)(1) Except as otherwise provided in division (E)(2) of this section, nothing in this section shall prevent a board of elections from examining provisional ballot affirmations and additional information under divisions (B)(1) and (2) of this section to determine the eligibility of provisional ballots to be counted during the ten days after the day of an election.

(2) A board of elections shall not examine the provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section of any provisional ballot for which an election official has indicated under division (B)(7) of section 3505.181 of the Revised Code that additional information is required for the board of elections to determine the eligibility of the individual who cast that provisional ballot until the individual provides any information required under division (B)(8) of section 3505.181 of the Revised Code, until any hearing required to be conducted under section 3503.24 of the Revised Code with regard to the provisional voter is held, or until the eleventh day after the day of the election, whichever is earlier.

Effective Date: 05-02-2006; 2008 HB562 09-22-2008

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
STATE, ex rel. Mary PICKREL, Relator,
v.
INDUSTRIAL COMMISSION of Ohio, James Mayfield, Administrator, Bureau of Workers' Compensation, and Rockwell Standard Company, Respondents.
No. 86AP-736.

March 24, 1988.

On Objections to Referee's Report in Mandamus.

James E. Buchan, Jr., for relator.
Anthony J. Celebrezze, Jr., Attorney General, Helen M. Ninos and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

OPINION

WHITESIDE, Presiding Judge.
*1 This original action in mandamus, pursuant to Civ.R. 53, was referred to a referee who has rendered a report recommending that the requested writ of mandamus be denied. Relator has filed objections to the referee's report contending that the referee misapplied and misconstrued R.C. 4123.59.

After a review of the evidence and the applicable law, we find that the referee correctly found the salient facts and applied the applicable law thereto. Accordingly, we approve and adopt the findings of fact of the referee.

Relator contends that, pursuant to R.C. 4123.59, she is entitled to receive death benefits at the maximum rate of $275 per week because of the death of her spouse as a result of an industrial injury while employed with respondent Rockwell Standard Company. The respondent Industrial Commission found that relator is entitled to death benefits in the amount of only $137.50 per week.

On the date of his death, relator's deceased spouse was receiving permanent total disability compensation because of his industrial injury, having been found to be permanently and totally disabled some nineteen years earlier. Relator's claim for death benefits as a wholly dependent surviving spouse was allowed, but the amount of such benefit was fixed at $137.50 per week. R.C. 4123.59 provides in pertinent part that:

"In case an injury to * * * an employee causes his death, benefits shall be in the amount and to the persons following:

" * * *

"(B) If there are wholly dependent persons at the time of the death, the weekly payments shall be sixty-six and two-thirds per cent of the average weekly wage, but not to exceed a maximum aggregate amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not in any event less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, regardless of the average weekly wage; * * * provided that when any claimant is receiving total disability compensation at the time of death the wholly dependent person shall be eligible for the maximum compensation provided for in this section. * * * "

Although the referee's report turns in part upon a distinction between entitlement and eligibility in re-

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liance upon a former decision of this court in *State, ex rel. Zupp, v. City of Youngstown Fire Dept.* (Oct. 14, 1986), No. 85AP-425, unreported (1986 Opinions 2763), there is an additional predicate for such conclusion. Under the contention made by relator, a surviving dependent would be entitled to the maximum possible compensation in every case where the decedent was receiving total disability compensation (without apparent distinction between temporary and permanent), at the time of his death. However, reading the provisions of R.C. 4123.59(B) to reach a logical result, the weekly payment shall be sixty-six and two-thirds percent of the average weekly wage of the decedent, with a minimum and a maximum provision, namely, the minimum amount being fifty percent of the statewide average weekly wage, and the maximum amount being the statewide average weekly wage. (There is another provision applicable only to injuries received after January 1, 1976, which has no application herein.)

We disagree with relator's construction of the words "maximum compensation provided for in this section." Relator contends that the maximum amount of compensation provided for in this section is the statewide average weekly wage. Even though, pursuant to R.C. 4123.95, the provisions of R.C. 4123.59(B) must be liberally construed in favor of claimants, we do not find that such liberal construction requires the result contended by relator. The words "the maximum compensation provided for in this section" is sixty-six and two-thirds percent of the average weekly wage of the decedent but in no event less than one-half of the statewide average weekly wage. The words "not to exceed a maximum aggregate amount of weekly compensation which is equal to sixty-six and two-thirds percent of the statewide average weekly wage" is a ceiling and in that sense a maximum beyond which no compensation may be made. Such ceiling is reached and is applicable only if the decedent's average weekly wage exceeds the statewide average. However, had the legislature intended to apply the statewide average provision as the amount dependents are entitled, it could have simply stated that the wholly dependent person would be eligible to receive sixty-six and two-thirds percent of the statewide average weekly wage.

*2 Relator further contends that the amount should be the actual statewide average weekly wage since the maximum amount payable under the section would be that amount with respect to injuries which occurred after January 1, 1976. We find no such legislative intent. Rather, had the legislature so intended, it would have been simple for the legislature to have provided that the wholly dependent person shall be eligible for payment of compensation equal to the statewide average weekly wage. Since the legislature chose not to use such language but, instead, used the words "maximum compensation," we must conclude that the legislature had some different meaning in mind. That apparent meaning is the amount determined by application of the statutory formula. Additionally, this court considered and determined the issue in *Zupp, supra,* and there is no reason for this court at this time to reach an opposite conclusion.

Accordingly, for the foregoing reasons, we approve and adopt the referee's report as supplemented herein as that of the court and deny the requested writ of mandamus.

Writ denied.

STRAUSBAUGH and BRYANT, JJ., concur.
Ohio App.,1988.
State ex rel. Pickrel v. Industrial Com'n
Not Reported in N.E.2d, 1988 WL 35809 (Ohio App. 10 Dist.)

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Slip Copy, 2007 WL 2325812 (Ohio App. 10 Dist.), 2007 -Ohio- 4176
(Cite as: 2007 WL 2325812 (Ohio App. 10 Dist.))

H
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
Ann H. Womer BENJAMIN, etc., Plaintiff-Appellee,
v.
ERNST & YOUNG, LLP, Defendant-Appellee,
Foley & Lardner et al., Defendants/Third-Party Plaintiffs-Appellants,
v.
Ohio Department of Insurance, Third-Party Defendant-Appellee.
Ann H. Womer Benjamin, etc., Plaintiff-Appellee,
v.
Ernst & Young, LLP, Defendant-Appellant,
Foley & Lardner et al., Defendants/Third-Party Plaintiffs-Appellees,
v.
Ohio Department of Insurance, Third-Party Defendant-Appellee/Cross-Appellant.
Nos. 06AP-1244, 06AP-1245.

Decided Aug. 16, 2007.

Appeals from the Ohio Court of Claims.

Kegler, Brown, Hill & Ritter Co., LPA, Melvin D. Weinstein, Richard W. Schuermann, Jr. and Charles R. Dyas, Jr., for plaintiff.
Squire, Sanders & Dempsey, LLP, John R. Gall and Aneca E. Lasley; Mayer, Brown, Rowe & Maw, LLP, and Stanley J. Parzen, for Ernst & Young, LLP.
Zeiger, Tigges & Little, LLP, John W. Zeiger and Stuart G. Parsell, for Foley & Lardner and Michael H. Woolever.
Marc Dann, Attorney General, Karl W. Schedler and Lawrence D. Pratt, for Ohio Department of Insurance.

BRYANT, J.
*1 {¶ 1} Appellants/third-party plaintiffs, Foley & Lardner and Michael Woolever, as well as appellant, Ernst & Young, LLP (collectively, "appellants"), appeal from a judgment of the Ohio Court of Claims granting the motion to dismiss of appellee/thirdparty defendant, the Ohio Department of Insurance ("ODI"). Because the Court of Claims improperly granted ODI's motion to dismiss, we reverse.

