UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel.   :
DANA SKAGGS, et al.,   :
                                    :   Case No. 2:08 cv 1077
        Relators,   :
                                    :   Judge Marbley
        vs.   :
                                    :   Magistrate Judge King
JENNIFER L. BRUNNER   :
SECRETARY OF THE STATE OF   :
OHIO, et al.,   :
                                    :
        Respondents.   :

RELATORS DANA SKAGGS AND KYLE FANNIN'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Relators Dana Skaggs and

Kyle Fannin ("Relators") move for summary judgment on their request for a Writ of Mandamus[1]

compelling: (1) Ohio Secretary of State Jennifer Brunner ("Secretary Brunner") to correct her

office's erroneous instruction to the Franklin County Board of Elections (the "Board"), based on

an erroneous interpretation of Section 3505.183(B)(1)(a) of the Ohio Revised Code, and

compelling her to advise the county boards of elections that any Provisional Ballot Application

cast in the November 4, 2008 election must include both the voter's name and signature in the

statutorily required affirmation and if it does not, it is not eligible to be counted; and (2)

compelling Secretary Brunner and the Board to reject any Provisional Ballot Applications as not

eligible to be counted if the Application does not include both the name and signature of the

voter on the provisional voter affirmation required by Section 3505.183(B)(1)(a).   A

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[1]   A Writ of Mandamus is the prescribed form of remedy under the Ohio Constitution and case law to address
Secretary Brunner's refusal to comply with the statutory requirements for consideration of provisional votes. With
the removal of the case, Relators seek such relief, irrespective of forum, to remedy Secretary Brunner's unlawful
direction to the Board.

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memorandum setting forth the basis for this motion and a supplemental affidavit of Matthew

Damschroder are attached.

                                        Respectfully submitted,

                                        /s/ John W. Zeiger
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<u>**MEMORANDUM IN SUPPORT**</u>

I.   <u>**INTRODUCTION**</u>

*"If . . . the statute conveys a meaning which is clear, unequivocal
and definite, at that point the interpretation effort is at an end, and
the statute must be applied accordingly".*

[In re Guardianship of Lombardo,
86 Ohio St. 3d 600 (1999).]

So too here. R.C. 3505.183(B)(1)(a) is clear, unequivocal and definite: a voter "*must*

include her name *and* signature on the provisional ballot application 'in order for the provisional

ballot to be eligible to be counted. . . .'" Since the duty is "mandatory," the voter must "strictly

comply. . . ." State ex rel. Myles, et al. v. Brunner, 2008-Ohio-5097, ¶ 18 (2008). If she fails to

do so, her provisional ballot is simply not eligible to be counted.

Relators seek the most basic of relief: Secretary Brunner's compliance with the statutory

requirements for the consideration of provisional ballots as set forth in the plain and

unambiguous language of Section 3505.183. Where an Ohio state official refuses to comply

with the statutory mandate prescribed by the General Assembly, the Sixth Circuit has made clear

the judiciary's role is to remedy this lack of compliance by "enforc[ing] the law [the General

Assembly] enacted, not to write a different one that [respondents] think is superior." Rittenhouse

v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005). That the instant action may impact a federal

congressional race is of no relevance, as Congress made "conspicuously" clear in 42 U.S.C. §

15482(a)(4) that "the issue of whether a provisional ballot will be counted as a valid ballot" is

left "to the States." Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 577 (6th Cir.

2004). Hence, it is Ohio statutory law—specifically, R.C. 3505.183(B)(1)(a)--which is

dispositive here.

As a preliminary matter, let's begin with what is not disputed. First, as the parties stipulated before this Court, there is no dispute as to any material fact.[2] Thus, Secretary Brunner has offered no evidence (nor is there any) that the defective provisional ballots (a) were the product of poll worker error; (b) were caused by any event or person other than the voter's failure to comply with the statutory requirements; or (c) that any excuse or explanation exists for the voter's non-compliance. Instead, she offers nothing but speculation and conjecture, both of which do not, under Rule 56, substitute for the evidence she fails to offer. See, e.g., Highland Capital, Inc. v. Franklin Nat'l Bank, 350 F.3d 558, 568 (6th Cir. 2003).

Second, as the Court as observed, there is no dispute as to the constitutionality of the Ohio statutory provisions at issue. They are, thus, to be applied as written, subject to the application of basic principles of statutory construction.

