

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE STATE OF OHIO ex rel.	:	
DANA SKAGGS, et al.,	:	
	:	Case No. 2:08-CV-1077
Plaintiff - Relator,	:	
	:	
v.	:	Judge Marbley
	:	
JENNIFER L. BRUNNER	:	
SECRETARY OF THE STATE	:	
OF OHIO, et al.,	:	
	:	
Defendant - Respondent.	:	
	:	

DEFENDANT OHIO SECRETARY OF STATE JENNIFER BRUNNER'S MOTION TO REALIGN PARTIES

Defendant, Ohio Secretary of State Jennifer Brunner, respectfully moves this Court to realign the parties because the Franklin County Board of Elections is a party with interests adverse to the Ohio Secretary of State. A memorandum in support is attached.

Respectfully submitted,
NANCY H. ROGERS
ATTORNEY GENERAL

/s Richard N. Coglianesse
Richard N. Coglianesse (0066830) Trial Attorney
Damian W. Sikora (0075224)
Pearl M. Chin (0078810)
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
rcoglianesse@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax
*Attorneys for Defendant Jennifer L. Brunner
Secretary of the State of Ohio*

MEMORANDUM IN SUPPORT

Although the Franklin County Board of Elections has been named a Defendant in this case, it is evident from the materials attached to the Complaint that the Franklin County Board of Elections' interests are adverse to the Ohio Secretary of State. It has long been held that "[i]t is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'" *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 690 (1941) (quoting *Dawson v. Columbia Trust Co.*, 197 U.S. 178, 180). If the parties are not properly aligned, as where one party is made a defendant when in truth and in fact he is not adverse to the plaintiff, or vice versa, the court will realign the parties according to their interests before determining diversity . . ." *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, fn 3 (5th Cir. 1973) (citing 3A Moore's Federal Practice, 2147-48). In other words, "[c]ourts may realign parties, according to their ultimate interests." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1133 (9th Cir. 2006).

"Although realignment questions typically arise in the diversity of citizenship context, the need to realign a party whose interests are not adverse to those of his opponent(s) exists regardless of the basis for federal jurisdiction." *Larios v. Perdue*, 306 F. Supp. 2d 1190, 1195 (N.D. Ga. 2003). The federal courts have employed two different tests in determining the propriety of realignment; the Sixth Circuit has employed what has been labeled the "primary purpose test." *Id.* (citing *United States Fid. & Guar. Co. v. A & S Mfg. Co., Inc.*, 48 F.3d 131, 132-33 (4th Cir. 1995). Under the primary purpose test "if the interests of a party named as a defendant coincide with those of the plaintiff in relation to the [primary] purpose of the lawsuit, the named defendant must be realigned as a plaintiff . . ." *United States Fid. and Guar. Co. v.*

Thomas Solvent Co., 955 F.2d 1085, 1089 (6th Cir. 1992) (citing *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987)).

Despite the structure of the Complaint, the Court must look past the fact that Plaintiffs have named the Franklin County Board of Elections as a Defendant and arrange the parties according to their sides in the dispute. In this case, the primary purpose of the litigation indicates that the Franklin County Board of Elections is an adversarial party to the Ohio Secretary of State and finds itself more aligned with the Plaintiffs in this case. This is indicated by the affidavit of Matthew Damschroder, the Deputy Director of the Franklin County Board of Elections, which was submitted as the only support for the Plaintiffs' Complaint. In his affidavit, Mr. Damschroder makes it clear that the Board of Elections' interests in this case are adverse to the Secretary of State. Not only has Mr. Damschroder, in his capacity as the Deputy Director indicated an alignment with the Plaintiffs, but so has Patrick Piccininni, counsel for the Franklin County Board of Elections. As evidenced by the emails attached to Mr. Damschroder's affidavit, Mr. Piccininni engaged in a lengthy disagreement with Brian Shinn of the Secretary of State's Office over the interpretation of Directives 2008-101 and 2008-103 and how provisional ballots should be processed and counted. Furthermore, during discussion on these issues before the Franklin County Board of Elections, Prosecutor Ron O'Brien argued to the Franklin County Board of Elections that as the board's legal counsel, the board of elections should follow his legal interpretation, not the Secretary's.¹

¹ Although the Prosecutor's office has taken the position that poll worker error should not be used to reject a provisional ballot that does not have printed name on Franklin County's unique ballot application, the Prosecutor did convince the board of elections to count provisional ballots cast in the wrong precinct despite the apparent prohibition against doing so in Ohio law under certain circumstances in the future.

For these reasons, the Court must look past the form of the Complaint and recognize that the Franklin County Board of Elections should be realigned with the Plaintiffs in this case based on the primary purpose of the Complaint.

Respectfully submitted,
NANCY H. ROGERS
ATTORNEY GENERAL

/s Richard N. Coglianesse
Richard N. Coglianesse (0066830) Trial Attorney
Damian W. Sikora (0075224)
Pearl M. Chin (0078810)
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
rcoglianesse@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax
Attorneys for Defendant Jennifer L. Brunner
Secretary of the State of Ohio

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 14th day of November, 2008.

/s Richard N. Coglianesse