{¶ 2} In her capacity as Liquidator for American Chambers Life Insurance Company ("ACLIC"), Ann H. Womer Benjamin, Superintendent of the Ohio Department of Insurance ("superintendent"), commenced this action in the Franklin County Court of Common Pleas against (1) Ernst & Young, LLP ("E & Y"), and (2) Foley & Lardner and Michael J. Woolever (collectively, "Foley"). E & Y is an accounting firm that audited ACLIC's financial statements prior to the delinquency proceedings that resulted in the liquidation of ACLIC; Foley & Lardner is a law firm that represented ACLIC prior to liquidation; and Woolever was a partner at Foley & Lardner. The superintendent's complaint alleged appellants not only negligently performed services for ACLIC, but also breached their fiduciary duty to ACLIC. The superintendent sought recovery of payments ACLIC made to appellants.

{¶ 3} In response to the superintendent's complaint, E & Y filed a motion to dismiss or to compel arbitration; the trial court has not ruled on the motion. Foley, however, filed an answer setting forth affirmative defenses, counterclaims against ODI, and a motion to transfer the action to the Ohio Court of Claims. On transfer to the Ohio Court of Claims, the superintendent filed a motion to dismiss Foley's counterclaims and to strike its affirmative defenses. The Court of Claims granted the motion to dismiss and returned the action to the Franklin County Court of Common Pleas. Both E & Y and Foley filed notices of appeal that were consolidated in this court.

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{¶ 4} The superintendent and Foley subsequently partially settled the superintendent's claims against Foley, and Foley dismissed its appeal. Concluding E & Y had standing to appeal, this court affirmed the judgment of the Court of Claims that dismissed Foley's counterclaims. In affirming, we determined the superintendent may act in two separate capacities: regulator and liquidator. While Foley's counterclaims asserted claims against the superintendent as regulator, the superintendent filed the action against appellants in her separate capacity as liquidator. Accordingly, we concluded a counterclaim was not an available means to bring Foley's claims against the superintendent as regulator. *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App.3d 350, 2006-Ohio-2739.

{¶ 5} While the appeal was pending, Foley filed both a third-party complaint in the Franklin County Court of Common Pleas seeking money damages against ODI and a petition that removed the entire action to the Court of Claims. Due to a partial settlement, parts of the third-party complaint were dismissed with prejudice; only Foley's third-party claim seeking contribution from ODI remains. ODI filed a motion to dismiss the third-party complaint pursuant to Civ.R. 12(B)(1) and (6) and, alternatively, a motion to sever. After the appeal was resolved, the Court of Claims granted ODI's motion to dismiss the third-party complaint. In the absence of an extant claim against the state, the Court of Claims returned the action to the Franklin County Court of Common Pleas.

*2 {¶ 6} Both Foley and E & Y filed appeals, again consolidated in this court, assigning the following error:

The Court of Claims committed reversible error in dismissing the Third Party Complaint, filed by Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance for lack of subject matter jurisdiction, and remanding the case to the Franklin County Court of Common Pleas.

ODI filed a cross-appeal, assigning the following errors:

1. To the extent that the Court of Claims erred in concluding that R.C. 3903.04 divested the court of subject matter jurisdiction over the Third-Party Complaint filed by Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance, the complaint should have instead been dismissed for failure to state a claim upon which relief could be granted under Sections 3903.01 to 3903.59 of the Revised Code.

2. To the extent that the Court of Claims erred in concluding that R.C. 3903.04 applied to the Third-Party Complaint filed by the Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance, the complaint should have instead been dismissed under the discretionary function immunity doctrine.

3. To the extent the Court of Claims erred in concluding that R.C. 3903.04 applied to the Third-Party Complaint filed by Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance, the complaint should have instead been dismissed due to the failure of F & Y to plead the existence of a special duty/special relationship on the part of ODI.

{¶ 7} In their single assignment of error, appellants contend the Court of Claims erred in concluding that R.C. 3903.04 vests the Franklin County Court of Common Pleas with exclusive jurisdiction over Foley's third-party complaint against ODI. In reviewing the Court of Claims' judgment dismissing Foley's third-party complaint pursuant to Civ.R. 12(B)(1), we must determine whether the third-party complaint states "any cause of action cognizable by the forum * * *." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80.

{¶ 8} R.C. 3903.04(A) provides that "[n]o delinquency proceeding shall be commenced under this chapter by anyone other than the superintendent of insurance of this state. No court has jurisdiction to

entertain, hear, or determine any delinquency proceeding commenced by any other person."As used in the statute, delinquency proceeding "means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving the insurer, and any summary proceeding under section 3903.09 or 3903.10 of the Revised Code."R.C. 3903.01. R.C. 3903.04(A) thus determines, for purposes of this action, who may institute delinquency proceedings under R.C. 3903.04 to liquidate ACLIC: the superintendent of insurance.

*3 {¶ 9} R.C. 3903.04(B) states that "[n]o court of this state has jurisdiction to entertain, hear, or determine" the superintendent's complaint praying for the liquidation of ACLIC or praying for a temporary "restraining order, preliminary injunction, or permanent injunction, *or other relief preliminary to, incidental to, or relating to delinquency proceedings* other than in accordance with sections 3903.01 to 3903.59 of the Revised Code."(Emphasis added.) R.C. 3903.04(E) specifies that "[a]ll actions authorized in sections 3903.01 to 3903.59 of the Revised Code shall be brought in the court of common pleas of Franklin County."Based on the italicized language in R.C. 3903.04(B), ODI argues that because the claim in Foley's third-party complaint "arises directly from, is incidental to, or is related to delinquency proceedings,"R.C. 3903.04 mandates exclusive jurisdiction in the Franklin County Court of Common Pleas.

{¶ 10} A proper third-party complaint arises from the transaction or occurrence that is the subject matter of the primary claim. As the Supreme Court of Ohio explained, "[t]he transaction or occurrence which forms the subject matter of the primary claim must be the same transaction or occurrence that gives rise to legal rights in the defendant against the third-party defendant. If the claim asserted in the third-party complaint does not arise because of the primary claim, or is in some way derivative of it, then such claim is not properly asserted in a third-party complaint," *State ex rel. Jacobs v. Municipal Court* (1972), 30 Ohio St.2d 239, 242.Thus, ODI argues, the third-party complaint necessarily is "preliminary to, incidental to, or related to delinquency proceedings."

{¶ 11} ODI's argument invokes one possible interpretation of R.C. 3903.04(B): only the Franklin County Common Pleas Court has jurisdiction to determine a request for "relief preliminary to, incidental to, or relating to delinquency proceedings."Indeed, it is one we cannot summarily reject as bearing no relation to the language of the statute. The interpretation ODI suggests, however, results in insulating ODI from possible negligence in the performance of its duties as regulator for the insurance industry and, in particular, ACLIC. Specifically, under ODI's proposed interpretation, Foley would be required to initiate the third-party complaint in the Franklin County Common Pleas Court. The same court, however, lacks jurisdiction to hear the third-party complaint because the third-party defendant, ODI, is subject to suit for money damages only in the Court of Claims. See R.C. 2743.03(A)(1) (stating that "[t]he court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code"); *Boggs v. State* (1983), 8 Ohio St .3d 15.

{¶ 12} By statute, the superintendent as liquidator is immune under R.C. 3903.24 from civil actions, but nowhere has the legislature expressed an intent that ODI be immune for negligent actions taken in pursuit of its regulatory function. As a result, although ODI posits a possible interpretation of R.C. 3903.04(B), ODI's interpretation directly contradicts the provisions of R.C. Chapter 2743 that permit the state to be held liable in money damages.