Finally, in light of Secretary Brunner's concession during oral argument, there is no dispute that Section 3505.183(B)(1) of the Ohio Revised Code, which establishes the requirements for evaluation and counting of provisional ballots by county boards of election in Ohio, contains *mandatory* language that, under Ohio Supreme Court precedent, must be *strictly* applied.[3]

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[2] Although the parties stipulated that there are no issues of material fact, Secretary Brunner has sought a stipulation and otherwise expressed an intention to interject additional factual contentions before this Court with respect to poll worker training and procedures. Specifically, Secretary Brunner seeks to introduce a poll worker information chart prepared by her office that purportedly imposes additional obligations placed on poll workers beyond those set forth in the Revised Code. While it is obvious that Secretary Brunner is not permitted to amend or rewrite the Revised Code by issuing new materials shortly before the election, in any event, as reflected in the affidavit of Matthew Damschroder (Exhibit A), Secretary Brunner's chart was provided to poll workers hired by the Franklin County Board of Elections only *after* their poll worker training had been completed.

[3] This motion is limited to the specific legal issues identified by the Court during the oral argument proceedings on November 17, 2008. Nonetheless, Relators also renew their arguments previously made, both with respect to the merits of Relators' claim for mandamus relief, and with respect to the Court's lack of subject matter jurisdiction to hear this case. Apparently, Secretary Brunner has similar concerns inasmuch as she has challenged whether Relators have Article III standing to proceed in federal court. See, e.g., Coyne v. American Tobacco Co., 183 F.3d 488, 496-97 (6th Cir. 1999) (where plaintiffs lack standing in removed action, remand to state court is "mandatory").

Accordingly, the only issue presented is one of basic statutory construction involving the interplay between Section 3505.183(B)(1), which mandatorily prohibits boards of elections from counting provisional ballots unless the voter provides her name *and* signature, and Section 3505.181(B)(2), which provides that provisional voters "shall be permitted to cast a provisional ballot . . . upon execution of a written affirmation . . . before an election official. . . ." The issue arises in the context of four different types of incomplete provisional ballot applications received by the Franklin County Board of Elections: (1) those where the voter executed the affirmation statement required under Section 3505.181(B)(2) of the Revised Code, but did not provide his or her printed name; (2) those where the voter provided his or her printed name but did not execute the affirmation by signature; (3) those where the voter executed the application in the wrong place (i.e., not in the required affirmation); and (4) those where the voter failed to provide the necessary voter identification information and/or identification affirmation. The answer to each of these questions is found in the express language of Ohio's election statutes.

As to the first three types, as reflected in both Section 3505.181 and Section 3505.183 of the Ohio Revised Code and as discussed below, *the statutory duty to complete the necessary information is clearly on the voter*. In contrast, under the fourth type, the statutory duty to complete the required identification information is clearly placed on the poll worker. See Ohio Rev. Code § 3505.181(B)(6). In light of this plain statutory language, 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. The same, mandatory language does not appear in Section 3505.181(B)(2), however. As a result, no similar

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poll worker duty attaches, and the obligation to include the name and signature on the required affirmation rests solely on the voter.

Nonetheless, Secretary Brunner asks the Court to simply ignore those words specifically chosen by the General Assembly and instead judicially re-write Section 3505.181(B)(2) to impose an express duty on the *poll worker* to ensure that the provisional voter completes the affirmation properly. The end result is clear: The poll workers become an absolute guarantor for voter error, and the mandatory language of Section 3505.183(B)(1), which *prohibits* the Board from counting ballots that do not contain the voter's name and signature, is completely eviscerated. This approach allows Secretary Brunner to ignore the directive of the General Assembly, as plainly stated in Section 3505.183(B)(1), and render the controlling provision of Ohio law for ensuring the very legality of a provisional ballot a nullity, in violation of every rule of statutory construction.

Fortunately, the law forbids this and the Sixth Circuit has specifically expressed its disdain for such tactics. This Court should as well by applying the plain language chosen by the Ohio General Assembly and granting Relators' motion summary judgment on all claims.

II.   LAW AND ARGUMENT

A.   **Section 3505.183(B)(1) Is Mandatory, And Its Terms Must Be Strictly Applied.**

Section 3505.183 sets forth the requirements, applicable to county boards of elections, for determining whether a provisional ballot is valid and entitled to be counted. Section 3505.183(B)(1) provides:

> To determine whether a provisional ballot is valid and entitled to
> be counted ... [t]he board shall examine the information contained
> in the written affirmation executed by the individual who cast the
> provisional ballot under division (B)(2) of section 3505.181 of the
> Revised Code.   ... [T]he following information *shall be included*

in the written affirmation *in order for the provisional ballot to be eligible to be counted*:

(a)   *The individual's name and signature*;

*   *   *

(2) In addition to the information *required to be included* in an affirmation under division (B)(1) of this section ...

