IN THE SUPREME COURT OF OHIO

STATE *ex rel.* SKAGGS, *et al.*	:	
	:	Case No. 08-2206
Relators,	:	
	:	
v.	:	**Original Action in Mandamus**
	:	
JENNIFER L. BRUNNER SECRETARY OF STATE OF OHIO, *et al.*,	:	
	:	
Respondents.	:	

EVIDENCE SUBMITTED BY RESPONDENT FRANKLIN COUNTY BOARD OF ELECTIONS

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BEFORE THE

FRANKLIN COUNTY BOARD OF ELECTIONS

- - - - -

IN RE: :

Special Meeting :

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- - - - -

Proceedings before Chairman Douglas J. Preisse, Board Members William A. Anthony, Jr., Michael F. Colley and Kimberly E. Marinello, Director Michael Stinziano, and Deputy Director Matthew Damschroder, taken at the Franklin County Board of Elections, 280 East Broad Street, Columbus, Ohio, on Friday, November 14, 2008, at 4:53 o'clock p.m.

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APPEARANCES:

Mr. Ron O'Brien
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On behalf of the Board.

ALSO PRESENT:

Ms. Suzanne Brown, Clerk

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P R O C E E D I N G S

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CHAIRMAN PREISSE: It appears that we have a full complement of Board members here, so why don't we call this meeting to order.

MR. STINZIANO: Roll call. Mr. Colley?

MR. COLLEY: Here.

MR. STINZIANO: Chairman Preisse?

CHAIRMAN PREISSE: Here.

MR. STINZIANO: Mr. Anthony?

MR. ANTHONY: Here.

MR. STINZIANO: Ms. Marinello?

MS. MARINELLO: Here.

MR. STINZIANO: This is the Franklin County Board of Elections Special Meeting for Friday, November 14th, 2008.

The first item on the agenda is regarding supplemental procedures for the processing of provisional ballots. We have several categories that the staff would like guidance on from the Board in terms of

clarification and how we should process them.

The first regards the individuals who had mistakenly been designated a three-voter on Election Day. It's the staff's recommendation, those individuals that we can determine should not have been designated a three not be processed as provisional ballots but treated as regular ballots.

CHAIRMAN PREISSE: Okay. And do we know how many voters this affects?

MR. STINZIANO: I don't think we got a final count, but I believe it was less than -- it was around 50 to 75.

CHAIRMAN PREISSE: Okay. Do you want to make a motion?

MR. ANTHONY: I think that's a good thing.

Mr. Chair, I move that the Board process as regular Election Day ballots the provisional ballots cast by individuals who were mistakenly designated in the Election Day poll book as having had their registration notice by the Board of Elections returned as undeliverable, thus improperly requiring them

to vote a provisional ballot.

MR. COLLEY: Second.

CHAIRMAN PREISSE: Do we have any discussion or questions by the Board members or input from our legal counsel on this matter?

MR. O'BRIEN: I think that based on our research and discussion with both the staff and the Board, it's our advice that you vote yes on Mr. Anthony's motion.

CHAIRMAN PREISSE: Are there any questions?

(No audible response.)

MR. CHAIRMAN PREISSE: We have a motion and a second.

MR. STINZIANO: Do a vote. All in favor?

MEMBERS: Aye.

CHAIRMAN PREISSE: None opposed.

The second category are those individuals who the staff can determine requested a regular paper ballot by their signing of the poll book or providing other information on the provisional ballot

envelope; for example, that they wrote "This is a regular ballot" but for whatever reason the poll workers put in a yellow provisional envelope. It is the staff's recommendation that those ballots be treated as a regular ballots and not processed as provisional.

MR. ANTHONY: Mr. Chair, I move that the Board process as regular Election Day ballots those provisional ballots of individuals who staff can determine requested a single paper ballot by the signing in the poll book or other information provided to the provisional ballot envelope or whose ballot was placed in a provisional ballot envelope.

MR. COLLEY: Second.

CHAIRMAN PREISSE: We have a motion and a second. And I think this is a fairly limited occurrence, and we are endeavoring to correct this limited occurrence. Do we have any questions of the Board or commentary or advice from counsel?

MR. O'BRIEN: Yes. We talked to both Mr. Damschroder and Mr. Stinziano and, again, as counsel for the Board would indicate

we think that Mr. Anthony's motion should be voted yes.

MR. STINZIANO: All in favor?

MEMBERS: Aye.

MR. STINZIANO: None opposed.

The next category of individuals are those that contain a signature but not a written name on the provisional ballot envelope. We provided samples of the envelopes. It would be in step 1, there's no printed name but there is a signature at the bottom in step 1.

MR. O'BRIEN: I think those of us that read the newspaper are aware this is the subject of a lawsuit in the Ohio Supreme Court, a writ of mandamus against the Secretary, and the Board itself is named a party. Mr. Piccininni from our office, who regularly represents the Board, entered an appearance in that case.

This morning, Secretary of State filed a motion to remove that from the Ohio Supreme Court to the United States Federal Court here in Columbus. It was initially

assigned to Judge Frost, who agreed to have it consolidated to a pending case with Judge Marbley, and Judge Marbley has ordered us, attorneys for the plaintiffs, and the Secretary of State's office, represented by Mr. Cogly, who typically handles these election matters, to his office at 9 a.m. in the morning.

So in an unusual Saturday morning court proceeding in federal court, these issues are going to be discussed and could be the subject of either a writ or an injunction by Monday.

So it's my suggestion that the Board, since it has absentee ballots to count, overseas ballots to count, military ballots to count, that you defer deciding anything with respect to provisional ballots because they're the subject of a lawsuit, and although you're not enjoined right here as we sit in this room today, I think it would be ill-advised to move forward on this with those lawsuits pending.

MS. MARINELLO: Any idea how many of those we're talking about?

