In The Supreme Court Of Ohio

THE STATE OF OHIO ex rel. DANA SKAGGS, et al.,	:	
	:	**Case No. 08-2206**
Relator,	:	
v.	:	**Original Action in Mandamus**
JENNIFER L. BRUNNER SECRETARY OF THE STATE OF OHIO, et al.,	:	**Expedited Election Matter Under S. Ct. Prac. R. X. § 9**
Respondent.	:	

RESPONDENT OHIO SECRETARY OF STATE JENNIFER BRUNNER'S MERIT BRIEF

John W Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE, LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
614-365-9900
614-365-7900 (Fax)
zeiger@litohio.com

Attorneys for Relators

Ron O'Brien, Esq.
Franklin County Prosecuting Attorney
Patrick J. Piccininni
Anthony E. Palmer, Jr.
373 South High St., 13th Floor
Columbus, Ohio 43215
614-462-3911
Attorney for Respondent Board of Elections of Franklin County, Ohio

NANCY H. ROGERS
Attorney General of Ohio

Richard N. Coglianese (0066830)
Damian W. Sikora (0075224)
Aaron Epstein (0063286)
Pearl M. Chin (0078810)
Michael. J. Schuler (0082390)
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
(614) 466-2872 – phone
(614) 728-7592 – fax
rcoglianese@ag.state.oh.us

Attorneys for Respondent Ohio Secretary of State Jennifer L. Brunner

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BRIEF OF RESPONDENT OHIO SECRETARY OF STATE JENNIFER BRUNNER,

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Columbus, Ohio 43215-3400
rcoglianese@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax

Attorneys for Respondent Ohio Secretary of State Jennifer L. Brunner

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INTRODUCTION

> [W]e "must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections." *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3; cf. *Stern v. Cuyahoga County Bd. of Elections* (1968), 14 Ohio St.2d 175, 180 ("Absolute compliance with every technicality should not be required in order to constitute substantial compliance, unless such complete and absolute conformance to each technical requirement of the printed form serves a public interest and public purpose.").

State ex rel. Myles v. Brunner (2008), 2008 Ohio 5097 ¶ 22.

> "[our] duty [is] to liberally construe election laws in favor of the right to vote. *See Wilson v. Kennedy* (1949), 151 Ohio St. 485, 493 39 O.O 301, 86 N.E. 2d 722 *quoting State ex rel. Beck v. Hummel* (1948), 150 Ohio St. 127, 139, 37 O.O. 435, 80 N.E. 2d 899 ("'All election statutes should be liberally interpreted in favor of the right to vote according to one's belief or free choice, for that right is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state.'")"

State ex rel. Colvin v. Brunner (2008), 2008 Ohio 5041 ¶ 62

The Relators in this case seek to disenfranchise approximately 1,000 Franklin Cuonty residents and possibly thousands of other Ohioans who cast provisional ballots in the November 4, 2008 general election. These voters were all properly registered to vote and cast their ballots in their correct precincts. There is no allegation of fraud, double-voting, or any defect in the provisional ballots themselves. Instead, Relators would have these votes discarded solely because the *envelopes* containing the ballot were not filled out completely.

Relators' petition for a writ of mandamus should be denied for a host of procedural and substantive reasons. First, this Court lacks subject matter jurisdiction over this case. Although presented as a petition for a writ of mandamus, the substantive relief Relators actually seek is an injunction: either to prevent Secretary of State Jennifer Brunner from enforcing her interpretation of election law, or an injunction to prohibit the Franklin County Board of Elections from opening

the provisional ballot envelopes and counting these votes. This Court has repeatedly affirmed the difference between a writ of mandamus, which compels official action, and an injunction, which prohibits action, and held that it lacks original jurisdiction over an action seeking injunctive and/or declaratory relief.

The footing becomes no firmer for Relators if the Court chooses to reach the legal merits of the case. Relators have misconstrued Ohio law in at least three respects: they have misread both the Ohio Revised Code and federal law to say that leaving a blank on a provisional ballot affirmation form is cause to disqualify the provisional ballot itself, irrespective of whether the eligibility of the voter can be confirmed by other means. They have shifted responsibility for the content of the affirmation forms onto the voters, although Ohio and federal law does not impose that duty and instead makes clear that the poll workers have an affirmative duty to make sure the forms are filled out correctly. And they have insisted that any deviation from the strict compliance with the election laws they raise invalidates the vote, when this Court has repeatedly held the contrary: that strict application must yield to the interest of counting votes cast by eligible, qualified electors. As if these were not sufficient reason to deny the requested relief, Relators have overlooked the fact that the result they seek would place the Franklin County board of election in violation of federal law, specifically the Help America Vote Act and the Voting Rights Act.

This Court should follow its prior precedent, reject the petition, and refuse to disenfranchise voters based upon a hyper-technical reading of Ohio's statutes concerning provisional ballots.