*   *   *

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

*   *   *

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

[Ohio Rev. Code § 3505.183 (emphasis added).]

On their face, these statutory terms: (1) impose a mandatory obligation on county boards of election to *reject* a provisional ballot application where the voter failed include *both* his or her *written name and signature* on the required affirmation; and (2) clearly indicate that it is the *voter's* obligation to provide this required information on the provisional ballot application.

These mandatory obligations, apparent from the face of the statute, must be strictly applied. It is a "settled rule" that "election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is." State ex. rel. Myles, et al. v. Brunner, 2008-Ohio-5097, ¶ 18 (2008) (emphasis added). Indeed, under Ohio law, a court "cannot accept substantial compliance" with the statutory terms unless the statute specifically provides for it. State ex rel. Citizens for Responsible Taxation v.

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Scioto County Board of Elections, 65 Ohio St. 3d 167, 169 (1992). See also State ex rel.

Evergreen Co. v. Board of Elections of Franklin County, 48 Ohio St. 2d 29, 31 (1976) ("It is a

basic principle of law that ... election statutes are mandatory and must be strictly complied

with.").

Where, as here, the legislature uses terms such as "shall contain" or "shall include," such

terms are *mandatory* and, pursuant to the general rule, must be strictly applied:

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

> [Myles, 2008-Ohio-5097, ¶ 18 (emphasis added).]

See also Esch, 61 Ohio St. 3d at 596 (election statute with "shall contain" language set forth

mandatory requirements, to be strictly applied); Citizens for Responsible Taxation, 65 Ohio St.

3d at 168 (legislature's use of, *inter alia*, "shall" in elections-related statute triggered strict

compliance requirement).

Where an elections statute contains this mandatory language, not only is substantial

compliance insufficient, but also the rule of strict construction precludes the need to resort to

public policy considerations. Secretary Brunner is obligated to apply the statute's "plain

language," and no deference whatsoever is due her interpretations, irrespective of whether such

guidance is embodied in a directive, email, manual, etc. See, e.g., State ex rel. Stokes v.

Brunner, 2008-Ohio-5392, ¶ 29 (Oct. 16, 2008) ("[W]e need not defer to the secretary of state's

interpretation because it … fails to apply the plain language" of the statute.); Myles, 2008-Ohio-5097, ¶ 26 (same).

Accordingly, the language of Section 3505.183(B)(1), is mandatory, and it expressly recognizes the _voter's_ obligation to include both his or her name and signature on the provisional ballot application affirmation. In the absence of _any_ of these mandatory items, the Board of Elections is _required_ to reject the provisional ballot. This statutory language could not be clearer, and when _strictly applied_, it is dispositive of Relators' claims in this case.

> **B.   R.C. 3505.181(B)(2) Can Not Eviscerate The Provisions Of R.C. 3505.183(B)(1) That Unequivocally And _Mandatorily_ Prohibit Respondents From Opening And Counting Provisional Ballot Applications Lacking Both The Name _And_ Signature Of The Voter.**

> **1.   No Poll Worker Duty Arises Under The Plain Language Of R.C. 3505.181(B)(2).**

In oral argument, counsel for Secretary Brunner conceded the obvious: R.C. 3505.183(B)(1) makes it mandatory that a provisional voter provide both "[t]he individual's name and address" "in order for the provisional ballot to be eligible to be counted. . . ." The Secretary nonetheless seeks to circumvent this flat prohibition against counting incomplete provisional ballots by arguing that R.C. 3505.181(B)(2) creates a duty on poll workers to confirm the completeness of the application before signing it themselves. The Secretary bases her claim on an otherwise unremarkable procedural provision:

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

> *   *   *

> (2)   The individual shall be permitted to cast a provisional ballot at that polling place _upon the execution of a written affirmation_ by the individual _before an election official_ at that polling place stating that the individual is both of the following:

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

(b) Eligible to vote in that election.

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

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

But that is not what the statute says. And, as the Sixth Circuit has recognized, the Court's duty is "to enforce the law . . . enacted, not to write a different one. . . ." Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005).