*4 {¶ 13} Accordingly, we necessarily examine the language of R.C. 3903.04(B) to determine whether it lends itself to any other interpretation consistent with the authority granted in R.C. Chapter 2743 to sue the state for money damages. In that context, we must resolve whether R.C. 3903.04 requires Fo-

ley's third-party complaint to be adjudicated in the Franklin County Court of Common Pleas. See *Franklin Township v. Village of Marble Cliff* (1982), 4 Ohio App.3d 213, 217 (stating "[i]t is a fundamental rule of statutory construction that, where under one possible construction two statutes would appear to be irreconcilable, but under another possible construction they would not, the construction will be adopted which harmonizes the statutes and gives effect to each").

{¶ 14} Appellants urge that R.C. 3903.04(B) does not apply to Foley's third-party claim because the third-party complaint does not seek "relief preliminary to, incidental to, or relating to delinquency proceedings."Appellants base their interpretation of R.C. 3903.04(B) on the statutory language that a "delinquency proceeding" is a proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving the insurer. From that premise, appellants contend R.C. 3903.04(B) addresses only a complaint seeking relief in the form of dissolution, liquidation, rehabilitation, or other relief the superintendent institutes against or on behalf of an insurer. Because Foley's third-party complaint seeks monetary damages from a third party non-insurer, appellants assert R.C. 3903.04 does not apply to Foley's claim.

{¶ 15} R.C. 3903.04(B) lends itself to the interpretation appellants suggest. While R.C. 3903.04(A) defines *who* may commence delinquency proceedings, R.C. 3903.04(B) addresses *where* the superintendent must commence those proceedings and any related litigation. Pursuant to such interpretation, R.C. 3903.04(B), combined with R.C. 3903.04(E), states that the delinquency proceedings the superintendent commences, including "any other relief preliminary to, incidental to, or relating to delinquency proceedings" that she initiates, are to be filed in the Franklin County Common Pleas Court. Under that interpretation, the statute does not address where Foley's third-party complaint must be filed.

{¶ 16} Interpreting R.C. 3903.04(B) to state only where the superintendent must commence delinquency proceedings and related actions not only preserves the positive effects of ODI's interpretation, but has other corollary results. Specifically, it provides the superintendent a defense to suggestions that the superintendent's action is more appropriately venued elsewhere. Secondly, it preserves the legislative intent that the superintendent's complaint for liquidation, as well as any related matters she may initiate, are litigated in, and under the supervision of, one court. In that regard, third-party complaints do not directly affect the rehabilitation, dissolution or liquidation of the subject insurance company. Rather, they address whether the defendant subject of the superintendent's complaint in the related action can recover any portion of the assessed damages from a third party, a matter of little or no consequence to the superintendent. Nor can Foley's third-party complaint be used as leverage in the superintendent's action against appellants, as the superintendent there is acting as liquidator, not as the regulator who oversees the third-party defendant, ODI.

*5 {¶ 17} Significantly, appellants' interpretation also allows R.C. Chapter 2743 to be fully effective. Because R.C. 3903.04(B) does not govern Foley's third-party complaint, the Court of Claims may (1) sever the third-party complaint from the superintendent's complaint, (2) return the complaint to the common pleas court for further proceedings, (3) stay the third-party complaint, and (4) hear it in the Court of Claims following the conclusion of the action against Foley in the common pleas court. At that time, if appropriate under the result reached in resolving the complaint against Foley in the common pleas court, the Court of Claims may determine whether ODI is liable in damages to Foley.

{¶ 18} ODI's cross-assignments of error present other arguments supporting the dismissal of Foley's third-party complaint. The Court of Claims, however, did not address any of ODI's other arguments because it dismissed the third-party complaint for lack of subject matter jurisdiction. Since the Court of Claims did not consider ODI's argu-

ments, we decline to address them in the first instance. Once the litigation in the common pleas court is concluded and the stay of the third-party complaint is lifted, the Court of Claims initially will need to address ODI's other contentions regarding dismissal.

{¶ 19} For the foregoing reasons, appellants' assignment of error is sustained; we decline to address ODI's cross-assignments of error at this time. We remand this matter to the Court of Claims with instructions to sever Foley's third-party complaint, to return the remainder of the action to the Franklin County Common Pleas Court, to stay the third-party complaint pending completion of the superintendent's action against Foley in the common pleas court, and, on conclusion of that action, to lift the stay, address ODI's other arguments supporting its motion to dismiss, and, as necessary, address the merits of the third-party complaint.

Judgment reversed and cause remanded with instructions.

BROWN and McGRATH, JJ., concur.
Ohio App. 10 Dist.,2007.
Benjamin v. Ernst & Young, L.L.P.
Slip Copy, 2007 WL 2325812 (Ohio App. 10 Dist.), 2007 -Ohio- 4176

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.
Debra M. ZWEBER, Plaintiff-Appellant,
v.
MONTGOMERY COUNTY BOARD OF ELECTIONS, et al., Defendants-Appellees.
No. 19305.

Decided April 25, 2002.

After trial court denied political candidate's request for declaratory and injunctive relief regarding county board of elections' and Secretary of State's refusal to recognize candidate's party and to place her name on the primary ballot as that party's candidate, candidate appealed. The Court of Appeals, Montgomery County, held that statute that designated a newly formed political party as a "minor political party" for not less than 12 months did not extend the life of a such party that was extinguished under another statute for failure to obtain a minimum percentage of votes in a general election.

Assignments of error overruled, judgment affirmed.

West Headnotes

[1] Elections 144 ⇐121(1)

144 Elections
144VI Nominations and Primary Elections
144k121 Party Organizations and Regula- tions
144k121(1) k. In General. Most Cited
Trial court properly concluded that first statute that provided that a newly formed political party shall be known as a "minor political party" until the time of first election for governor or president which occurs not less than 12 months after formation of party did not extend the life of a political party that was extinguished under other provision due to its failure to obtain five percent of votes in an election for governor or president; first statute merely designated new party as a minor party, and provided that such party may not elevate itself as an intermediate or major party until such election at which time party's status would be determined by percentage of election votes achieved. R.C. 3501.01(F), 3517.01(A).

[2] Statutes 361 ⇐223.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases
A well-recognized principle of statutory construction requires Court of Appeals to construe two seemingly conflicting statutes, when possible, to give effect to both.

[3] Statutes 361 ⇐223.2(1.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(1) Statutes That Are in Pari Materia
361k223.2(1.1) k. In General, Most Cited Cases
All statutes pertaining to the same general subject matter must be read in pari materia.

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Debra M. Zweber, Kettering, OH, plaintiff-appellant, pro se.
Victor Whisman, Atty Reg. # 0008033, Dayton, OH, for defendant-appellee Montgomery County Board of Elections.
Elizabeth Luper Schuster, Atty Reg. # 0068022, Assistant Attorney General, Chief Counsel's Staff, Columbus, OH, for defendant-appellee Ohio Secretary of State.

PER CURIAM.
*1 Debra M. Zweber appeals pro se from the trial court's denial of her request for declaratory and injunctive relief regarding her right to be placed on the May 7, 2002, primary ballot as a Libertarian Party candidate. In its April 1, 2002, ruling, the trial court held that the Montgomery County Board of Elections and the Ohio Secretary of State, the appellees herein, were not required to recognize the Libertarian Party as an existing political party in Ohio or to place Zweber's name on the upcoming primary ballot as a Libertarian Party candidate for the office of Montgomery County Commissioner. On appeal, Zweber argues that the Libertarian Party is a viable political party under Ohio law. As a result, she insists that the appellees are obligated to recognize the Libertarian Party and to place her name on the primary ballot as a candidate of that party.

The parties agree that resolution of Zweber's appeal requires an interpretation of Ohio election law, specifically R.C. 3501.01(F) and R.C. 3517.01(A), in light of stipulated facts. In her four assignments of error, Zweber argues that the trial court misinterpreted these two statutes and, as a result, erred in denying her request for declaratory and injunctive relief.[FN1] As a means of analysis, we first will set forth the stipulated facts upon which the trial court based its decision. We then will address the operation of R.C. 3501.01(F) and R.C. 3517.01(A) in the context of the stipulated facts.