STATEMENT OF FACTS

Secretary of State Jennifer Brunner is the State's chief elections official. R.C. 3501.04. In that position she has the authority to direct county boards of elections on the proper method of conducting an election, and she further has the authority to prescribe the use of forms by those boards. R.C. 3501.05(b),(c),and (g). In order to fulfill her statutory duty, the Secretary has developed Form 12-B, the provisional ballot affirmation envelope. Wolfe Aff. At ¶¶ 13-14. The Secretary of State has informed county boards of elections since 2006 that the poll worker must review the provisional ballot affirmation envelope before signing the election official verification that the pollworker witnessed the voter's execution of the affirmation. Wolfe Aff. At ¶ 15; Rothschuh Aff. At ¶ 8.

Consistent with her obligation to instruct the county boards of elections on the proper method of conducting an election, Secretary Brunner has issued a poll worker training manual, a poll worker quick reference guide, and various directives in order to assure that poll workers are properly and consistently trained. Wolfe Aff. At ¶¶ 7 and 9. One of those directives is Directive 2008-77. The poll worker training manual specifically requires that poll workers "check to make sure the voter's [provisional ballot affirmation] envelope is completed" and that "[t]he completed [provisional ballot affirmation] envelope should be double-checked by a second poll worker." Wolfe Aff. At ¶ 10 quoting Poll Worker Training Manual at 37-40. Furthermore, a provisional voter must sign the back of the poll book under the section "Provisional Voters Only." Poll Worker Training Manual at 40.

The Poll Worker Quick Reference Guide also addressed provisional voting. That guide also mandates that poll workers "check to make sure the voter's [provisional ballot affirmation] envelope is completed" and that "[t]he completed [provisional ballot affirmation] envelope

should be double-checked by a second poll worker." Wolfe Aff. At ¶ 11 quoting Poll Worker Quick Reference Guide. Pursuant to Directive 2008-77, all county boards of elections were obligated to include this material in their poll worker training. Furthermore, at least one poll worker quick reference guide had to be given to each poll worker prior to election day and at least three poll worker quick reference guides had to be included with each precinct's supplies so that they would be available to assist the poll workers on election day. Directive 2008-77.

This case, however, is not the only litigation concerning provisional ballots. In October 2006, the Northeast Ohio Coalition for the Homeless filed Case No. 2:06-cv-896 in the U.S. District Court for the Southern District of Ohio. In October of this year, the Plaintiffs in that case moved for a preliminary injunction based upon allegations that provisional ballots were not being treated consistently by Ohio's 88 county boards of elections. In an attempt to settle the issues raised in that litigation, Secretary Brunner issued Directive 2008-101. In that Directive, the Secretary informed the county boards of elections that they could only reject provisional ballots if:

a) The individual named on the affirmation is not properly registered to vote;
b) 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;
c) The individual did not provide the following:
    a. His or her name and signature as the person who cast th provisional ballot;
    b. A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
    c. A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;

Or

d. His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by the election official.

Directive 2008-101 at 8. The District Court later adopted this directive as its order on October 24, 2008.

The District Court then issued a second order on October 27, 2008 in which it ordered that provisional ballots may not be rejected due to poll worker error. Pursuant to that Court order, Secretary Brunner issued Directive 2008-103 which instructed boards of elections that "provisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker's failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R.C. 3505.181." Directive 2008-103 at 1.

STATEMENT OF THE CASE

On November 13, 2008, Relators Dana Skaggs and Kyle Fannin filed this original action against Secretary of State Jennifer Brunner and the Franklin County Board of Elections ("the Board"), seeking a writ of mandamus. The Petition seeks to disenfranchise approximately 1,000 Franklin County voters who cast provisional ballots on November 4, 2008 *and who were in fact properly registered and eligible to vote* and who cast their ballots in the correct precinct. Relators' theory is that the votes should not count because information was omitted from the provisional ballot affirmation forms (used only in Franklin County) that accompanied the ballots.

Under the Help America Vote Act, 42 U.S.C. 15301 et seq. ("HAVA"), a person "shall be permitted to cast a provisional ballot" if the person's name does not appear on the list of eligible voters for the polling place or if an election official asserts that the person is not eligible to vote and the individual executes a written affirmation "before an election official at the polling place" stating that the individual desires to vote and is eligible to vote. 42 U.S.C. § 15482(a). HAVA further provides that, once a provisional ballot has been cast and transmitted to the

appropriate entity for tabulation – in Ohio, a county board of elections – the board shall verify that the provisional voter is eligible to vote under State law. Upon determining that "*the individual is eligible under State law to vote, the individuals' provisional ballot shall be counted* as a vote in that election in accordance with State law." 42 U.S.C. § 15482(a)(3) and (4). (Emphasis added). Thus, if it can be determined that votes on a provisional ballot were cast by a qualified, eligible voter, as determined by State law, HAVA states that the votes must be counted – HAVA does not authorize the rejection of those votes on the basis that technical irregularities occurred in the process by which a voter executed the written affirmation and was provided the ballot. Ohio law similarly provides that a voter may cast a provisional ballot by executing a written affirmation in the presence of an election official. R.C. 3505.181(B)(2). The written affirmation is printed on the provisional ballot envelope into which the voter inserts the provisional ballot. The envelopes are then submitted to the county board of elections for a determination of the voter's eligibility. Only if the county board determines that the voter is eligible will the envelope be opened and the provisional ballot counted.