2.   This Court Can Not Construe R.C. 3505.181(B)(2) To Impose An Implied Duty On Ohio's Poll Workers That The Legislature Did Not Expressly Impose.

The Secretary's request that the Court imply a duty on poll workers to check provisional ballot applications is precluded by Ohio's law on statutory construction. "Where under one possible construction [such as that the Secretary proposes] two statutes would appear to be irreconcilable, but under another possible construction they would not, the construction will be adopted which harmonizes the statutes and gives effect to each." Franklin Township v. Village of Marble Cliff, 4 Ohio App. 3d 213, 217 (10th Dist. 1982). Accord: Benjamin v. Ernst & Young, LLP, 2007 WL 2325812, *4-5 (10th Dist. Aug. 16, 2007) (citing Franklin Township and

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adopting construction of R.C. §3903.04 in a manner which "also allows R.C. Chapter 2743 to be fully effective"). This maxim of statutory interpretation is equally applicable to the construction of Ohio's Election Laws. See Zweber v. Montgomery County Board of Elections, 2002 WL 857857, *3 (2d Dist. April 25, 2002) ("A well-recognized principle of statutory construction requires us to construe two seemingly conflicting statutes, when possible, to give effect to both. … In accordance with these principles, the trial court properly construed R.C. 3501.01(F) and R.C. 3517.01(A) in the only way that avoids an irreconcilable conflict and gives effect to both provisions as written.").

Here, the result of the construction proposed by the Secretary would make R.C. 3505.181(B)(2) directly irreconcilable without the mandatory mandates of R.C. 3505.183(B)(1)(a). As such, the Court is bound to construe R.C. 3505.181 to avoid the irreconcilable conflict the Secretary proposes.

Second, R.C. 3505.181(B)(1) "may not be extended by implication beyond the clear impact" of the words it contains. United States v. Stewart, 311 U.S. 60. That is because it is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. Lake County v. Rollins, 130 U.S. 662, 670, 671.

Here, R.C. 3505.181(B)(2) does not impose *any* duty on a poll worker. Rather, it merely says a voter must cast a provisional ballot "*before* an election official" at the polling place. (Emphasis added.) The statute prescribes conduct by a voter; it does not mandate conduct of a poll worker. As such, R.C. 3505.181(B)(2) can not be extended by implication beyond the clear import of its word as the Secretary seeks.

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Nor may one be inferred in an effort to override the express, mandatory language of Section 3505.183(B)(1). Courts may not delete words used or insert words not used in a statute. Columbia Gas Transmission Corp. v. Levin, 117 Ohio St. 3d 122, 125 (2008). It is simply not the province of a court to add words to a statute that the legislature omitted. Indeed, a proffered statutory construction must be rejected where such construction could have been conveyed by "very simple and concise language," which the legislature did not employ. See State, ex rel. Darby v. Hadaway, 113 Ohio St. 658 (1925). That is, if it "would have been simple" for the legislature to use certain, clear language, and if the legislature chose not to, it must have "had some different meaning in mind." State, ex rel. Pickrel v. Industrial Commission, 1988 WL 35809, *2 (10th Dist. March 24, 1988).

It is equally well settled that where the legislature uses specific language in one statutory provision, its failure to use the same language in another provision must be deemed intentional. As the Supreme Court has stated:

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. ... "The short answer is that Congress did not write the statute that way."
>
> [Russello v. U.S., 464 U.S. 16, 23 (1983) (emphasis added).]

See also City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994) ("'it is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another'") (citation omitted).[4] Ohio courts have applied this same canon of construction. Thus, where the General Assembly uses clear

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[4] Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197-98 (6th Cir. 1983) ("[i]t is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent").

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

And it has been long the rule in Ohio that statutory provisions are to be construed so as "to give effect to every word and clause ..." State ex rel. Myers v. Board of Education of Rural School Dist. of Spencer TP., Lucas County, 95 Ohio St. 367, 372-73 (1917). Under this canon, "[n]o part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." Id.