> FN1. In her first assignment of error, Zweber contends that "[t]he trial court erred in holding that Ohio Revised Code § 3501.01(F) only classifies political parties into categories."In her second assignment of error, Zweber argues that "[t]he trial court erred in holding that Ohio Revised Code § 3517.01(A) is the exclusive statute for the determination of the formation and existence of a political party."In her third assignment of error, Zweber claims "[t]he trial court erred in denying the request for declaratory judgment."In her final assignment of error, she contends "[t]he trial court erred in denying the request for injunctive relief."*See* Appellant's Brief at 5.

I. Stipulated Facts

The Libertarian Party qualified as a political party on November 8, 1999, having filed on that date with the Ohio Secretary of State at least the requisite number of signatures required to become a newly formed political party under Ohio law. Many people filed declarations of candidacy throughout the state for nomination to various federal and state offices in the March 7, 2000, primary election as candidates of the Libertarian Party and were so designated on the ballot. The Libertarian Party also ran joint candidates for president and vice president in the general election on November 7, 2000. Those candidates received 13,475 votes, which is 0.3% of the total votes cast at that election. This election occurred less than twelve months after the qualification of the Libertarian Party as a newly formed political party under Ohio law.

On February 5, 2002, the Secretary of State sent all County Boards of Elections Directive 2002-02, reminding them that the Democrat and Republican Parties are the only two parties recognized in Ohio at this time. The Directive further stated that: "No declaration of candidacy or nominating petition should be certified by board members as a valid petition if it seeks to nominate a person as a candidate of a political party that is not recognized in Ohio."

Zweber filed her Declaration of Candidacy and Petition for the nomination of the Libertarian Party for

Montgomery County Commissioner with the Montgomery County Board of Elections on February 11, 2002. On February 27, 2002, the Montgomery County Board of Elections decided not to certify Zweber's Declaration of Candidacy and Petition for the nomination of the Libertarian Party for Montgomery County Commissioner. This decision was based solely on the finding of the Montgomery County Board of Elections, in concurrence with Secretary of State Directive 2002-02, that the Libertarian Party is not a recognized political party in Ohio at this time. The Montgomery County Board of Elections indicated that the petition otherwise would have been certified.

II. Analysis

*2 [1] As noted above, resolution of Zweber's appeal requires us to interpret R.C. 3501.01(F) and R.C. 3517.01(A) in the context of the foregoing stipulated facts. Section 3501.01(F) provides that the phrase "political party" means "any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party."[FN2]With one exception that will be discussed *infra,* it then divides "political parties" into three categories, depending upon the votes a party's candidate received in the last election for president or governor. Specifically, R.C. 3501.01(F) reads as follows:

> FN2. We will discuss these requirements *infra* in our analysis of R.C. 3517.01.

> (1) "Major political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received no less than twenty per cent of the total vote cast for such office at the most recent regular state election.
>
> (2) "Intermediate political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received less than twenty per cent but not less than ten per cent of the total vote cast for such office at the most recent regular state election.
>
> (3) "Minor political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received less than ten per cent but not less than five per cent of the total vote cast for such office at the most recent regular state election or which has filed with the secretary of state, subsequent to any election in which it received less than five per cent of such vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote cast for such office in the last preceding regular state election, *except that a newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president.*
>
> R.C. 3501.01(F)(1), (2) and (3) (emphasis added).

The other relevant portion of Ohio election law, R.C. 3517.01(A), sets forth the requirements for formation and continuation as a political party. It provides as follows:

> (A) A political party within the meaning of Title XXXV [35] of the Revised Code is any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office *or* that filed with the secretary of state, subsequent to any election in which it received less than five per cent of that vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of

> organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing....*If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.*

*3 R.C. 3517.01(A) (emphasis added).

The parties' stipulated facts indicate that the Libertarian Party became a recognized political party in Ohio on November 8, 1999, under the second method set forth in R.C. 3517.01(A). On that date, a group of voters made the requisite filing with the Secretary of State. Thereafter, Libertarian Party candidates participated in both the March 7, 2000, primary election and the November 7, 2000, general election, which occurred just less than twelve months after the Libertarian Party's formation in Ohio. Although the Libertarian Party garnered only 0.3% of the votes cast in the November 7, 2000, general election, Zweber argues that it remains in existence today as a "minor political party." In support, she relies on the last sentence of R.C. 3501.01(F)(3), which, as noted above, provides "that a newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president."Because the November 7, 2000, general election *did occur* less than twelve months subsequent to the formation of the Libertarian Party, Zweber insists that the party remains viable, notwithstanding R.C. 3517.01(A), which states that "[i]f any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party."Not surprisingly, the appellees rely on section 3517.01(A) to argue that the Libertarian Party ceased to exist on November 7, 2000, when it *did fail* to cast five per cent of the total vote in the general election held that day.

[2][3] Upon review, we find Zweber's argument to be unpersuasive, and we agree with the trial court's and the appellees' interpretation of the foregoing statutes. A well-recognized principle of statutory construction requires us to construe two seemingly conflicting statutes, when possible, to give effect to both. *See, e.g., Gahanna Jefferson Local School Dist. Bd. of Educ. v. Zaino* (2001), 93 Ohio St.3d 231, 234, 754 N.E.2d 789. We note too that "[a]ll statutes pertaining to the same general subject matter must be read *in pari materia.*" *Hughes v. Ohio Bur. of Motor Vehicles* (1997), 79 Ohio St.3d 305, 308, 681 N.E.2d 430. In accordance with these principles, the trial court properly construed R.C. 3501.01(F) and R.C. 3517.01(A) in the only way that avoids an irreconcilable conflict and gives effect to both provisions as written.

As noted above, R.C. 3501.01(F) provides that the phrase "political party" means "any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party."In turn, R.C. 3517.01(A) provides that a viable political party comes into existence upon the requisite filing with the Secretary of State. Notably, R.C. 3517.01(A) also provides that a political party "shall cease to be a political party" if it fails to receive five per cent of the total vote cast at an election for the office of governor or president. In our view, the Libertarian Party came into existence on November 8, 1999, when it made the requisite filing, and it ceased to be a political party on November 7, 2000, when it failed to receive five per cent of the vote in the general election held that day. This conclusion is consistent with the plain language of R.C. 3517.01(A).

*4 The foregoing conclusion also is easily reconcilable with the portion of R.C. 3501.01(F) upon which Zweber relies. As an initial matter, we note that section 3501.01(F) itself explicitly references the requirements for the formation and existence of a political party found in R.C. 3517.01(A). It then

categorizes existing political parties based on the per cent of the total vote their candidates received at the most recent general election. If a party's candidate received at least twenty per cent of the vote at such election, then it is a "major political party." If a party's candidate received at least ten per cent but less than twenty per cent of the total vote at such election, then it is an "intermediate political party." If a party's candidate received at least five per cent but less than ten per cent of the total vote at such election, then it is a "minor political party." R.C. 3501.01(F)(1), (2) and (3).

The portion of section 3501.01(F) upon which Zweber relies merely provides an exception to the foregoing categorization of political parties. It provides that "a newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president."Under this exception, the Libertarian Party would have remained a "minor political party" after the November 7, 2000, general election even if it had garnered one-hundred per cent of the vote that day. This is so because the November 7, 2000, general election occurred slightly less than twelve months subsequent to the formation of the Libertarian Party. In other words, under the exception cited by Zweber, a newly formed party *cannot* elevate itself to an "intermediate political party" or to a "major political party" until it performs sufficiently well in a general election held at least twelve months after its formation.