Relators concede that all provisional ballots of questionable eligibility have already been culled. They have identified four categories of provisional ballot envelopes which bear allegedly defective affirmation forms:

(1) Forms where the election official neglected to mark any box to indicate the type of identification the voter showed when receiving the provisional ballot;

(2) Forms upon which the voter's name has been printed, but which do not contain the voter's signature;

(3) Forms which contain the voter's signature, but which lack the voter's name printed at the top; and

(4) Forms which the voter has signed, and which do have the voter's name printed upon them, but the signature or the

printed name (or both) appears someplace other than in the designated line.[1]

Relators maintain that Ohio law requires the boards of election to discard the ballots that fall into any of these categories. The Board split two-two when it voted on the validity of these provisional ballots. Therefore, pursuant to R.C. 3501.11(x), the Secretary cast the tie-breaking vote. She determined that Ohio and federal law requires that these provisional ballots be counted.

Before the Secretary broke the tie, and in anticipation of this outcome, Relators filed suit asking this Court to issue three writs:

A. Issue a writ of mandamus compelling [Secretary Brunner] to correct her erroneous interpretation of R.C. 3505.183(B)(1)(a) and compelling her to advise the county Board of Elections that any provisional ballot 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.

B. Issue a writ of mandamus compelling [Secretary Brunner] to correct her erroneous interpretation of R.C. 3505.181 and compelling her to advise the county Boards of Elections that any provisional voter must provide the identification verification information mandated by R.C. 3505.181 on the Provisional Ballot Application[2] or, alternatively, complete the identification affirmation provided in R.C. 3505.18(A)(4) and if the voter fails to do so, her provisional ballot is not eligible to be counted.

C. Issue a writ of mandamus compelling Respondents to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the

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[1] Relators frequently write as if there is a fifth category in question, namely those forms that contain *neither* a printed name *nor* a signature. However, the Secretary has already instructed the boards of elections not to count those ballots, so it is unclear why Relators continue to raise this issue.

[2] Relators' use of the phrase "provisional ballot *application*" (used on the Franklin County provisional ballot envelope) is inconsistent with the statutory text of both the Ohio Revised Code and HAVA. A voter is not required to "apply" for a provisional ballot, but is entitled to one upon the execution of a written affirmation. R.C. 3505.181(B); 42 U.S.C. 15482(a)(2).

name and signature of the voter on the provisional voter affirmation required by R.C. 3505.183(B)(1)(a) and/or the voter fails to provide on the Application the identification verification information required by R.C. 3505.18 or, alternatively, fails to complete the identification affirmation provided in R.C. 3505.18(a)(4).[3]

The writs must be denied. First, though couched in terms of mandamus, the relief Relators are actually seeking is a preliminary and permanent injunction, and the Supreme Court has no original action jurisdiction to grant such relief. Moreover, Relators are wrong on the substantive law: the Secretary does not have a clear legal duty to reject these provisional ballots based on the alleged defects in the provisional ballot affirmation forms; in fact, state and federal law compels the Board to count these ballots.

LEGAL ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Because Relators Are Seeking Declaratory Judgment And Injunctive Relief

The Ohio Constitution confers original jurisdiction upon this Court over mandamus proceedings but not over original actions seeking injunctive relief. *State ex rel. Stine v. McCaw* (1939), 136 Ohio St. 41, 44. Article IV, Section 2, Ohio Constitution. The difference between the two remedies is simply stated: a writ of mandamus compels the performance of a preexisting legal duty, whereas an injunction restrains action. *State ex rel. Smith v. Industrial Comm'n.* (1942), 139 Ohio St. 303, 306. This Court has consistently held "if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction." *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007 Ohio 2453 (internal quotations omitted); *State ex rel. Grendell v. Davidson* (1999), 86

[3] In addition, Relators asked the Court to issue a temporary restraining order to restrain the board of elections from opening the provisional ballot envelopes until the case could be decided. Thus, the ballots remain unopened.

Ohio St. 3d 629, 634. In expedited election cases the Court applies the jurisdictional rule "by examining the complaint to determine whether it actually seeks to prevent, rather than compel, official action." *State ex rel. Evans v. Blackwell*, (2006), 111 Ohio St.3d 1, 2006-4334, ¶¶ 19-20. In this case, Relators have improperly disguised a prayer for injunctive relief as a petition for a writ of mandamus. Simply stated, Relators seek an order to stop the Secretary and the Board from opening and counting these provisional ballots. Indeed, Relators plainly state as much in their "Prayer C," which asks for "a writ of mandamus compelling Respondents to reject any Provisional Ballot Applications as not eligible to be counted" if certain conditions are not met. Prayers A and B seek declaratory judgment that the Secretary has misconstrued the requirements of the Revised Code. [See also ¶¶ 32-33 of the Petition]. Though the Complaint frames the request in terms of a writ compelling the Secretary to "correct" her interpretation of Ohio law, the reality is that the petition seeks to restrain the Secretary of State from enforcing her interpretation and ordering the ballots counted.