Applied to Section 3505.181(B)(2), these canons of construction compel the conclusion that poll workers do not have a mandatory obligation to ensure that provisional voters complete all of the necessary information on the provisional ballot application affirmation. First, and fundamentally, in the absence of express statutory language imposing a duty on poll workers to act as a guarantor for voter error in completing the provisional ballot affirmation, the Court may not "write" such a supplemental provision. Had the legislature chosen to impose such a mandatory duty on poll workers, it could have done so with "simple" and "concise" language. The fact that it did not do so must be deemed intentional.[5]

Moreover, when the Ohio legislature seeks to create mandatory obligations, it knows how to do so, as reflected in its use of terms such as "shall" and "require" in instructing county boards

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[5] In addition, Secretary Brunner's proffered interpretation of Section 3505.181(B)(2) would effectively construe that provision as _requiring_ the counting of all provisional ballots where the voter failed to write his name or execute the required affirmation in the proper place, because such failure is a result of poll worker error. Such a construction would, on its face, create an irreconcilable conflict with Section 3505.183(B)(1), which expressly directs the boards of elections _to reject any such ballots_—without any provision for poll worker error.

of election as to their duties under Section 3505.183(B)(1). In fact, the legislature expressly utilized such mandatory language in identifying poll worker duties in *other portions of Section 3505.181*. In Section 3505.181(B)(6), for example, the legislature expressly imposed certain obligations on poll workers as they relate to voter identification requirements, which are distinct from the affirmation required of the voter in Section 3505.181(B)(2). In doing so, the legislature used the same mandatory language found in Section 3505.183(B)(1):

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

[Section 3505.181(B)(6) (emphasis added).]

This express language, contained in another part of Section 3505.181, clearly reveals that when the legislature seeks to impose mandatory duties on poll workers, with respect to provisional ballots, it knows how to do so. It did not use such language in Section

3505.181(B)(2). And, thus, the legislature did not intend to impose a duty on poll workers to make sure that voters correctly complete the provisional ballot affirmation required thereunder.[6]

3. **Even If A Duty Could Be Implied Under R.C. 3505.181 That A Poll Worker Is To Review A Provisional Voter's Application, The Special Provisions Of R.C. 3505.183(B) Control Over The More General Provisions Of R.C. 3505.181.**

Here, both R.C. 3505.183(B)(1)(1) and 3505.181(B)(1) were adopted as part of the same legislation. [2006 H.B. 3.] The General Assembly established "procedures" for casting provisional ballots in R.C. 3505.181 and established the rules for counting—and rejecting—provisional ballots in R.C. 3505.183. When it comes to determining eligibility for a provisional ballot to be *counted*, R.C. 3505.183 is applicable—and 3505.181's procedures for casting a provisional ballot is not. In short, R.C. 3505.181 is a special statute that contains specific mandatory requirements that the General Assembly imposes on the eligibility of any provisional ballot to be counted, while R.C. 3505.181 imposes no such specific mandatory provisions. As such, R.C. 3505.183 is the more specific and controlling statute.

Thus, even if a duty could be implied on poll workers under R.C. 3505.181 to assure the completion of every provisional ballot, defective provisional ballots missing the voter's name *and* signature still would not be eligible to be counted. As in Andrianos v. Community Traction Co., 155 Ohio St. 47, syllabus ¶1 (1951), the specific provision mandating the eligibility of provisional ballots to be counted "is controlling over a [more] general statutory provision" such as R.C. 3505.181 that "might otherwise be applicable." See also Exemption of Real Property From Taxation v. County of Franklin, 167 Ohio St. 256, 261 (1958) ("a special statutory

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

provision which relates to the specific subject matter involved in litigation [here R.C. 3505.183] is controlling over a general statutory provision [here R.C. 3505.181] which might otherwise be applicable").

III.   CONCLUSION

For all of the reasons set forth herein, Relators' Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel

of record by means of the Court's CM/ECF system on this 18th day of November, 2008.

/s/ John W. Zeiger
John W. Zeiger   (0010707)

859-001: 189215

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel.　　　　　　：
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SECRETARY OF THE STATE OF　　：
OHIO, et al.,　　　　　　　　　：
　　　　　　　　　　　　　　　　：
　　　　　Respondents.　　　　　：

SUPPLEMENTAL AFFIDAVIT OF MATTHEW M. DAMSCHRODER

STATE OF OHIO　　　　　　　）
　　　　　　　　　　　　　　）ss:
COUNTY OF FRANKLIN　　　　）

Matthew M. Damschroder, being duly cautioned and sworn, supplements his original Affidavit in this matter with the following:

1.　　As I stated previously, I am Deputy Director of the Board of Elections of Franklin County, Ohio ("Board of Elections"), having held the position since March 2008. Previously, I served as Director of the Board of Elections continuously from June 2003 until my appointment as Deputy Director in March 2008. As Director or Deputy Director of the Board of Elections, I have been involved in sixteen elections, each of which involved issues of provisional ballot eligibility, and am personally familiar with the training regime the Franklin County Board of Elections provided to its poll workers for the November 2008 election.