MR. STINZIANO: We do not have a count as of now. We had asked the question of the Secretary of State prior, and they had suggested -- or they said that they must be counted. And I think you've seen Brian Chin's explanation on that. But we do not have a count for any of these; they're just categories.

MS. MARINELLO: Okay.

CHAIRMAN PREISSE: Well, my concern is that we are aware that the rules of the game may or may not be changing, but there's at least a significant chance that they may, so I'm not sure we're well advised to make the next play when the rules may be about to change. I think I hear counsel saying that in more eloquent terms than my layman verbiage.

But do we have any other comments on the pending motion, which hasn't been made yet, before you make it?

MR. ANTHONY: Well, thank you, so much, Mr. Chair. I certainly do respect the opinion of our legal counsel, which I certainly appreciate and respect, but I'm

under the impression that we should proceed with this anyway, and whatever happens in the court happens and we're protected either -- and we are ready to either -- we don't have to come back and meet and talk on it, so I'm going to make a motion that we proceed with this and then at least see what happens with it.

I move that the Board proceed with processing and deem as valid those provisional ballots that contain the signature of a voter but not the written name of the voter, if the staff can determine the person to be a qualified elector of the state who voted in the correct precinct and the person was not required to provide additional information to the Board.

MS. MARINELLO: Second.

CHAIRMAN PREISSE: We have a motion and a second. Is there any discussion?

I believe, in reviewing the statute, that this is one of those places where it's pretty crystal clear, at least to my eyes and mind, that this is a clearly stated

deficiency, which under the law and current procedure would disqualify this provisional ballot. Am I off base there?

MR. DAMSCHRODER: That's certainly my view, having reviewed the statute, that it's very clear that the name and signature of the voter is required by the statute in order for it to be considered a provisional ballot eligible to be counted.

MR. STINZIANO: I think we thought there was some gray area with the Directive, and that's why we asked the Secretary of State's office for clarification. Their guidance was to proceed with processing them.

MR. ANTHONY: Mr. Chair, part of the reason I'm doing this is, I really believe that there's -- and I understand it's to be decided by the courts, maybe, or it may be decided by the Secretary of State, but based on her -- the e-mail we received not too long ago, and based on my own beliefs also, as well, that just because the person forgot to sign their name on there does not make it a fatal ballot, and we should make every effort

we can to count every ballot that was cast on Election Day and not just throw the ballots out because of a deficiency that isn't, in my determination, that fatal.

So that's why I'm moving to put this out there, so that we can at least make an attempt to count every ballot that was cast on Election Day.

CHAIRMAN PREISSE: Well, my concern with that, Mr. Chairman, is that the advice from the Secretary of State came in the form of an e-mail, not a Directive or a more substantial communication.

MR. ANTHONY: I understand.

MR. O'BRIEN: I might add, then, Mr. Chairman, the Secretary of State is not counsel for this Board. Mr. Piccininni previously gave advice to counsel of this Board. The regional counsel for the Secretary of State is not the counsel for this Board, either. Our office, by statute, passed by the General Assembly, is your attorney.

And in the first instance, we suggested it's ill-advised to try to proceed

on this.

But secondly, if you are going to proceed on it, it would be our suggestion that you follow our advice and vote no, simply because that's consistent with what the Secretary of State says as recently as last March 31st in writing to this Board.

Number two, there's been an apparent flip-flop recently on that advice from the Secretary of State's office that's the subject of this lawsuit, and the cause of this lawsuit, I might add, that it would seem to me that the statute says a signature and the written name of the voter.

The last time I looked at a dictionary and the last time I looked at the courts' decisions, the word "and" is something that's called conjunctive; it means both of the items are to be considered together. Not disjunctive; they use the word "or" when you intend it to be a signature or a handwritten notation.

So both the case law and the Ohio Revised Code has a specific provision on that

matter, and so at least it would be my suggestion and recommendation to the Board, as your lawyer, that you vote no on this and would so recommend.

CHAIRMAN PREISSE: We've had substantial discussion on this point. Is there any more?

(No audible response.)

CHAIRMAN PREISSE: Let's have a vote.

MR. STINZIANO: Mr. Colley?

MR. COLLEY: No.

MR. STINZIANO: Chairman Preisse?

CHAIRMAN PREISSE: No.

MR. STINZIANO: Mr. Anthony?

MR. ANTHONY: Yes.

MR. STINZIANO: Ms. Marinello?

MS. MARINELLO: Yes.

MR. STINZIANO: The next category are those individuals then in step 1 on the provisional ballot form. In this situation, they printed their name at the top but there is no signature. Again, there is a gray area. We asked for clarification from the Secretary

of State's office, and they said these should also be counted if we can show that they voted in the correct precinct and they're a qualified elector and they were not required to provide additional information to the Board.

MR. ANTHONY: Mr. Chair.

CHAIRMAN PREISSE: Are you going to do it again?

MR. ANTHONY: I'm going to do it again. And I know I'll be not following the advice of our counsel --

MR. O'BRIEN: Well, he followed it twice.

(Laughter.)

MR. ANTHONY: I'm kind of obstinate at times, and this would be one of those times.

Again, I believe that it is not a fatal flaw, and I believe that the intent of the voter -- that we should be looking at trying process as many of these as we can to allow as many folks to be able to vote as possible and not deny folks the right to vote.

So, Mr. Chair, I move that the Board proceed with processing and deem as valid those provisional ballots that contain the names of the voter but not the voter's signature, if the staff can determine the person to be a qualified elector of the state who voted in the correct precinct and the person was not required to provide additional information to the Board.

MS. MARINELLO: Second.

CHAIRMAN PREISSE: We have a motion and a second. Are there any comments, questions by the Board, or input from our counsel? And we may have just heard that already.

MR. O'BRIEN: Well, I think this is even more blatant than the previous one, and I say that because the voter's signature is not on the provisional ballot.