If the Libertarian Party had received at least five per cent of the total vote on November 7, 2000, it certainly would have remained a viable political party under R.C. 3517.01(A). It did not do so, however. As a result, under section 3517.01(A) it ceased to be a political party on that day. Construing the language of R.C. 3501.01(F) upon which Zweber relies to produce a contrary result would require section 3501.01(F) to "trump" section 3517.01(A), and it would bring the two statutes, as written, into irreconcilable conflict. We decline to adopt such a reading of Ohio election law, particularly when the two statutes may be reconciled in a way that gives effect to the plain language of both.[FN3]

> FN3. In her appellate brief, Zweber suggests that our interpretation of R.C. 3501.01(F) and R.C. 3517.01(A) unlawfully infringes on the First Amendment rights of individuals who wish to form a political party. She cites absolutely no legal authority, however, to support the proposition that our reading of the two statutes violates the Constitution.

In short, the trial court properly concluded that section 3501.01(F)(3)"does not extend the life of a political party which has been extinguished by § 3517.01(A)." Accordingly, the trial court properly denied Zweber's request for declaratory and injunctive relief regarding her right to be placed on the upcoming primary ballot as a Libertarian Party candidate. In light of this conclusion, we need not address the parties' alternative arguments regarding the doctrines of laches and estoppel.

III. Conclusion

*5 Based on the reasoning and citation of authority set forth above, we hereby OVERRULE Zweber's assignments of error and AFFIRM the judgment of the Montgomery County Court of Common Pleas.

WOLFF, PJ., BROGAN and FAIN, JJ., concur.
Ohio App. 2 Dist.,2002.
Zweber v. Montgomery County Bd. Of Elections
Not Reported in N.E.2d, 2002 WL 857857 (Ohio App. 2 Dist.), 2002 -Ohio- 2152

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File Name: 08a0427p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STATE OF OHIO, ex rel. DANA SKAGGS, et al.,
Relators-Appellants,

v.

JENNIFER L. BRUNNER, Secretary of the State of Ohio, et al.,
Defendants-Appellees.

No. 08-4585

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 08-01077—Algenon L. Marbley, District Judge.

Submitted: November 20, 2008

Decided and Filed: November 25, 2008

Before: KENNEDY, SUTTON, and McKEAGUE, Circuit Judges.

COUNSEL

ON BRIEF: John Wolcott Zeiger, Marion H. Little, Jr., Christopher J. Hogan, ZEIGER, TIGGES & LITTLE, Columbus, Ohio, for Appellants. Richard N. Coglianese, Aaron David Epstein, Damian W. Sikora, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, Patrick J. Piccininni, Anthony E. Palmer, Jr., PROSECUTING ATTORNEY'S OFFICE FOR THE COUNTY OF FRANKLIN, Columbus, Ohio, Caroline H. Gentry, PORTER, WRIGHT, MORRIS & ARTHUR, Dayton, Ohio, for Appellees. Meredith E.B. Bell-Platts, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Atlanta, Georgia, Carrie L. Davis, AMERICAN CIVIL LIBERTIES UNION OF OHIO, Cleveland, Ohio, Donald J. McTigue, Mark A. McGinnis, LAW OFFICE, LAW OFFICE, Columbus, Ohio, for Amici Curiae.

OPINION

PER CURIAM. On November 4, 2008, more than 27,000 voters in Franklin County cast provisional ballots in the various federal, state and local election contests. In reviewing those ballots, the Franklin County Board of Elections determined that roughly 1,000 of them have a potential defect: They do not contain the printed name or signature of the voter. That omission implicates two questions of state law. First, does Ohio law require a provisional ballot to include the name *and* signature of the voter in order to be eligible to be counted? *See* Ohio Rev. Code Ann.

§ 3505.183(B)(1). Second, if Ohio law contains such a requirement, should a ballot containing such a defect be counted anyway given Ohio's exemption for mistakes attributable to poll-worker error?

The Ohio Secretary of State, Jennifer Brunner, has taken the position that the 1,000 ballots comply with Ohio law. Claiming that Ohio law prevents some or all of these ballots from being counted, two Franklin County voters filed this action against the Secretary of State and the Board in the Ohio Supreme Court. The Secretary of State responded to the lawsuit by removing it to federal court. The claimants parried this thrust by filing a motion to remand the case back to the Ohio Supreme Court. The district court kept the case, holding that it had authority to resolve the dispute and that, under Ohio law, the ballots should be counted.

Before we can consider the district court's decision on the merits—do these ballots comply with Ohio law?—we must ask ourselves whether the federal courts have the power to resolve this dispute. The short answer is that we do not. In bringing this claim, the claimants relied solely on state law and disclaimed any reliance on federal law, stating that "[n]o federal law claims are asserted." Compl. ¶ 1. And in their request for relief, the claimants sought a writ of mandamus compelling the Secretary to comply with state law—a form of relief that only a state court, not a federal court, has the power to impose. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Combs v. Wilkinson*, 315 F.3d 548, 560 (6th Cir. 2002). That normally would end the matter. The federal and state courts traditionally allow claimants to be the masters of their own fate, permitting them to file a lawsuit in whichever court system they prefer and thus permitting them to choose for themselves which body will decide their case—so long as the court in which the case is filed has jurisdiction over their claim.

There are, however, at least two limits on a party's authority to pick its forum. If a party opts to file a complaint in the state court system, the defendant may remove it to federal court if it is one that originally could have been brought there—either because the parties are diverse or because the complaint seeks relief on the basis of federal law. And if a party files a complaint in federal court, the court on its own initiative or on the initiative of one of the parties may certify a pressing question of state law to the state supreme court. *See, e.g.*, R. Prac. Sup. Ct. Ohio XVIII § 1; *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir. 2008).

The claimants opted to file this case in state court, and no basis for removing the case to federal court exists. The diversity exception does not apply because, as will generally be the case, the parties to this election dispute all reside in the same State. And the federal-question exception does not apply because the claimants did not rely on federal law in bringing their claim and indeed expressly disclaimed relying on federal law. In her notice of removal, the Secretary claimed jurisdiction based on two consent decrees previously entered by the district court regarding provisional-voting issues. That the Secretary of State and the plaintiffs in *another* lawsuit have entered into a consent decree in federal court adopting their agreement about the meaning of these provisions does not change matters. A consent decree binds only the parties to the settlement agreement, not the rest of the world or for that matter today's claimants (who had no say in what the consent decree said). Otherwise, state officials and a willing claimant could enter into federal-court consent decrees embracing their preferred interpretation of a state law and forever prevent the final interpreter of state law—the state supreme court—from deciding what it means. That is not how our federal system typically decides what a state law means.

Even if the Secretary had authority to remove this action to federal court, we should point out, we likely would have sought the Ohio Supreme Court's input on the meaning of these state-law provisions—by certifying the questions to the Court to consider in the first instance. No federal court has the final say on what Ohio law means. Even a decision by the highest federal court, the United States Supreme Court, about the meaning of an Ohio law has no more binding authority on the Ohio Supreme Court than a decision of the Michigan Supreme Court or for that matter any other

court. The threshold question in this case is what Ohio law means. And the stakes of this dispute—one federal and two state legislative races—make it quite sensible, even aside from the intricacies of the removal doctrine, to find out what the ultimate arbiter of Ohio law has to say about the matter before, rather than after, the provisional-vote-counting process has been irreversibly conducted during this election season. For these reasons and those elaborated below, we vacate the district court's decision and remand the case to the Ohio Supreme Court to resolve the claimants' state-law causes of action.

I.