2.　　The Franklin County Board of Elections used its Precinct Election Official's Training Manual, prepared specifically for the November 2008 election, to

train precinct poll workers for the November 4, 2008 election. True and accurate copies of the cover page of the Training Manual and the pages instructing poll workers how to complete provisional ballot envelopes (pages 159-166) are attached.
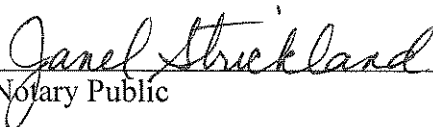
3.   The Franklin County Board of Elections provided each poll worker with a copy of its Precinct Election Official's Training Manual as part of their training. Each poll worker received a training session of between two and four hours (depending on their assigned duties) conducted by the Franklin County Board of Elections in which each poll worker was familiarized with, and trained according to, the provisions of the Precinct Election Official's Training Manual.

4.   The Poll Worker Quick Reference Guide for the November 2008 election prepared by the Secretary of State (SOS 0541-P (08/08)) was not used by Franklin County to train its poll workers for the November 4, 2008 election.

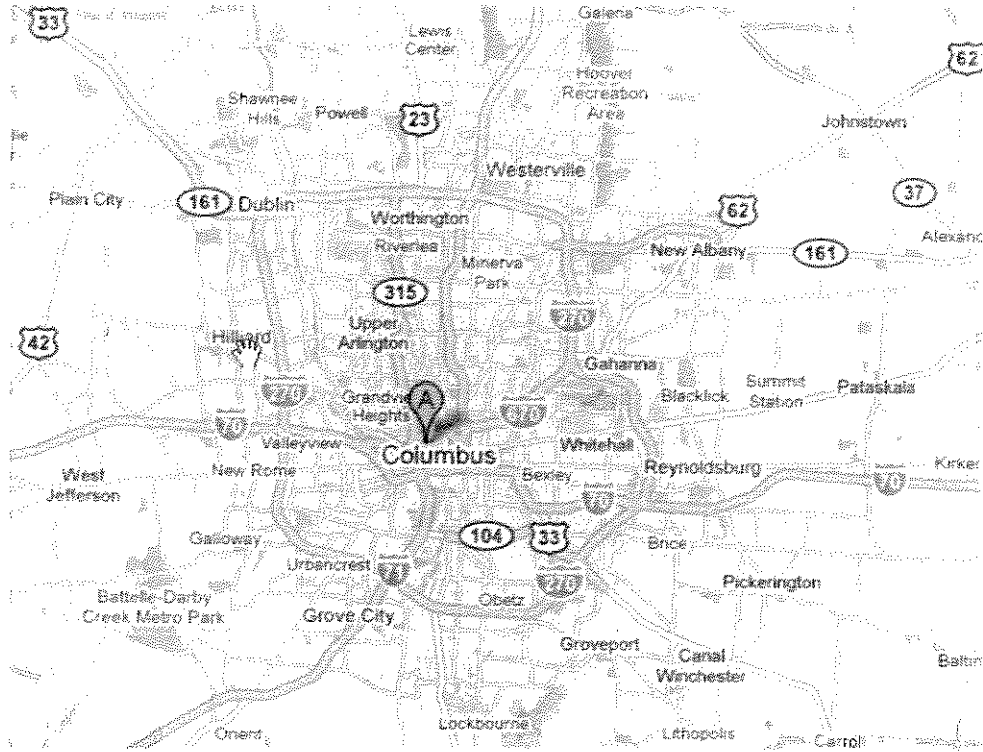Futher Affiant sayeth naught.

_____
Matthew M. Damschroder

Sworn to before me and subscribed in my presence this 18th day of November, 2008.
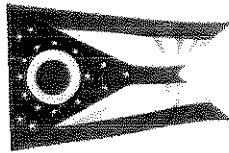
_____
Notary Public

JANEL STRICKLAND
Notary Public, State of Ohio
My Commission Expires 07-24-13

Precinct Election Officials Training Manual

**Franklin County
Board of Elections
November 2008**

280 East Broad Street
Columbus, OH 43215-4572
614/462-3100

http://vote.franklincountyohio.gov

COMPLETING THE
PROVISIONAL BALLOT
APPLICATION ENVELOPE

All required information MUST be completed for the Provisional Ballot to count

STEP 1: VOTER INFORMATION

1. <u>VOTER</u> prints his/her name (required)

2. <u>VOTER</u> prints CURRENT (**required**) and FORMER Addresses, including Apartment #, if applicable, and Zip Code.