When people circulate petitions to put people on the ballot, they have to sign their name. The circulator has to sign their name. When they register to vote, they have to sign their name. You have their signature

in the poll book to compare.

All election documents require the signature of the voter to be effective, and there's a reason for that. There's a warning there that says what you're signing is subject to election falsification, subject to prosecution for voter fraud. And as we all know, and I think you have a motion on the agenda later, there was voter fraud in this county during this election cycle.

So what you're doing is saying that the signature that is to be placed on the provisional ballot that has the warning regarding election falsification, that that's not necessary to count the ballot. And I think that is very bad policy, first; but secondly, how are you going to compare the signature if you don't have -- with the poll book, if you don't have the signature of the person who presented himself to vote?

So I just don't know legally or from a policy standpoint how you can vote anything other than no, and I think this is a different issue than the previous one that the Board

just considered and split on. And I don't want to speak for staff, but I'd ask the Board to ask staff what their view is on it.

CHAIRMAN PREISSE: Staff, we would like to hear from you.

MR. DAMSCHRODER: From the Deputy Director's standpoint, I think it's for all the reasons Ron mentioned but also that the letter of the law, when it comes to the qualifications for a provisional ballot to be counted, that signature is a requirement.

MR. ANTHONY: Mr. Chair, part of the other reason why -- you know, this was a very important election that we just went through, and the person filling out this document here, and looking at it and we have a poll worker also there and the poll worker, part of that responsibility is to kind of review this document to make sure that everything is put out properly.

And so in some of those cases, and maybe many or all of those cases, it may be more deemed to be poll worker error than a person's intent to defraud. So I don't

believe that those that we will be counting would fall into the category as election fraud. I would put it under the category as it not being checked, it not being checked by our poll workers, and we should not deny the folks a right to vote because of that error. And that's why I made the motion.

CHAIRMAN PREISSE: I appreciate your comments. You opened by commenting on the importance, a very important election, and I don't disagree, and congratulations to the victors high and low.

But the importance of the election should not dictate to us compliance, pretty standard compliance with very clear election law, which again I reviewed, and I don't think it could be written any clearer than this, the lack of a signature, which is such a common device used in everyday official proceedings that is so clear in the statute, that it would disqualify this document.

If there is no other commentary, we can perhaps call a vote on this matter.

MR. STINZIANO: A roll call vote.

Mr. Colley?

MR. COLLEY: Vote no.

MR. STINZIANO: Chairman Preisse?

CHAIRMAN PREISSE: No.

MR. STINZIANO: Mr. Anthony?

MR. ANTHONY: Yes.

MR. STINZIANO: Ms. Marinello?

MS. MARINELLO: Yes.

MR. STINZIANO: We have a tie vote.

The next category are individuals on the form that printed their name and signed but not necessarily in the places in step 1. In the vast majority of the cases, that occurred in the affirmation at the bottom of step 2.

Again, we asked the Secretary of State's office for their interpretation. They felt that if it was on the form, then that would be sufficient, as long as we can determine they are properly registered, voted in the right precinct, and they didn't have to show any more additional identification.

MR. ANTHONY: Mr. Chair, I have a feeling we're not going to agree on this one

either, but I move that the Board proceed with processing and deem as valid those provisional ballots that contain the voter's name and/or signature on the provisional ballot envelope but not necessarily in the proper designated place on the provisional ballot envelope, if staff can determine the person to be a qualified elector of the state who voted in the correct precinct and the person was not required to provide additional information to the Board.

MS. MARINELLO: Second.

CHAIRMAN PREISSE: We have a motion and a second. Any discussion or further counsel?

MR. O'BRIEN: At least I think this, I would suggest again, this would permit -- and if you have one of these forms and hold it up and look at it, that would purport to say that if someone prints their name anywhere on that item, they're not signing the affirmation, they're not signing who they are, they're not signing the voter information, nothing subject to election falsification,

then I could show up and print Bill Anthony's name on a form and you're saying that would be acceptable.

And that's just not the law and it's not what the statutes provide for, and I don't know how you can vote yes on that.

CHAIRMAN PREISSE: Any other comments or input?

(No audible response.)

CHAIRMAN PREISSE: Okay. We have a motion on the floor here.

MR. STINZIANO: Roll call vote. Mr. Colley?

MR. COLLEY: No.

MR. STINZIANO: Chairman Preisse?

CHAIRMAN PREISSE: No.

MR. STINZIANO: Mr. Anthony?

MR. ANTHONY: Yes.

MR. STINZIANO: Ms. Marinello?

MS. MARINELLO: Yes.

MR. STINZIANO: Another tie vote.

The next category, staff was made aware of at least one situation where the poll worker told an individual that they were in

the correct precinct. That individual cast a provisional ballot and subsequently called our office and learned that they were not in a proper precinct.

In terms of reading Directive 101 and 103, where poll worker error seems to be the concern, we thought it was worth having the Board weigh in on whether or not they thought they should also be processed as a provisional ballot that's fatally flawed or if it could be processed normally.

Typically, if they're in the wrong precinct, we would agree it's fatally flawed, but if there is poll worker error, and that is the theme of the day, that seems to be the concern that this is the case where it was documented clearly as poll worker error.

MR. ANTHONY: Mr. Chair.

CHAIRMAN PREISSE: Yes.

MR. ANTHONY: You know, I had an opportunity to visit a number of polling places on Election Day, and I witnessed this happen firsthand.

I saw a woman that was in the right

precinct but her driver's license had a different address on it, and they told her to go to another precinct. And she went to the other precinct, and when she went to the other precinct they had her in the books there, but she said, I don't live here. And so they said, well, you can vote here.

And then she was smart enough to come back to the precinct that she was at, but had she not come back, she would have voted in the wrong precinct, and being directed to vote in the wrong precinct by our poll workers. So I see where this would be a situation that we ought to at least take into consideration.