When individuals go to the polls on election day, they may be prohibited from casting an ordinary vote for any number of reasons—say, because their name does not appear on the official list of eligible voters for the polling place or because they did not bring an acceptable form of identification. *See* Ohio Rev. Code Ann. § 3505.18. Rather than allowing poll workers to turn these voters away, federal and Ohio law permit the voters to cast provisional ballots—votes that are not counted until the voter's registration and eligibility are confirmed. *See* 42 U.S.C. § 15482(a); Ohio Rev. Code Ann. § 3505.181(A). To make confirmation possible, Ohio law typically requires the voter to complete a provisional-ballot "affirmation," in which the voter attests that he is both registered and eligible to vote. Ohio Rev. Code Ann. § 3505.181(B)(2). The affirmation—a standard form printed on the face of the ballot envelope—contains blanks for the voter's printed name and signature among other things. *Id.* § 3505.182. After completing the affirmation "before the election official," the voter fills out the provisional ballot, seals it in the envelope and submits it to election officials. *Id.* § 3505.181(B).

Once the polls have closed on election day, precincts deliver the provisional ballots (along with all of the regularly cast ballots) to the county boards of elections, where the boards compare the information contained in the written affirmation with their own records to "determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election." *Id.* § 3505.183(B)(1). If the provisional-ballot voter completed an affirmation, the statute provides that his ballot is only "eligible to be counted" if his "name and signature" appear on the affirmation. *Id.* § 3505.183(B)(1)(a). If the provisional voter "decline[d] to execute" the affirmation, the voter's name, "written by either the individual or the election official at the direction of the individual," must be on the affirmation. *Id.* § 3505.183(B)(1).

Four developments form the backdrop to today's dispute. First, on March 31, 2008, a member of the Secretary of State's office responded to an inquiry from the Franklin County Board of Elections about the meaning of these provisions. He responded by saying that the "[n]ame AND signature are required" under §3505.183(B)(1)(a) in order for a ballot to be eligible to be counted, and the Board proceeded to interpret the provision on this basis. Compl., Ex. B at 2.

Second, in October 2008, shortly before election day, the United States District Court for the Southern District of Ohio entered two orders concerning provisional ballots in another case—one still pending from the 2006 election that presented federal constitutional challenges to Ohio's provisional-ballot and voter-identification laws. *See Northeast Ohio Coalition for the Homeless v. Brunner* (*Ohio Coalition for the Homeless*), No. 2:06-cv-896 (S.D. Ohio filed Oct. 24, 2006). (Apparently the case was still pending because the parties and the court had not resolved the claimants' request for attorney fees.) Shortly before election day, the parties in the case entered into a settlement, by which the Secretary agreed to issue a statewide interpretation of the provisional-voting laws—what became Directive 2008-101 and which lays out general state-wide rules for boards of elections to apply in determining how to count provisional ballots. On October 24 the district court, "[b]y agreement of the Plaintiffs and the Secretary of State," adopted Directive 2008-101 as an order of the court. Order at 1, *Ohio Coalition for the Homeless*, No. 2:06-cv-896 ("10/24 Order"). Soon thereafter, the parties to the same case reached a second agreement—that, consistent

with state law, provisional ballots should not be rejected if any defects in them were caused by poll-worker error. On October 27, in the aftermath of this agreement, the district court entered a second order directing the Secretary to tell the county boards of elections that provisional ballots should not be rejected due to poll-worker error, though the order did not purport to define what constitutes poll-worker error. Order at 2, *Ohio Coalition for the Homeless*, No. 2:06-cv-896 ("10/27 Order"). The Secretary then issued Directive 2008-103 along these lines.

Third, on election day, November 4, 2008, approximately 27,000 provisional ballots were cast in Franklin County, Ohio. Of those, around 1,000 are deficient in one of three ways: (1) the affirmation has a voter's signature but no printed name, (2) the affirmation has a printed name but no signature or (3) the affirmation has both a signature and printed name, but either one or both of those things are in the wrong location on the affirmation.

Fourth, two members of the Franklin County Board of Elections disagreed with two other members of the Board and the Secretary of State over whether to count these ballots. Citing the language of the relevant Ohio laws, the March 2008 guidance received from the Secretary's office and Directives 2008-101 and 2008-103, two Board members took the position that provisional ballots suffering from these deficiencies were not "eligible to be counted" under Ohio law. The Secretary and two other Board members took the position that the ballots should be counted as long as the Board could verify that "the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within 10 days." Compl., Ex. A at 7.

On November 13, 2008, two Franklin County voters, Dana Skaggs and Kyle Fannin, filed a complaint in the Ohio Supreme Court against the Secretary and the Board arguing that the deficient ballots could not be counted under Ohio law and seeking a writ of mandamus ordering the Secretary to direct the county boards of elections not to count provisional ballots where the written affirmation does not contain both a printed name and a signature in the correct place on the affirmation. Compl. at 15. The Secretary removed the action to federal district court. The claimants and the Board filed separate motions to remand, challenging the removal on the grounds that the complaint did not state any claims arising under federal law and that it violated the "rule of unanimity," which requires all defendants to join in a removal petition, *see Loftis v. United Parcel Service, Inc.*, 342 F.3d 509, 516 (6th Cir. 2003). For her part, the Secretary of State moved to realign the parties, arguing that the Board's interests lined up with the claimants, not the Secretary. After granting the Secretary's motion to realign the Board as a plaintiff, the district court denied the motions to remand. Order at 1, 12, *State of Ohio ex rel. Skaggs v. Brunner*, No. 2:08-cv-1077 (S.D. Ohio Nov. 17, 2008).

The parties filed cross motions for summary judgment on the merits, and the district court granted summary judgment in favor of the Secretary. Opinion and Order at 1, 11, *State of Ohio ex rel. Skaggs v. Brunner*, No. 2:08-cv-1077 (S.D. Ohio Nov. 20, 2008). The court held that Ohio law imposed a duty on poll workers to verify that a voter had properly completed the provisional-ballot-envelop affirmation before accepting the voter's provisional ballot, that the deficient ballots were the result of poll-worker error and that the Board therefore should count the ballots. *See id.* at 11–15.

II.

In challenging the district court's decision, the claimants first raise two jurisdictional arguments—that the removal violates the rule of unanimity and that the removal was improper because the complaint does not rely on federal law. Because we agree that the complaint does not present a federal question and because no other basis for removal exists, we need not reach the rule-of-unanimity question or for that matter the merits of the district court's decision.

Federal courts are courts of limited jurisdiction. Unlike state trial courts, they do not have general jurisdiction to review questions of federal and state law, but only the authority to decide cases that the Constitution and Congress have empowered them to resolve. When a party opts to file a complaint in state court, the federal courts must honor that choice unless Congress has authorized removal of the case. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 474 (1998); 28 U.S.C. § 1441(a). Absent diverse parties or absent one of the other express (though rarely relied upon) grounds for removal, *see* 28 U.S.C. §§ 1442–1444—none of which applies here—the defendant may take the dispute to federal court only if the plaintiff's claim "aris[es] under" federal law, 28 U.S.C. § 1441(b); *see Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir. 2007) (en banc). A party seeking to invoke the jurisdiction of the federal courts—here the Secretary of State—bears the burden of establishing that such jurisdiction exists. *See Brittingham v. Gen. Motors Corp.*, 526 F.3d 272, 277 (6th Cir. 2008). And a dispute over the removal jurisdiction of a federal district court gets a fresh look on appeal. *See City of Warren v. City of Detroit*, 495 F.3d 282, 286 (6th Cir. 2007).