This Court has, on more than one occasion, looked past the form of a purported mandamus petition to the substance of the case, and dismissed a mis-captioned "mandamus" petition. *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006-Ohio-4334. Evans brought suit to challenge then-Secretary of State Blackwell's decision to transmit an initiated statute to the Ohio General Assembly before all the statutory protests were completed in the common pleas courts. Evans sought a writ of mandamus to bar the House and Senate Clerks from maintaining receipt of the proposed law, and therefore treat the transmittal as never having occurred, and declaring the Secretary's actions null and void. The Supreme Court recognized that Evans was seeking an injunction, and ruled that only the Common Pleas Court had original jurisdiction over the case. *Id.* at ¶ 19. Likewise, in *State ex rel. Smith v. Industrial Comm'n.* (1942), 139 Ohio St.

303, the petitioner sought a writ of mandamus to bar the Ohio Industrial Commission from disbursing funds. The Court denied the writ because an order compelling one to desist from some action is an injunction, which is beyond the original jurisdiction of the Ohio Supreme Court. As the Court observed, "[t]he nature of the writ sought is not to be determined by the label attached thereto by the relator." *Id.* at 308. *See also State ex rel. Grendell v. Davidson* (1999), 86 Ohio St. 3d 629, 634 (Supreme Court dismissed a petition seeking to declare statutes unconstitutional for lack of original jurisdiction, notwithstanding the fact that the request was joined as part of a plea for a mandamus writ); *State ex rel. Stine v. McCaw* (1939), 136 Ohio St. 41 (couching request for injunction to prevent payment of salary in terms of mandamus did not alter the nature of the relief sought).

The Secretary anticipates that Relators will attempt to liken this case to *State ex rel. Colvin v. Brunner*, 2008 Ohio 5041, in which this Court recently held that if the secretary of state "has, under the law, misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of mandamus." *Id* at ¶ 20, quoting *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, 226. Any relevance the *Colvin* holding may once have held has been superseded by events. This case is no longer about "correcting" the legal instructions issued by the Secretary to the boards of elections. After this case was filed, the Secretary broke the tie votes of the Board concerning these provisional ballots, and decided 3-2 in favor of counting the ballots. The Secretary's "instructions" or Directives to the board are no longer relevant. "Corrected" instructions from the Secretary will not undo the vote. Given the posture of the case, the only meaningful remedy Relators have is an injunction to prevent the counting of the provisional ballots, a remedy this Court is without authority to provide.

Regardless of how Relators phrase their relief, it is clear that they are asking this Court to exercise original action jurisdiction in a declaratory judgment case and issue an injunction. It is also clear that the Court lacks original jurisdiction to hear declaratory judgment cases. As a result, this Court should dismiss Relators' request for lack of subject matter jurisdiction.

II. Relators Cannot Meet The Necessary Elements For A Writ Of Mandamus

Even assuming, *arguendo*, that Relators' complaint satisfies the Court's jurisdictional requirements (and it does not), Relators cannot satisfy the requirements for relief in mandamus. "Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." *State ex rel. Smith v. Indus. Comm'n* (1942), 139 Ohio St. 303, 306. In order to obtain a writ of mandamus in this case, Relators must show (1) that they have a clear legal right to the requested relief, (2) that the respondents are under a clear legal duty to perform the requested act, and (3) that Relators do not have an adequate remedy at law. *State ex rel. Nat'l City Bank v. Bd. of Ed.* (1977), 52 Ohio St. 2d. 81, 83. Relators cannot satisfy any of these requirements.

A. Relators Do Not Have A Clear Legal Right To Relief, And The Secretary Has No Corresponding Clear Legal Duty To Act, Because Relators Have Incorrectly Interpreted Ohio Election Law

Revised Code Chapter 3505 creates a comprehensive scheme for processing provisional ballots. That scheme imposes multiple affirmative duties upon election officials at the polls, including but not limited to directing individuals to their proper polling places [R.C. 3505.181(C)(1)] and advising them that they have the right to cast provisional ballots. [R.C. 3505.181(B)(1)]. It also imposes a duty upon election officials, not voters, to ensure that the provisional ballot affirmation forms are filled out correctly and completely. R.C.

3505.181(B)(2). That statutory scheme, if read in full, leads to the inescapable conclusion that all four categories of allegedly defective ballots at issue must be counted.

In order to argue that these 1,000 provisional ballots should not be opened and counted, Relators ask this Court to read one provision of the Revised Code, R.C. 3505.183(B)(1), in isolation from other sections of the Revised Code and from federal statutory law. They would unnecessarily disenfranchise 1,000 Ohioans for technical defects that in no way call into question whether these individuals were properly registered to vote or were appropriately casting ballots. However, whether standing alone or read in tandem with other Code provisions, R.C. 3505.183(B)(1) demonstrates that these ballots must be counted.