And with that, I move that the Board process and deem as valid those provisional ballots of individuals who have represented to staff that the voter was given false information by a poll worker, such as what is his or her proper precinct for voting, and thus cast a provisional ballot in the wrong precinct.

MS. MARINELLO: I'll second that.

CHAIRMAN PREISSE: We have a motion

and a second on this matter. Do we have any questions, comments, or input from counsel down at the other end of the table conferring?

MR. O'BRIEN: I think, in this instance, if the person would come in and confirm, I don't know how the Board is getting the information that they were directed to the wrong location.

MR. STINZIANO: We were made aware of it by a poll observer. We didn't suggest the individual come in, and they have not yet, but if they did, we'd want not to just have them come in but kind of let them know, if they came in, what the process would be.

MR. O'BRIEN: I think if they came in and confirmed what the poll worker relayed, then it would seem to me that, yes, we should count their vote, because I think that is poll worker error and their vote should be counted. I think somewhat inexplicably, given the other issues, the Secretary of State's Directive says you shouldn't count that vote.

So I would say that that person, because it's our employee, directed him to the

wrong place, that we should count the vote.

MR. DAMSCHRODER: I think we probably need some clarification then. Because at this point, my understanding is all we have is a written statement from an observer and perhaps a copy of a declaration from a voter that I don't believe was made under oath and signed by a notary, and so I guess if we're going to allow this to be a category, I think the Board needs to develop some kind of process or standard by which we judge those, as opposed to just getting an e-mail from an observer saying, on such-and-such a date a person came in and a poll worker directed them to the wrong place.

CHAIRMAN PREISSE: That sounds reasonable to me. It falls within your --

MR. O'BRIEN: It falls within the statute on how you should proceed, I think.

CHAIRMAN PREISSE: Well, I wonder if it would be satisfactory to Chairman Anthony to reconsider that motion; subsequently, we can develop a policy and approach.

MR. ANTHONY: How come we can't vote

on it and then develop a policy?

MR. O'BRIEN: Maybe if you would modify the motion to say that the vote should be counted if satisfactory proof is provided to the Board by the voter.

MR. ANTHONY: Then I will do that. See, I don't always disagree with you, Ron.

What Ron said.

CHAIRMAN PREISSE: What would satisfactory proof constitute? Any opinion?

MR. STINZIANO: I think a statement from the poll worker that that incident did occur and a statement from the voter that the incident occurred, I think that would show that said incident was truthful and that it was properly then recorded, that they did tell that individual to stay and vote and the voter did that, and then that the voter learned afterwards that they were given improper information and there was a poll worker error there.

CHAIRMAN PREISSE: I wonder if that statement would require something so drastic as a signature from the voter.

(Laughter.)

CHAIRMAN PREISSE: Should we have the motion read as amended so we know what we're voting on? Who's our scribe?

MR. DAMSCHRODER: I think we probably should do that. I don't know if the transcriptionist is able to put all of those different things together, or whether we're better off moving forward with other agenda items and maybe drafting something quickly that can be in the form of a substitute amendment, Mr. Anthony.

MR. ANTHONY: So what was the verbiage you had used?

MR. O'BRIEN: I think if you just tack on to the end of the existing motion "provided that sufficient evidence is presented to the Board from the poll worker and the voter."

MR. ANTHONY: Then I'd like to amend my motion to include "provided that sufficient evidence is provided by the poll worker and the voter." So is there a second for my amendment?

MS. MARINELLO: I second it.

MR. ANTHONY: So the whole motion is -- should we read it back?

MR. DAMSCHRODER: I think we have the sense.

MR. ANTHONY: Okay, then.

CHAIRMAN PREISSE: All right. Any further discussion?

MR. STINZIANO: Roll call?

CHAIRMAN PREISSE: I think that sounds sufficient. No, I don't think we need a roll call.

MR. STINZIANO: Okay. All in favor?

MEMBERS: Aye.

MR. STINZIANO: Any opposed?

(No audible response.)

MR. STINZIANO: Motion passes.

The last category are individuals with provisional ballot envelopes that contain no identification verification, which would be your category 3 -- or category 2.

MR. DAMSCHRODER: From step 2.

MR. STINZIANO: From step 2, there's nothing checked in that box. There is a

printed name, a signature, but no forms of identification documentation.

Again, contacted the Secretary of State's office and it was their recommendation that if a person is qualified elector of the state who voted in the correct precinct and they were not required to provide the additional form, that we go ahead and process them as valid.

CHAIRMAN PREISSE: All right.

MR. ANTHONY: Mr. Chair, I move that the Board proceed with processing and deem as valid those provisional ballots' envelopes that contained no identification verification on the provisional ballot such as the last four digits of the Social Security number or Ohio driver's license number, et cetera, if the staff can determine the person to be a qualified elector of the state who voted in the correct precinct and the person was required to provide additional information to the Board.

MS. MARINELLO: Second.

CHAIRMAN PREISSE: Well, okay. I

have some thoughts about this one, but I wonder if counsel wants to precede those with any thoughts about this amazing motion, in my mind.

MR. O'BRIEN: The only observation I would make is the statute imposes a mandatory duty on the voter to put that information on the document, and in the absence of the voter fulfilling their duty, that it should not be acceptable. I mean, it's not the poll worker error.

CHAIRMAN PREISSE: And as I understand our statutes, in addition to that, if the voter fails to or consciously chooses not to, he or she may visit the Board within ten days and provide further information.

And with respect, Mr. Chairman, your motion would appear to say it's okay to do one and, also, you don't have to comply with the law and do the second piece which was permitted previously. So you can guess how I'm going to vote, I think. Any other --

MR. STINZIANO: I think again it's the interpretation of reading Directive 101

and 103, with poll worker error, that there's responsibility to the poll worker that there is a reason it's not checked, and the interpretation, as I understood it, was that it's the poll worker's fault, not the voter's fault.