In "determin[ing] whether [a] claim arises under federal law," we look only to the "well-pleaded allegations of the complaint and ignore potential defenses" that the defendant may raise. *Mikulski*, 501 F.3d at 560 (internal quotation marks omitted). Even "defense[s] that rel[y] on the preclusive effect of a prior federal judgment or the pre-emptive effect of a federal statute," *id.* (internal quotation marks omitted), or that are "anticipated in the plaintiff's complaint" are irrelevant, as they do not form "part of a plaintiff's properly pleaded statement of his or her claim," *Rivet*, 522 U.S. at 475 (internal quotation marks omitted). Although the well-pleaded-complaint rule focuses on what the plaintiff alleges, it allows a court to look past the words of a complaint to determine whether the allegations, no matter how the plaintiff casts them, ultimately involve a federal question. In addition to causes of action expressly created by federal law, *see City of Warren*, 495 F.3d at 286, federal-question removal thus also reaches ostensible state-law claims that (1) necessarily depend on a substantial and disputed federal issue, (2) are completely preempted by federal law or (3) are truly federal-law claims in disguise. *See Mikulski*, 501 F.3d at 560.

In filing this complaint in the Ohio Supreme Court, the claimants presented a single cause of action under state law and sought a writ of mandamus and injunctive relief as a remedy. Compl. at 15–16. Their complaint expressly disclaimed any reliance on federal law. Compl. ¶ 1. And none of the three grounds for otherwise characterizing their complaint as a federal question applies: (1) Their claim does not necessarily depend on a substantial federal issue; (2) their claim is not completely preempted by federal law; and (3) there is no cognizable basis for saying that they have filed an ersatz state-law claim that, when all is said and done, amounts to nothing more than a federal claim.

Our esteemed district-court colleague, who as is so often the case in an election dispute was given little time to resolve this matter, reached a different conclusion. The court concluded that the complaint arose under two separate sources of federal law: the two consent decrees that the court had issued in the *Ohio Coalition for the Homeless* case, and the Equal Protection Clause of the United States Constitution. We consider each ground in turn.

Does the complaint allege a violation of the consent decrees or turn on them? No. The claimants, to start with, did not allege that the Secretary had violated the consent decrees or any other federal court order. In the statement of the claim and the prayer for relief, the complaint does not invoke the consent decrees, and indeed it never mentions either consent decree. The most that can be said is that, at one point in the complaint, the claimants mention the Secretary's Directive 2008-101, though not the consent decree. *See* Compl. ¶ 18. But that reference was not in the context of alleging that the Secretary had violated a federal court order; it was in the context of alleging that the Secretary had offered one interpretation of the relevant statutes before the election and had offered another interpretation of the statutes after the election when the significance of these

provisional-ballot-counting issues had become apparent, *see id.* ¶¶ 17–22. Nowhere did the claimants allege that the Secretary, by adopting a different interpretation of the state laws on November 10, had "violated" her prior administrative directive or the court order that "adopt[ed] and annexe[d]" it, 10/24 Order at 1. To read the complaint any other way would suggest that the *defendant*, not the claimants, is "the master of [their] complaint." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007) (en banc).

The Secretary alternatively seeks to uphold the removal decision on the ground that, even if the complaint alleged only state-law grounds for relief, it still "necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983). The substantial-federal-issue exception opens the federal removal door only if "(1) the state-law claim . . . necessarily raise[s] a disputed federal issue; (2) the federal interest in the issue [is] substantial; and (3) the exercise of jurisdiction [will] not disturb any congressionally approved balance of federal and state judicial responsibilities." *Mikulski*, 501 F.3d at 568. As the Secretary and the district court see it, the complaint meets these requirements because this action cannot proceed without interpreting the two federal-court consent decrees, which incorporate the Secretary's two advisory directives. But, as we see it, the complaint does not satisfy any of these requirements, much less all three of them.

First, the consent decrees do not transform this state-law cause of action into a federal cause of action for a threshold reason: The decrees represent a settlement agreement between the parties to the *Ohio Coalition for the Homeless* case and thus cannot control the outcome of a case involving different parties, much less insulate a question of Ohio law from review by the one court with a final say over its meaning: the Ohio Supreme Court. Consent decrees derive their authority from the parties' consent, which permits the parties to give away their rights, not the rights of third parties. *See City of Warren*, 495 F.3d at 287. That a defendant in a state-court lawsuit has previously entered into an agreement with other parties about the meaning of state law that was approved in a federal-court consent decree does not inject a substantial federal issue into a subsequent state-court case. *See id.*

Moreover, even if for the sake of argument we were to suppose that these orders bound the Secretary in this case, that at most would raise a defense to this action; it would not make the orders an essential element of the claim. Unlike the case on which the district court most heavily relied, *EBI-Detroit, Inc. v. City of Detroit*, 279 F. App'x 340 (6th Cir. 2008), where the plaintiffs explicitly alleged that the defendant had contravened an existing district-court order and therefore had to prove that point to obtain relief, *see id.* at 346, the claimants in this case have not brought any claims premised on the Secretary's failure to adhere to the terms of the consent decrees. If the *Ohio Coalition for the Homeless* orders come into play at all in this case, that will be because the Secretary takes the position that the orders tie her hands and preclude her from adopting any inconsistent interpretation of the statutes. But the issue-preclusive shadow cast by a prior federal decision is an affirmative defense, not an ingredient of the claimants' claim, and as such it cannot convert a state-law claim into a federal one. *See Rivet*, 522 U.S. at 476–77.

Second, the federal interest in this dispute is not "substantial," as measured by the four factors we consider in assessing this point: (1) whether a federal agency is involved; (2) whether the federal question is important; (3) whether a decision on the federal question will resolve the parties' dispute; and (4) how many other cases a decision on the issue in this case will resolve. *See Mikulski*, 501 F.3d at 570. For one, no federal agency is involved in this dispute. It involves only Ohio voters and Ohio public officials. In this respect, too, the instant facts differ materially from those presented in *EBI-Detroit*, where the complaint alleged misconduct by a specially appointed federal officer in the performance of his appointed duties, a circumstance necessarily adding to the substantiality of the federal question presented. *See* 279 F. App'x at 346.

For another, the Secretary's directives, even though they have been included in two federal-court consent decrees, do not create important federal questions in any meaningful sense. The orders do not contain any conclusion that Ohio's election laws violate any provision of positive federal law or that the Constitution, a congressional enactment or an agency regulation requires reading the state statutes in a certain way—say, to avoid constitutional doubts. Rather, both orders by their terms reflect only the parties' mutual agreement about the meaning of these state laws, *see* 10/24 Order at 1; 10/27 Order at 1, a subject on which the state courts presumptively have the last word, *cf. Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 246 (6th Cir. 2006). No less importantly, the Secretary's directive with respect to poll-worker error says nothing at all about what constitutes poll-worker error under state (or federal) law, much less about whether a voter's failure to sign a provisional ballot application or include one's name on it constitutes poll-worker error. And the other directive merely restates Ohio law without offering any elaboration on how it would apply to the ballot-counting problem presented in this case. The mere incorporation of state-law requirements in a federal-court consent decree does not automatically create a federal question, much less an important one.

For still another reason, the interpretation of these consent decrees will not resolve this dispute. As noted, they have *no* direct bearing on the merits of this lawsuit because they merely reflect an agreement among parties to a different suit. And because the decrees offer no specific guidance about how to resolve these disputes, other than by reciting or paraphrasing the relevant language of the state laws, our interpretation of them here would be no more helpful to our resolution of this case than our interpretation of the underlying state laws themselves.

For a final reason, no one suggests that the federal court's resolution of this issue will head off future lawsuits. Exactly the opposite, it would seem, is more likely to happen. Until the Ohio Supreme Court finally decides what these state-law provisions mean, injured parties are bound to continue to ask that Court to resolve this dispute once and for all—as indeed is their right.