One principle ought not to be in dispute in this case: an otherwise qualified voter may not legally be disenfranchised because of an error by a poll worker. As this Court has plainly stated,

> We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the willful misconduct of election officers in performing the duty cast upon them.

Mehling v. Moorehead (1938), 133 Ohio St. 395, 407, quoting *McGrane v. County of Nez Perce*, 18 Idaho 714, 726 (1910). What is truly at issue is whether controlling federal and state law places the duty of completing these affirmation forms fully and properly on voters or on election officials. As shown below, the duty falls on the election officials, but even if it did not, the votes still must be counted.

One reason for Relators' misconception that the duty of completing these forms rests with the voters is, ironically enough, the consequence of additional problems caused by Franklin County's election officials. Under Ohio law, Secretary of State Jennifer Brunner is the State's chief elections officer. R.C. 3501.04. She has the authority to instruct the boards of elections on the proper conduct of the election, R.C. 3501.05(b), (c), and she further has the legal authority to

prescribe the forms to be used in an election. R.C. 3501.05(g). The Secretary of State's form, Form 12-B, contemplates that the poll worker must witness the provisional voter sign the affirmation envelope. The form does not purport to impose a requirement that the provisional voter print his own name. Instead, the Secretary's form allows, consistent with the requirements of Ohio law, the poll worker to print the voter's name on the form. The Secretary's form is completely consistent with the requirements of R.C. 3505.182.

Unfortunately, the Board decided to reject the Secretary's form and developed its own affirmation form for inclusion on provisional ballot envelopes. Franklin County's form did not require that the poll worker actually print the voter's name on the form. Rather, the form seemingly implied that it was up to the voter to fill in the blanks. But the form adopted by the Board cannot trump the Revised Code. Thus, the underlying problem in this case is actually caused by Franklin County's refusal to use the Secretary of State prescribed form and to require all of its poll workers to actually check provisional ballot envelopes before accepting them to make sure that the provisional voter filled the affirmation form out correctly. However, innocent voters should not be punished for the decisions made by Franklin County's elections officials.

1. Forms That Do Not Indicate The Type of Voter ID Used Are Still Valid, And The Provisional Ballots Must Be Counted R.C. 3505.181(B)(6))

In order to procure a provisional ballot at the polling place, the individual first sign the back of the poll book in a separate provisional voter section. Poll Worker Training Manual at 40. The provisional voter must present an acceptable form of identification to the poll worker.[4] The provisional ballot affirmation forms have blanks to indicate which form of identification was used. Relators would have this Court disqualify any provisional ballots where the affirmation

[4] If the individual voter did not produce an acceptable form of identification, the poll worker has a statutory obligation to note that fact on the provisional ballot envelope. R.C. 3505.181(B)(6).

forms/envelopes do not specifically identify the form of identification shown. However, the fact that the identification boxes were left blank is a clear example of poll worker error.

The responsibility for checking the boxes relating to Voter Identification belongs to the election official. "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." R.C. 3505.181(B)(6). If those boxes were left blank, the fault is clearly the election official's, not the voter's.

Indeed, Relators have already conceded this point. In their pleadings before the federal court, they stated "Relators do not challenge the validity of Secretary Brunner's Directive to the Board to count those provisional ballots that do not include the necessary identification information because, pursuant to Section 3505.181(B)(6), the poll worker has an express duty to record such information." Relators' Motion for Summary Judgment, p. 5.

It is unclear why Relators would claim that the responsibility to fill out this part of the form belongs to the voter. Certainly nothing in R.C. 3505.18(A)(4) speaks to this issue, and the language of R.C. 3505.181(B)(6) is crystal clear. Yet, in Prayer for Relief B, Relators ask for a writ commanding the Secretary to tell the local boards that "the provisional voter must . . . complete the identification affirmation provided in R.C. 3505.18(A)(4). Thus, Relators are seeing an order to command the Secretary to make a clear misstatement of Ohio law.

The bottom line is this: poll workers are trained to get appropriate identification from the voter or note that no identification was provided on the provisional ballot envelope. If a poll worker failed to write down what type of identification he was shown, this Court can presume the poll worker made an error, and count the vote. To disqualify the vote would mean the Court has either assumed the provisional ballot was handed out absent proper identification or that the

poll worker failed to identify the fact on the envelope. The Relators have cited **no** law to justify such a harsh result (and see, by contrast, the requirement of "material" error under the Voting Rights Act, discussed below). As for the first possibility, the Relators cannot merely ask the Court to presume an impropriety. They must show a clear legal right to the relief they seek, and they have no evidence to show the failure to mark the identification box was anything other than an honest oversight.