MR. ANTHONY: And not to be redundant, one of the things that I think we all should be trying to do is, if the person, after we've checked all the other information out, if they are a qualified elector and they're given a precinct where they voted, that we should let them vote. And that's my stance. So are we ready to vote on this?

MR. STINZIANO: Are you ready for a vote?

CHAIRMAN PREISSE: Mm-hmm.

MR. ANTHONY: I am.

MR. STINZIANO: Mr. Colley?

MR. COLLEY: No.

MR. STINZIANO: Chairman Preisse?

CHAIRMAN PREISSE: No.

MR. STINZIANO: Mr. Anthony?

MR. ANTHONY: Yes.

MR. STINZIANO: Ms. Marinello?

MS. MARINELLO: Yes.

MR. STINZIANO: Those are all the categories that we desire to present before the Board, four of which have resulted in tie votes, three of which have passed.

CHAIRMAN PREISSE: Okay. Then I'm going to move that as certain of the preceding motions regarding the categories with provisional ballots that resulted in a tie vote shall be submitted to the Ohio Secretary of State pursuant to Section 3501.11, paragraph 10, of the Ohio Revised Code.

The Chairman asks that both sides of the issue submit their rationale for voting for or against the motions to the Director not later than noon on Tuesday, November 18th, 2008, so that the Director may submit the matter in controversy to the Ohio Secretary of State on Tuesday, November 18th, 2008.

MR. STINZIANO: The next item on the agenda is referral of possible voter fraud cases to the prosecuting attorney.

MR. DAMSCHRODER: We do have six

CERTIFICATE

The undersigned do hereby certify that the foregoing proceedings were digitally recorded, electronically transmitted, and transcribed via audible playback, and that the foregoing transcript of such proceedings is a full, true and correct transcript of the proceedings as so recorded.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this _____ day of _____, 2008.

_____

MICHELLE K. SALINAS
Certified Digital Reporter
Notary Public - State of Ohio.
My commission expires July 10, 2013.

_____

DONNA J. BELLOUS
Certified Digital Transcriber

Franklin County
Where Government Works

BOARD OF ELECTIONS
Michael Stinziano, Director Matthew M. Damschroder, Deputy Director

November 18, 2008

The Honorable Jennifer Brunner
Ohio Secretary of State
180 East Broad Street
Columbus, Ohio 43215

Re: Tie Vote

Dear Secretary Brunner:

Please find included with this letter, the various positions of the Franklin County Board of Elections regarding the recent tie votes concerning four different categories of provisional ballot envelopes and whether each category results in a fatal flaw for processing purposes. In addition, please find attached the minutes from the meeting.

Do not hesitate to contact either of us with any questions you may have.

Sincerely,

Michael Stinziano
Director

Matthew M. Damschroder
Deputy Director

FRANKLIN COUNTY
BOARD OF ELECTIONS
280 East Broad Street
Columbus, Ohio 43215

(614) 462-3100
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http://Vote.FranklinCountyOhio.gov

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November 18, 2008

The Honorable Jennifer Brunner
Ohio Secretary of State
180 East Broad Street
Columbus, Ohio 43215

Dear Secretary Brunner:

We write to respectfully urge you to join us in opposing four motions, offered by Board Member William A. Anthony, Jr. and seconded by Kimberly E. Marinello, which resulted in tie votes of the Franklin County Board of Elections at a special meeting on Friday, November 14, 2008.

A summary of the motions are as follows (the Director will provide a copy of the meeting transcript for the precise language of the motions):

1. To permit the counting of a provisional ballot when the voter provided the voter's signature without also providing the voter's name as a part of the appropriate affirmation on the Provisional Ballot Envelope.

2. To permit the counting of a provisional ballot when the voter provided the voter's name without also providing the voter's signature as a part of the appropriate affirmation on the Provisional Ballot Envelope.

3. To permit the counting of a provisional ballot when the voter provided the voter's name and/or signature on the Provisional Ballot Envelope but not as a part of the appropriate affirmation.

4. To permit the counting of a provisional ballot when the voter failed to provide any form of identification, as evidenced by the Provisional Ballot Envelope, and the voter did not present in person at the Board of Elections during the ten days following the election to provide the required identification.

While reserving the right to advance any and all additional arguments relative to these questions in the appropriate venue, [1] at this time we limit the discussion in support of our position to the fact that the Franklin County Prosecuting Attorney, the Board's sole legal counsel under R.C. 309.09, advised against offering or supporting of any such motion due to pending litigation, which had been filed against the Board of Elections seeking to enjoin us from acting on these very matters until the Ohio Supreme Court could decide the merits of the complaint. As of this writing, these questions are now before the United States District Court, which has announced its intent to rule on Thursday of this week.

[1] Upon motion of the Secretary of State filed by the Attorney General, the United States District Court has realigned the parties to a complaint originally filed against the Secretary and this Board before the Ohio Supreme Court such that the interests of this Board, at the request of the Secretary, are now in opposition to those of the Secretary of

EXHIBIT
3

For this reason alone, the recommendation of the Board's Counsel against offering or supporting any such motion due to pending litigation on the same questions, we respectfully urge you to break the tie vote in our favor.

Sincerely,

Douglas J. Preisse
Chairman

Michael F. Colley
Member

Franklin County
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BOARD OF ELECTIONS
Michael Stinziano, Director Matthew M. Damschroder, Deputy Director

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November 18, 2008

The Honorable Jennifer Brunner
Ohio Secretary of State
180 East Broad Street
Columbus, Ohio 43215

Re: Tie Votes on Provisional Ballots

Dear Secretary Brunner:

We write in support of the motions determining that the categories of provisional ballots that are the subject of the tie vote are not fatally flawed and should be processed and deemed valid if staff can determine the person to be a qualified elector of the State who voted in the correct precinct and the person was not required to provide additional information to the Board but failed to do so. The importance of these tie votes is the number of provisional ballots being counted as votes in the November 4, 2008 general election. The context and our support on the motions rely on the following circumstances.