Third, this is hardly a case where "the exercise of jurisdiction [will] not disturb any congressionally approved balance of federal and state judicial responsibilities." *Mikulski*, 501 F.3d at 568. Congress's most recent handiwork concerning provisional ballots, the Help America Vote Act of 2002, Pub. L. No. 107-252, Title III, § 302, 116 Stat. 1666, 1706 (codified at 42 U.S.C. § 15301 *et seq.*), leaves no doubt which lawmaking body—the federal or state governments—has plenary authority over the counting of provisional ballots. It "conspicuously leaves . . . to the States" the determination of "whether a provisional ballot will be counted as a valid ballot," *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 577 (6th Cir. 2004); *see* 42 U.S.C. § 15482(a)(4). To allow federal courts free rein in determining whether and under what circumstances a partially deficient provisional ballot will count—under state law—would deprive state courts of their long-established role as the "final arbiter on matters of state law," *Planned Parenthood*, 531 F.3d at 410. If all it takes to transform purely state-law questions into a substantial issue of federal law—sufficient to end state courts' supremacy in interpreting their own statutes—is the agreement of two putatively opposed parties and one federal judge incorporating an interpretation of that law into a consent decree, it is hard to imagine any state-law matter lying outside a federal court's reach.

Accordingly, we hold that the claimants' cause of action does not satisfy any of the three required elements of the substantial-federal-issue exception to the well-pleaded-complaint rule, as set forth in *Mikulski*. We therefore conclude that the Secretary has failed to carry her burden of demonstrating that the claimants' state-law claim necessarily presents a substantial federal question that warrants removal to federal court.

Did the complaint allege a violation of the Equal Protection Clause? No. On its face, the complaint does not set forth an equal-protection claim, and indeed it explicitly disavows *any* reliance on federal law: "No federal law claims are asserted." Compl. ¶ 1.

The Secretary nonetheless claims that the complaint amounts to artful pleading because it invokes the substance of an equal-protection claim even if it leaves the form of such a claim behind. *See Mikulski*, 501 F.3d at 561. In making this argument, she points to paragraphs 4 and 5 of the complaint where, in a section devoted to identifying the relevant parties, the claimants say that they are "bring[ing] this action to assure that [their] vote[s are] not diluted as a result of the misdirected instructions of the Secretary of State to count provisional ballots that are not lawful or valid under Ohio law." Compl. ¶ 5. Yet the claimants made these allegations not in order to raise an equal-protection claim *sotto voce* but in order to gain admission to the state courts. Under Ohio law, the claimants were *required* to identify an injury to establish standing to bring this claim. *See State ex rel. Toledo v. Lucas County Bd. of Elections*, 765 N.E.2d 854, 857 (Ohio 2002) (per curiam) ("The applicable test for standing is whether [the] relator would be directly benefited or injured by a judgment in this case, and this test applies to mandamus actions concerning election matters.").

As with all allegations that a State is counting ballots it should not, one form of injury caused by that problem will be vote dilution. But that reality does not preclude the claimants from relying on state law to redress the harm, particularly when the source of the injury is an alleged misinterpretation of Ohio law. Even if it is true that the claimants might have brought a separate federal constitutional claim to redress this injury, a point on which we need not take a stand, neither the federal courts nor a state official may force them to do so.

Because the Equal Protection Clause also is not a "necessary element of one of the [claimants'] well-pleaded state claims," *Franchise Tax Bd.*, 463 U.S. at 13, this case does not fit within that "special and small category" of cases finding federal jurisdiction on that ground, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). The complaint alleges that the Secretary's instructions to the Board violate several Ohio statutes—claims that do not "necessarily depend[]," *Franchise Tax Bd.*, 463 U.S. at 28, on the resolution of any kind of equal-protection question. The district court, it is true, identified the specter of an equal-protection problem: the chance that a ruling in favor of the claimants might lead to non-uniform provisional vote counting across counties. But such a claim is not a "necessary element of one of the well-pleaded state claims," *Franchise Tax Bd.*, 463 U.S. at 13, but at best a federal defense that the Secretary may or may not wish to inject into the case in the Ohio courts in support of her proposed interpretation of state law.

One other thing. A federal court may not enjoin a state official to follow state law, *see Pennhurst*, 465 U.S. at 106, which means that, if the Secretary's position in this case were accepted, it is doubtful that the claimants could *ever* obtain relief. Consider the three possible ways in which the federal court could resolve this case. One is that the federal court might reject the claim because it is inconsistent with state law. Another is that the federal court might reject the claim because, even though it is consistent with state law, the federal Constitution (or a federal law) prohibits the claimants from obtaining relief. The third possibility is that the federal court might agree with the claimants' interpretation of state law, might reject the Secretary's' federal-law defenses and might wish to grant the requested relief: an injunction preventing the Secretary from counting the disputed provisional ballots. But because the United States Constitution prohibits federal courts from enjoining state officials to follow state law, the court could not enter such an order. The only relief the federal courts could give in this instance thus would appear to involve the *denial* of the claimants' request for relief. "Heads I win, tails you lose" is not a traditional way, let alone a fair way, to apply the removal doctrine.

* * *

In the final analysis, this case does not present one of those "limited circumstances" where "a defendant may force a plaintiff into federal court despite the plaintiff's desire to proceed in state court." *Mikulski*, 501 F.3d at 560. By the terms of their complaint, the claimants raise only a state-law claim and disavow any reliance on federal law. Absent a substantial federal issue lurking beneath their claim, "we should take [the claimants] at [their] word." *NicSand*, 507 F.3d at 458.

Both parties, elbows drawn, accuse the other of engaging in forum shopping. But to the extent the lawyers for the parties wish to obtain the best forum for resolving their clients' claims, they are doing only what their professional obligations require. To the extent the parties are doing the same thing, the law expressly allows them to do so. The central premise of the well-pleaded-complaint rule is to *facilitate* forum shopping—to allow claimants to pick the law under which they seek redress, to pick the forum that they would like to resolve their claim and to have the courts (most of the time) respect those choices. *See Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

Nor do we see any reason to think that a state-court forum for resolving this question of state law will favor one party over the other. In the 2008 calendar year, by our count, there have been at least six original actions decided by the Ohio Supreme Court involving the Secretary of State and interpretations of state law. Not only were none of these six actions removed to federal court, but the Secretary also has won three of them, lost two, and achieved mixed results in one. *See State ex rel. Stokes v. Brunner*, ___ N.E.2d ___, 2008 WL 4810591 (Ohio Oct. 16, 2008) (per curiam); *State ex rel. Myles v. Brunner*, ___ N.E.2d ___, No. 2008-1842, (Ohio Oct. 2, 2008) (per curiam); *State ex rel. Colvin v. Brunner*, ___ N.E.2d ___, 2008 WL 4443962 (Ohio Sept. 29, 2008) (per curiam); *State ex rel. Lawrence County Republican Party Executive Comm. v. Brunner*, 892 N.E.2d 428 (Ohio 2008) (per curiam); *State ex rel. Summit County Republican Party Executive Comm. v. Brunner*, 890 N.E.2d 888 (Ohio 2008) (per curiam); *State ex rel. Parrott v. Brunner*, 882 N.E.2d 908 (Ohio 2008) (per curiam). In a seventh case, we should point out, the defendant removed the case to federal court, but the district court remanded the case to the Ohio Supreme Court after concluding that the plaintiff's mandamus petition (as here) "d[id] not on its face state a claim arising under federal law," or necessarily "require resolution of substantial, disputed issues of federal law," but simply "ask[ed] the court to compel the Secretary to comply with her duties under state law." *Ohio ex rel. Myhal v. Brunner*, No. 2:08-cv-893, 2008 WL 4647701, *1–2 (S.D. Ohio Oct. 20, 2008).

The resolution of this dispute by the Ohio Supreme Court also does not prohibit the Secretary from asserting any relevant defenses, including the defense, if she wishes, of saying that the failure to count these provisional ballots would violate federal law. And if a federal defense is raised and the Ohio Supreme Court rejects it, the Secretary is free to attempt to seek review in the United States Supreme Court. *See Bush v. Gore*, 531 U.S. 98, 102–03 (2000) (per curiam).

III.

For these reasons, we vacate the district court's opinion and remand the case to the Ohio Supreme Court.