3. <u>VOTER</u> prints FORMER NAME (if applicable) if the former registration is under another name.

4. <u>VOTER</u> prints DATE OF BIRTH (required)

5. <u>VOTER</u> signs and provides date (required)

STEP 1:
VOTER INFORMATION
Each blank must be completed by the Voter.

I,

_____,
(CLEARLY PRINT NAME-REQUIRED)

solemnly swear or affirm that I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in this election, for which I am casting this provisional ballot. I am casting this provisional ballot because my name should appear on the official precinct list, but does not, my address has changed, my name has changed, I requested an absentee ballot and/or I am listed in the official precinct list as having requested an absentee ballot or for another reason. I declare under penalty of election falsification I am a citizen of the United States, will have lived in this state for 30 days immediately preceding the next election, and I will be at least 18 years of age at the time of the general election.

CURRENT ADDRESS

_____
HOUSE #/STREET   APT #

CITY _____ ZIP CODE:_____

FORMER ADDRESS:

STREET: _____

CITY: _____

COUNTY: _____

FORMER NAME (if applicable)

_____

DATE OF BIRTH <u>REQUIRED</u>

_____/_____/_____(MM/DD/YYYY)

I understand that if the information I provide on this provisional ballot application is not fully complete and correct, and/or if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, and/or if the board of elections determines that I have already voted in this election, this provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution. I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief.

X _____ Date _____
VOTER'S SIGNATURE (REQUIRED)

STEP 2: VOTER IDENTIFICATION

1. <u>VOTER</u> checks which form of Identification he/she is providing to the Paper Ballot Judge. (required, unless no form of ID)

2. Only if a voter does not have any form of valid ID **and** does not have a Social Security number, will that voter will sign and date the Identification Affirmation.

   If the voter refuses to complete the Identification Affirmation Statement, continue on to Step 3 of the application.

STEP 2:
VOTER IDENTIFICATION
To be completed by the Voter.

You must provide <u>one</u> of the following forms of identification documentation

<u>NOTE</u>: If you are unable to provide proof of identity or if your right to vote was challenged and you were unable to provide the necessary documentation to satisfy the challenge, you may provide proof of identity at the Board of Elections within 10 days after the election.

☐ The <u>last four digits</u> of my Social Security Number are: _____

☐ My Ohio Driver's License Number OR State Identification Card Number is:

_____

☐ Other form of photo identification displaying name and current address:
(specify kind of ID) _____

☐ Other (copy of current utility bill, bank statement; government check, paycheck, or other government document that shows my name and current address) (specify kind of ID) _____

☐ I have no identification documentation and I have NO Social Security Number
(complete <u>Identification Affirmation</u> below if applicable)

IDENTIFICATION AFFIRMATION
ONLY FOR VOTERS WHO CHECKED "NO ID" ABOVE
RC 3505.18(A)(4)

I,_____,
(CLEARLY PRINT NAME)
declare under penalty of election falsification that I cannot provide a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing my name and current address, nor the last four digits of my social security number because I have no social security number and further declare that I am the person named on this application and that I understand I may cast a provisional ballot.

X_____ Date _____
VOTER'S SIGNATURE

STEP 3: POLL WORKER STATEMENT

The <u>POLL WORKER</u> records the type of identification presented by the voter.

Use the form the Roster Judge filled out at the Roster table and sent with the voter so you know if the voter is a PROVISIONAL VOTER OR IS VOTING A PAPER BALLOT BY CHOICE.