On November 14, 2008, the Franklin County Board of Elections held a special meeting to consider, among other things, various categories of provisional ballots and whether supplemental procedures for the processing of the provisional ballots was warranted. Four tie votes occurred. The four tie votes are as follows:

1. Motion by Board member Anthony and seconded by Board member Marinello to proceed with processing, and deem as valid, those provisional ballots that contain the signature of a voter but not the written name of the voter, if staff can determine the person to be a qualified elector of the State who voted in the correct precinct and the person was not required to provide additional information to the Board.
(Yes: Anthony & Marinello / No: Chairman Preisse & Colley).

2. Motion by Board member Anthony and seconded by Board member Marinello to proceed with processing, and deem as valid, those provisional ballots that contain the name of the voter but not the voter's signature, if staff can determine the person to be a qualified elector of the State who voted in the correct precinct and the person was not required to provide additional information to the Board.
(Yes: Anthony & Marinello / No: Chairman Preisse & Colley).

3. Motion by Board member Anthony and seconded by Board member Marinello to proceed with processing, and deem as valid, those provisional

ballots that contain the voter's name and/or signature on the Provisional Ballot Envelope but not necessarily in the proper designated place on the Provisional Ballot Envelope, if staff can determine the person to be a qualified elector of the State who voted in the correct precinct and the person was not required to provide additional information to the Board.
(Yes: Anthony & Marinello / No: Chairman Preisse & Colley).

4. Motion by Board member Anthony and seconded by Board member Marinello to proceed with processing, and deem as valid, those provisional ballots envelopes that contain no identification verification on the provisional ballot envelope (such as the last four digits of the social security number, Ohio driver license number, etc), if staff can determine the person to be a qualified elector of the State who voted in the correct precinct and the person was not required to provide additional information to the Board.
(Yes: Anthony & Marinello / No: Chairman Preisse & Colley).

Voting to count the provisional ballot of an otherwise eligible voter in each of the instances described above would be in keeping with the Ohio Revised Code at sections 3505.181 and 3505.182; Ohio Secretary of State's Directives 2008-101 and 2008-103; and, the Orders of the United States District Court for the Southern District of Ohio.

The central question regarding each category is whether there is a "fatal defect" requiring that the provisional ballots be rejected and whether that defect is the result of poll worker error. It is our position in each instance that the defect is not fatal, and thus the provisional ballot of an otherwise eligible voter should be counted because of poll worker error. It is the statutory duty of our poll workers to make certain that on each provisional ballot, the voter prints their name and signs the affirmation in Step One of the ballot envelope. R.C. 3505.181(B)(2) requires that the affirmation, or Step One on the Franklin County provisional ballot, be executed "before the election official." The election official in question is our poll worker. R.C. 3505.181(B)(2) imposes a duty upon our poll worker to make certain that the voter prints their name and signs the affirmation in Step One of the provisional ballot envelope. The poll worker can easily, discharge their statutory duty by either reviewing the provisional ballot envelope while the voter is completing Step One before them, or by making a final check of the provisional ballot envelope when the voter hands it to the poll worker as the provisional ballot is cast. By accepting a provisional ballot to be cast whose envelope is not complete in Step One, our poll worker erred and this error cannot cause the voter to lose their right to vote.

Furthermore, to invalidate the vote of an otherwise eligible voter who took the time to come to the polling place to exercise their right to vote because one of our poll workers did not properly execute their statutory duty to make sure that all steps on the provisional ballot envelope are completed correctly would disenfranchise that voter. There is no harm to the public interest in accepting the provisional ballots of otherwise eligible voters whose provisional ballots are the subject of the four tie votes described above and, in fact, counting these provisional ballots furthers the role of the Board in protecting the right to vote of Franklin County citizens.

The motions we support are based on our firm belief that "we must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections." *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, 22. We therefore respectfully request that you, or your designee, summarily decide in favor of all four motions regarding provisional ballots.

Respectfully Submitted,

William A. Anthony, Jr.

Kimberly E. Marinello

JENNIFER BRUNNER
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November 20, 2008

Michael Stinziano, Director
Franklin County Board of Elections
280 East Broad Street, Room 100
Columbus, Ohio 43215

RE: Tie votes of November 14, 2008 concerning four categories of provisional ballots

Dear Director Stinziano:

The Franklin County Board of Elections met on November 14, 2008. During this special board meeting the board voted on several motions concerning categories of provisional ballots with irregularities on the provisional ballot affirmation form. Four of these motions resulted in a tie vote of the board. In accordance with R.C. 3501.11(X), and with the procedures outlined in the Ohio Election Official Manual, the Franklin County Board of Elections submitted the tie votes, including position statements of the board members and a transcript of the meeting, to me on November 18, 2008. After a full review of these materials, and for the reasons outlined below, I vote with Board Members Anthony and Marinello in favor of all four motions to deem valid and process the four categories of provisional ballots described below. Accordingly, the votes contained on the provisional ballots at issue must be included as valid votes in the official canvass of the November 4, 2008 election. My analysis and decision follow.

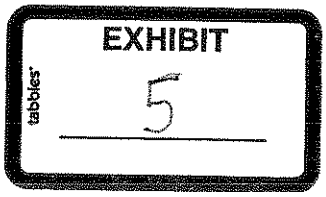
Background

The 2008 General Election was held on November 4, 2008. There were over 27,000 provisional ballots cast in Franklin County during the 2008 General Election. Board staff began reviewing provisional ballot affirmations after Election Day to determine whether the provisional ballots should be counted. On November 14, 2008, the board held a special meeting to consider whether provisional ballots that had similar irregularities would be counted in the official canvass.