2. Forms That Contain a Printed Name But No Signature Must Be Counted (R.C. 3505.183(B)(1) and R.C. 3505.181(B)(6))

Relators primarily rely on R.C. 3505.183 to argue that both the individual's name and signature must appear on the affirmation form, or else the ballot must be rejected. [Petition, ¶16, ¶32 and Prayers A and C]. Relators have misread the plain language of R.C. 3505.183(B)(1).

Section (B)(1) addresses two scenarios: one in which the individual executes an affirmation, and one in which the individual refuses to sign the affirmation. The two scenarios lead to different outcomes, yet Relators would conflate this distinction. R.C. 3505.183(B)(1) states in full:

> 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.

Relators call Subpart (a) a mandatory obligation, yet it only applies when the voter agrees to sign the provisional ballot affirmation. When the voter does not sign the affirmation, the result is a provisional ballot affirmation that contains a printed name but no signature, exactly what we have in his case, and R.C. 3505.183(B)(1) clearly considers that a valid vote. (If refusal to sign invalidated the provisional ballot, there would be no point to requiring the poll worker to print the individual's name on the form).

In fact, the Revised Code goes a step further and imposes an affirmative duty upon election officials to print the voter's name on the affirmation form when the individual does not sign. R.C. 3505.181(B)(6). Clearly, the General Assembly anticipated that some affirmation forms would arrive at the boards of elections bearing printed names but no signatures, and yet be valid.

Relators will likely argue that the first part of subpart (B)(1), contemplating printed name but no signature, only applies when the voter *refuses* to sign the affirmation form. How can we know, Relators may ask, if the voter truly refused to sign, or just left the signature blank by accident? The answer is "it does not matter." In theory, a subpart (B)(1) form [name printed by the election official because the voter refused to sign] is indistinguishable on its face from a form on which the printed name appears but the voter *forgot* to sign the affirmation. But the two forms *should* be distinguishable. If an individual refuses to sign, the election official is required to note that fact on the affirmation form. R.C. 3505.181(B)(6). There is no question that R.C. 3505.181(B)(6) imposes the duty on the election official, not the voter, to make sure the refusal to sign is clearly delineated on the face of the affirmation form.

Thus, affirmation forms that have printed names but no signature can be classified three ways. The first class is those that clearly indicate the voter refused to sign the affirmation. Without question, those votes must be counted, according to R.C. 3505.183(B)(1).

The second class includes those ballots where the voter refused to sign, but the election official failed to make the appropriate notation on the form. And an otherwise valid vote cannot be rejected because of poll-worker error. Because poll worker error cannot be held against the voter or used as a basis for disqualifying the ballot, the second category of provisional ballots must also be counted.

That leaves a third group of provisional ballots: those where the voter wrote his own name on the affirmation form but for whatever reason neglected to sign the form (although the voter should have signed the poll book in the "Provisional Voters Only" section according to the pollworker training materials provided to the Board). Relators will correctly note that we have no way to distinguish this group from category 2, and that is precisely Relators' problem because *they hold the burden of proof.* They want this Court to find that the Secretary has a clear legal duty to reject provisional ballots, but how can there be a clear legal duty when it is impossible to tell whether the missing signature is the result of voter inadvertencer or election official error, and in one case, the votes should be counted? Clearly, this Court has to err on the side of counting the votes, because there is no clear legal basis for disqualifying them, rather than risk disqualifying legitimate votes. *See State ex rel. Myles*, 2008 Ohio 5097.

Disqualifying some of these ballots would also create a problem under Section (A) of the Voting Rights Act of 1964, 42 U.S.C. §1971(a), which prohibits officials from using inconsistent standards to decide the eligibility of voters within the same county. If Relators prevail, Franklin

County would arbitrarily count some of the provisional ballots that are missing signatures and discard others.

In short, R.C. 3505.183(B)(1) stands for the exact opposite of what Appellants claim: an otherwise eligible, qualified provisional ballot must be counted when the affirmation has a printed name but no signature.

3. Forms That Contain a Signature But No Printed Name Must Be Counted (R.C. 3505.181(B)(2) and R.C. 3505.182)

The foregoing analysis only disposes of half of Relator's argument: they also contend that R.C. 3505.181(B)(1) requires disqualification of a ballot where the affirmation form contains a signature but lacks a printed name. Here the case for disqualification is *weaker*, at least as regards any concern about voter fraud.[5] In this scenario, the provisional voter has signed the declaration acknowledging and subjecting himself to the penalties for election fraud. It is unclear what additional fraud protection the printed name provides, such that a signed affirmation lacking a printed name should be rejected (especially since provisional ballot voters sign poll books).

Fortunately, here again, the Revised Code is consistent with sound policy and common sense: the provisional ballot should be counted notwithstanding any alleged technical violation. R.C. 3505.181(B)(2) states:

> 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;

[5] The Relators have absolutely no evidence whatsoever that any of these challenged ballots are fraudulent. Furthermore, Ohio law simply does *not* require a signature or printed name in order to bring criminal charges against a person who attempts to fraudulently vote. R.C. 3599.12(a).