The board reached tie votes on the following motions:

1) Board Member William A. Anthony, Jr., made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains the signature of the voter but not the written name of the voter if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Kimberly E. Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Douglas F. Preisse and Board Member Michael F. Colley voted against the motion, resulting in a tie vote. (Tr. 11, 15).[1]

[1] References to the transcript of the November 14, 2008 special board meeting are referred to by the abbreviation "Tr." and the page number.



2) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains the printed name of the voter but not the signature of the voter if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Preisse and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 17, 21).

3) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains both the printed name of the voter and the signature of the voter but not in the place designated for the name and signature in column one of Franklin County's provisional ballot affirmation form if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Preisse and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 22, 23).

4) Board Member Anthony made a motion to process and deem valid provisional ballots for which the provisional ballot affirmation form contains both the printed name of the voter and the signature of the voter but no verification that the voter provided identification in column two of Franklin County's provisional ballot affirmation form if the staff can determine that the person is a qualified elector, voted in the correct precinct, and was not required to provide additional information to the board of elections but failed to do so. Board Member Marinello seconded the motion. Board Members Anthony and Marinello voted in favor of the motion, while Board Chair Preisse and Board Member Colley voted against the motion, resulting in a tie vote. (Tr. 31, 33-34).

Discussion

The tie votes of the Franklin County Board of Elections concern whether certain provisional ballots cast in the 2008 General Election with similar irregularities on the provisional ballot affirmation form should be counted in the official canvass. Prior to Election Day, and pursuant R.C. 3501.05(B), I issued two directives to the Ohio county boards of elections providing instructions for the processing and counting of provisional ballots. These directives were the result of settlement negotiations in the federal court case captioned *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-CV896 (S.D. Ohio). Directive 2008-101 interprets R.C. 3505.181, 3505.182 and 3505.183 and outlines the process by which boards of elections must process and count provisional ballots, while Directive 2008-103 specifically addresses the issue of poll worker error in processing provisional ballots. The U.S. District Court for the Southern District of Ohio adopted Directives 2008-101 and 2008-103 as orders of the court.

Ohio's current provisional voting process provided in R.C. 3505.181, 3505.182 and 3505.183 was enacted by House Bill 3, effective May 2, 2006. In order to vote a provisional ballot in Ohio, R.C. 3505.181(B)(2) requires a voter to execute a written affirmation "before an election official at the polling place." The voter is also required to provide identification to the election official, who records the type of identification provided by a voter, or if the voter does not have

identification, to execute an affirmation as provided in R.C. 3505.181(B)(6). If a voter declines to execute an affirmation, the election official must record the voter's name and note on the provisional ballot envelope that the voter declined to execute an affirmation. The election official must then transmit the provisional ballot back to the board of elections under R.C. 3505.181(B)(3) and (6). Thus, R.C. 3505.181(B) places a duty on poll workers to interact with voters and to oversee the completion and execution of the provisional ballot affirmation.

The form of the provisional ballot affirmation is provided in R.C. 3505.182. Pursuant to R.C. 3501.05(G), and consistent with R.C. 3505.182, this office adopted Secretary of State Form 12-B ("SOS Form 12-B") as the official Provisional Ballot Affirmation form. Pursuant to R.C. 3501.05(C) and 3501.27(B), and to aid Ohio's county boards of elections in training poll workers regarding the proper administration of elections, this office developed the Poll Worker Manual and Poll Worker Quick Reference Guide. Directive 2008-27 requires Ohio's county boards of elections to train poll workers using the Poll Worker Manual and Poll Worker Quick Reference Guide. Additionally, the directive requires boards of elections to provide a copy of these documents to all poll workers and to provide three copies of the Poll Worker Quick Reference Guide to each precinct for use on Election Day.

Clear direction is provided in SOS Form 12-B, the Poll Worker Manual (on page 40) and the Poll Worker Quick Reference Guide (in the "Processing Provisional Ballots Voted" section) that poll workers must review provisional ballot affirmation forms to ensure that the affirmation is properly completed by voters before the poll worker executes the election official verification section of SOS Form 12-B. This requirement is consistent with the express authority of poll workers to administer elections at precincts (R.C. 3501.33 and 3501.22), the statutory mandate that poll workers be trained regarding election laws and procedures (R.C. 3501.27), and the duty of poll workers to interact with voters and to oversee the completion of the provisional ballot affirmation (R.C. 3505.181(B)).

Unfortunately, the Franklin County Board of Elections does not use SOS Form 12-B as its provisional ballot affirmation form. Instead, the board has adopted a form that is inconsistent with SOS Form 12-B. It is unclear whether the Franklin County Board of Elections instructed its poll workers using the Poll Worker Manual and Poll Worker Quick Reference Guide as required by Directive 2008-27. However, Franklin County's poll workers still must comply with Ohio election law and the directives, advisories, rules and instructions for the conduct of elections promulgated by the Secretary of State. Moreover, the failure of a poll worker to do so constitutes poll worker error. Under Directive 2008-103 and the October 27, 2008 federal court order no provisional ballot may be rejected by a board of elections for reasons that are attributable to poll worker error.

Directive 2008-101, which interprets R.C. 3505.181, 3505.182 and 3505.183, provides the steps that boards of elections must follow in reviewing and processing provisional ballots. Section VI.D.1. of the directive provides the necessary information for a provisional ballot to be counted:

Ballots Eligible to be Counted

Where **ALL** of the following apply, board staff responsible for processing provisional ballots must recommend to the board that a provisional ballot shall count, and a board of elections shall count the provisional ballot:

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 the following:

(1) His or her name and signature as the person who cast the provisional ballot;

(2) 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

(3) 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

(4) His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by an election official;

or

(5) A completed affirmation under R.C. 3505.18(B)(4) (SOS Form 10-T).

d) If applicable, the individual has provided additional information to the board of elections as may be required, i.e. because he or she falls into one of the four categories of provisional voters who **must** provide additional information to the board of elections during the ten days after the day of an election, and discussed in more detail below; and

e) If applicable, the individual has been afforded a hearing conducted under R.C. 3503.24, which has resulted in the inclusion of the provisional voter's name in the official registration list.

Finally, the determination of the validity of provisional ballots must also be viewed in the context of the Supreme Court of Ohio's reminders in *State ex rel. Myles v. Brunner*, 2008-Ohio-

5097, ¶ 22, that election officials "must avoid unduly technical interpretations [of election law] that impede the public policy favoring free, competitive elections," and in *State ex rel. Colvin v. Brunner*, 2008-Ohio-5041, ¶ 62, that election laws are to be "liberally construed 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."

1. Provisional ballot affirmations containing the voter's signature but not the printed name

The first category of provisional ballots with affirmation form irregularities includes ballots that contain the signature of the voter but not the printed name of the voter. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.1 or 4. (above), the provisional ballot must be counted if the voter's name and signature were recorded by the voter or if the printed name was recorded by the voter or a poll worker. If the voter did not provide his or her written name, the poll worker was required to review the form and to instruct the voter to record it. Moreover, if the board had used SOS Form 12-B, the poll worker would have been required to print the voter's name in the election official verification. Thus, the failure to record the name of the voter was poll worker error, and poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a signature in the affirmation form but not a printed name must be counted.

2. Provisional ballot affirmations containing the voter's printed name but no signature

The second category of provisional ballots with affirmation form irregularities includes ballots that contain the printed name of the voter but not the signature of the voter. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.4. (above), the provisional ballot must be counted if the voter's name was recorded by the voter or by a poll worker. Section VII of Directive 2008-101 specifically states that "the statutory scheme contemplates at least one circumstance where a provisional voter does not have to provide a signature" for the provisional ballot to be counted.

There is specific statutory authority for this conclusion in Directive 2008-101. The last sentence of R.C. 3505.182 provides that "[i]f 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." Under R.C. 3505.181(B)(6):

> If, at the time that an individual casts a provisional ballot, the individual *** declines to execute such an affirmation *** the appropriate local 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 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)(3) provides

> 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.

R.C. 3505.181(B)(4) states "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.**"

Finally, R.C. 3505.183 specifically provides:

> (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.

Thus, even in the absence of poll worker error, there is clear statutory authority for counting the provisional ballot of a voter that includes the printed name of the voter on the provisional ballot

affirmation but no signature. Moreover, poll workers are required by R.C. 3505.181(B)(6) to record that a voter has declined to execute an affirmation and the failure of a poll worker to do so constitutes poll worker error. Poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing the printed name of a voter in the affirmation form but no signature must be counted.

3. Provisional ballot affirmations containing the voter's printed name and signature but not in the spaces designated on Franklin County's provisional ballot affirmation form

The third category of provisional ballots with affirmation form irregularities includes ballots that contain both the printed name and signature of the voter but not in the place designated for the name and signature in column one of Franklin County's provisional ballot affirmation form. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day, if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.1.c.1 or 4. (above), the provisional ballot must be counted if the voter's name and signature were recorded by the voter in the affirmation. As stated above, poll workers are required to review the affirmation to ensure that it is properly completed before completing the election official verification. If the poll workers had complied with this duty the voter would have been instructed by the poll workers to complete the affirmation properly and would likely have corrected their envelope by placing their name and signature on the appropriate lines, since these voters had already once provided their name and signature. Thus, the failure of poll workers to review the provisional ballot affirmation and instruct the voter to complete the form properly clearly was poll worker error, and poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a name and signature in the affirmation form but not in the spaces designated on the form for name and signature must be counted.

4. Provisional ballot affirmations containing the voter's printed name and signature but no verification of identification on the provisional ballot affirmation form

The fourth category of provisional ballots with affirmation form irregularities includes ballots that contain both the printed name and signature of the voter but lack verification on the face of the affirmation that the voter provided identification to the poll worker. The motion provides that these provisional ballots may be counted if the board's staff is able to determine that the voter is a qualified elector, voted in the correct precinct, and did not fail to provide additional information to the board of elections after Election Day if the voter was required to do so. Thus, eligibility of these voters is not at issue. Under Directive 2008-101 section VI.D.2.g. and R.C. 3505.183(B)(4)(a)(vii), a provisional ballot may not be counted if the voter did not provide identification, the last four digits of the voter's social security number or execute an affirmation stating that the person does not have identification or a social security number.

Under SOS Form 12-B and Franklin County's provisional ballot affirmation form, the poll worker was required to mark whether the voter failed or refused to provide identification. The absence of the designation whether the voter failed or refused to provide identification is poll worker error, and consistent with my duty to interpret the election laws liberally in favor of upholding the right to vote, it is appropriate to assume that the voter provided identification. Poll worker error cannot serve as a basis for rejecting a provisional ballot under Directive 2008-103 and the October 27, 2008 federal court order. Thus, provisional ballots containing a name and signature in the affirmation form but no verification on the face of the affirmation that the voter provided identification to the poll worker must be counted.

Decision

For the foregoing reasons, I vote with Board Members Anthony and Marinello **in favor** of all four motions to deem valid and process the four categories of provisional ballots described above. Accordingly, those motions pass. The Franklin County Board of Elections is hereby instructed to begin processing provisional ballots in accordance with this tie vote decision unless there is an order in the federal case of *State ex rel. Skaggs v. Brunner*, Case No. 2:08 cv 1077 (S.D. Ohio) to the contrary.

Sincerely,

Jennifer Brunner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served this 1st day of December 2008 via ordinary U.S. Mail and email upon:

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Damian W. Sikora
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