(b) Eligible to vote in that election.

R.C. 3505.181(B)(2) is significant for two reasons. First, it sets a modest floor for counting provisional ballots: the individual must merely be registered and eligible. And while Relators will argue that this contradicts the "mandatory" language of R.C. 3505.181(B)(2), it is consistent with HAVA, 42 U.S.C. Section 15482(a)(2), which provides that an "individual **shall be permitted to cast a provisional ballot** . . . upon the execution of a written affirmation by the individual before an election official at the polling place." Subsection (4) provides that the ballot shall be counted if "that individual is *eligible* under State law *to vote*." Thus, irrespective of whatever additional procedural obstacles the Ohio Revised Code may or may not impose, federal law requires **only** voter eligibility for the provisional ballot to be counted. (And lest there be any confusion, "eligibility" is an issue of registration and residency, and has nothing to do with whether or not the provisional ballot affirmation form is completely filled out). So the Board would be violating federal law by disqualifying these ballots.

R.C. 3505.181(B)(2) is significant for a second reason. R.C. 3505.181(B)(2) makes the election official a mandatory witness to the execution, that is, the completion, of the provisional ballot affirmation form. This provision requires more than mere passive observation by the poll worker. The provision exists precisely to avoid problems such as incomplete forms, and it therefore confers a duty on the election official to verify the actual completion of the provisional ballot application form. This conclusion is bolstered by R.C. 3505.182, which requires the poll worker to sign a Verification Statement attesting that the affirmation form was "subscribed and affirmed before me." To "subscribe" means "to sign one's name." "To affirm" means "to swear under oath." By law, the poll worker must attest that the voter completed the affirmation by providing both a name and signature.

Relators' assertion, that R.C. 3505.183(B)(1) makes it the voter's responsibility to make sure the affirmation is complete, is without textual support. R.C. 3505.183(B)(1) is written in passive tense; it does not say whose responsibility it is to check the form. But though that section is silent, R.C. 3505.182 is not: it demands a Verification from the election official that the form was completed. What more unambiguous demonstration could there be that it is up to the poll workers to see the work is done correctly? The absence of a name and signature can only be the result of error or nonfeasance by the poll worker. Simply put, a poll worker who was doing her job would never have accepted a provisional ballot affirmation that was signed but lacked a voter's written name.

The Secretary acknowledges that this analysis alone may not be fully dispositive of the issue. Relators will continue to insist that R.C. 3505.181(B)(1) is unambiguous and mandatory: when the voter elects to sign the affirmation form, the form must also contain a printed name or else it cannot be counted. And while reading that provision in isolation, ignoring other sections of the Revised Code, is contrary to basic rules of statutory interpretation, the argument in favor of doing so does have some superficial intellectual appeal.

But any apparent contradiction between provisions of the Revised Code disappears in the light of federal law, which cuts clean through the proverbial Gordian knot. If Franklin County election officials were to discard ballots solely because the voter failed to fill in a printed name (but otherwise signed the envelope in such a way that election officials could verify the voter's identity), they would violate the Voting Rights Act of 1964.

The Voting Rights Act of 1964, 42 U.S.C. § 1971(a), provides:

(2) No person acting under color of law shall:

* * *

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election;

Section 1971's materiality provision "was designed to eliminate practices that could encumber an individual's ability to register to vote" by prohibiting officials from blocking voters from registering or voting based on trivial clerical errors made on government paperwork. *Friedman v. Snipes,* 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004)(emphasis omitted).

Ohio law does not make printing one's name on an affirmation envelope material to any aspect of voting. OHIO CONST. ART. V, §I provides: "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections." None of these requirements includes having the voter print his name on the provisional ballot envelope. This is especially true when election officials are otherwise able to verify the identity and when the voter signed the envelope. Such a failure of the voter to print his name on the envelope constitutes an "other act requisite to voting," the omission of which is not "material" to determining whether the person is qualified to vote.

Though perhaps having the voter print the name might be useful, Congress specifically stated that the requirement must be material. *See, e.g., Schwier v. Cox,* 340 F.3d 1284, 1286 (11th Cir. 2003) (disclosure of Social Security number is immaterial to voter registration); *Washington Assoc. of Churches v. Reed,* 492 F. Supp. 2d at 1270-71 (requirement that state match potential voter's name, date of birth, and driver's license or Social Security digits to information in either the Social Security Administration database or the motor vehicles database

before allowing that person to register to vote violates § 1971 because a failure to match such information is immaterial to eligibility).

Relators have not even attempted to explain why this particular requirement – printing one's name on an envelope that already contains a signature – is "material" in determining whether the voter is qualified to vote under state law. Indeed, the opposite is self-evidently true: Franklin County election officials have already independently confirmed the eligibility of these voters even without the printed name. (Otherwise, the provisional ballots would already have been rejected, and we would not be having this discussion). Thus, irrespective of what Ohio law may or may not say, federal law will not permit the disqualification of these ballots solely because the envelopes do not have printed names on them. It is important for this Court to send a clear signal that disfranchisement by clerical error will not be tolerated.

4. The Placement of a Signature in the Wrong Place is Not Disqualifying

Apparently, some voters signed their names in cursive in the blank for "name" and printed their names on the signature line. The argument for disallowing these ballots is tenuous at best. Two quick points should suffice to address the validity of these ballots. First, there is no statutory requirement that names – in cursive or block print – appear in any particular location on the affirmation. The best Appellants can do is point to R.C. 3505.182, which offers up a sample provisional ballot affirmation form. But R.C. 3505.182 merely suggests that the form should be "**substantially** as follows." By its plain terms, R.C. 3505.182 requires only "substantial" compliance, not strict compliance. Substantial compliance with an election law is acceptable when, as here, the statute expressly says so. *State ex rel. Stokes v. Brunner*, ____ Ohio St.3d ____, 2008 Ohio 5392, at ¶ 33; *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio

St.3d 116, 2008 Ohio 566, at ¶ 21. Therefore, R.C. 3505.182 offers no support for the notion that a ballot is invalid unless the affirmation is filled in one particular way.

Second, rejecting these ballots would contradict the principle, repeatedly affirmed by the Ohio Supreme Court, that courts "must avoid unduly technical interpretations [of election laws] that impede the public policy favoring free, competitive elections." *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22 (quoting *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3). Yet this is precisely what plaintiffs seek to achieve: a rigid, hyper-technical statutory construction that would achieve no valid end but would serve to disenfranchise hundreds of otherwise eligible voters.

B. Mandamus Is Not Available Because Relators Have A Remedy At Law

The preceding sections have demonstrated that no writ should issue because the Secretary is under no clear legal duty to rescind correct statements of law. But in addition, Relators are not entitled to mandamus because they have an adequate remedy at law. Their correct remedy at all times has been to file for a TRO and declaratory judgment in the Common Pleas Court. That is the relief they have sought from this Court instead. It is also the relief they sought in District Court. Mandamus is not available because adequate remedies for the concerns raised by Relators may be addressed through the normal operation of law.[6]

[6] The need for expedited review of this case is not sufficient reason to believe that the Relators do not have an adequate remedy at law. In an expedited elections case earlier this year in federal court, the Plaintiff Ohio Republican Party filed its litigation in district court on October 5, 2008, Case No. 2:08-cv-913. The District Court granted a temporary restraining order on October 9, 2008. A panel of the Sixth Circuit reversed the trial court's decision on October 10, 2008. That decision was vacated and the trial court's opinion reinstated by the Circuit sitting en banc on October 14, 2008. Finally, the United States Supreme Court issued an order vacating the decision on the trial court on October 17, 2008 – only eight days after the trial court issued its original ruling.

C. The Relators Have Failed To Follow The Requirements Of The Supreme Court's Rules Of Practice.

This Court's rules of practice mandate that all complaints for a writ of mandamus "shall contain a specific statement of facts upon which the claim for relief is based, [and] shall be supported by an affidavit of the relator or counsel specifying the details of the claim...." S. Ct. Prac. R. X Sec. 4(B). In this case, neither the relator nor their counsel have filed an affidavit. This Court has recognized that this is a mandatory rule of practice and the Court must dismiss a case if the Relator or his attorney fails to comply with the rule. *State ex rel. Committee for the Charter Amendment v. City of Bay Village* (2007), 115 Ohio St.3d 400, 2007 Ohio 5380 ¶ 14; *see also State ex rel. Citizens for Environmental Justice v. Campbell* (2001), 93 Ohio St.3d 585, 2001 Ohio 1617.

This Court cannot excuse this simple requirement even for expedited elections cases. *See City of Bay Village* 2007 Ohio 5380 at ¶ 14. Since neither the Relators nor their attorneys have filed an affidavit based upon personal knowledge in this case, the Relators' complaint is fatally defective and this case must be dismissed.

CONCLUSION

For the foregoing reasons, this court should deny the Petition and dismiss the case.

NANCY H. ROGERS
Attorney General of Ohio

Richard N. Coglianese (0066830)
Damian W. Sikora (0075224)
Pearl M. Chin (0078810)
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
rcoglianese@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax

Attorneys for Respondent Ohio Secretary of State Jennifer L. Brunner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Brief of Ohio Secretary of State Jennifer Brunner* was served upon the following, on this 1st day of December, via electronic mail, facsimile transmission and ordinary, postage prepaid U.S. mail to:

John W Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE, LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
614-365-9900
614-365-7900 (Fax)
zeiger@litohio.com

Attorneys for Relators

Donald J. McTigue
550 Walnut Street
Columbus, Ohio 43215

Attorney for Intervenor
Ohio Democratic Party

Ron O'Brien, Esq.
Franklin County Prosecuting Attorney
373 South High St., 14th Floor
Columbus, Ohio 43215

Attorney for Respondent Board of Elections of Franklin County, Ohio

Richard N. Coglianese (0066830)