PROVISIONAL = YELLOW

DISABLED PROVISONAL VOTING ON MACHINE = BLUE

2. <u>PAPER BALLOT JUDGE</u> fills in Voting Precinct and signs

---

STEP 3:
POLL WORKER STATEMENT
To be completed by a Poll Worker

The preceding Provisional Ballot Application was subscribed and affirmed before me. The following is true concerning the reason necessary to issue a provisional ballot:

☐ Voter's name is not in the Signature Poll Book

☐ Voter has a LEGAL NAME CHANGE

☐ Voter has an ADDRESS CHANGE

☐ Number '2' is to the left of the signature box (undeliverable 60-day election notice)

☐ Number '3' is to the left of the signature box (undeliverable registration acknowledgement notice)

☐ Number '4' is to the left of the signature box (voter requested an ABSENTEE BALLOT)

☐ " ATTORNEY IN FACT" is printed in signature box. Check here and also check the <u>specific reason</u> for a provisional ballot

☐ The Voter is unable to provide valid identification

☐ The Voter refuses to provide valid identification

☐ Name or address on the Valid Non Photo identification does NOT match the Signature Poll Book

☐ Voter's name does not match the Signature Poll Book (Signature Poll Book has current legal name but ID does NOT have current legal name)

Precinct/MPL: _____

(Check Location Street Guide for this)

X _____
POLL WORKER'S SIGNATURE

STEP 4: VOTE!

2) PAPER BALLOT JUDGE records the **BALLOT STYLE** for the voter (**From the Precinct Street/Road Guide**)

3) PAPER BALLOT JUDGE locates all pages of the correct paper ballot with the voter's correct ballot style.

4) A 5-digit, red number should be PREPRINTED on ALL YELLOW and BLUE Provisional Application envelopes.

5) PAPER BALLOT JUDGE gives the voter the completed YELLOW application envelope and the PAPER ballot.

   Voter goes to privacy booth to vote paper ballot. Voter puts all pages of ballot in the application envelope and deposits it into the slot of the Paper Ballot Station Transport Box.

6) Paper Ballot Judge gives Provisional voter the two Provisional handouts (Judge Carr notice and Provisional Voter Rights).

   NOTE: A disabled provisional voter can vote provisionally ON THE VOTING MACHINE (BLUE envelope, two handouts, but NO paper ballot)

   DISABLED VOTER completes the BLUE Provisional Ballot Application Envelope. The voter takes the envelope to the machine judge and votes on the machine.

   NOTE: A disabled provisional voter seals the Provisional Application Envelope and deposits it in the sealed ballot box, after voting on the voting machine.

7) ALL Paper Ballot Envelopes with voted paper ballots in them (Yellow and TAN) remain in the sealed ballot box ALL DAY. The Blue Envelopes for disabled voters also remain in the sealed ballot box (remember, this voter votes on the machine so the envelope does NOT contain a voted ballot).

STEP 4: VOTE!

After completing this application in its entirety:

1. POLL WORKER: Using the Precinct Street Listing, find the provisional voter's current address and write the ballot style number for the voter's address here:

   _____
   (Ballot Style Number)

2. POLL WORKER: Locate a provisional ballot packet with the same ballot style number that you wrote above.

   58672

3. POLL WORKER; Give the provisional voter the provisional ballot packet and the Provisional Application envelope, and direct the provisional voter to a provisional booth (UNLESS THE VOTER IS DISABLED AND VOTING ON THE MACHINE) to mark the PAPER ballot.

4. VOTER: Open the provisional ballot packet and carefully read all of the instructions. Once you have completed voting your provisional ballot, fold it in half and place it inside this envelope. Seal the envelope and deposit the envelope in the sealed ballot box.

THIS SPACE FOR OFFICE USE ONLY

PROVISIONAL VOTER

VOTER DOES NOT SIGN SIGNATURE POLL BOOK; DO NOT ISSUE ATV SLIP

Driver's License State ID → NAME DOES NOT MATCH → Signature Poll Book (Name is Different) → **PROVISIONAL** Complete Steps 1-4 on application

Other Forms of Valid Identification → NAME/ADDRESS DOES NOT MATCH → Signature Poll Book (Name and Address) → **PROVISIONAL** Complete Steps 1-4 on Application

Does Not Have Identification → **PROVISIONAL** Complete Steps 1-4 on Application Voter signs affirmation

Declines to Show or Does Not Bring ID → **PROVISIONAL** Complete Steps 1-4 on Application Can record last 4 digits of SS#

Declines to Sign Affirmation Statement → **PROVISIONAL** Complete Steps 1-4 on Application

VOTER DOES NOT SIGN SIGNATURE POLL BOOK; DO NOT ISSUE ATV SLIP

ATTENTION PRESIDING JUDGES/VOTING LOCATION MANAGERS: YOU MUST POST THIS NOTICE AT BOTH THE MAIN ENTRANCE TO THE BUILDING WHERE YOUR VOTING LOCATION IS, AS WELL AS AT YOUR POLLING STATION WITH THE OTHER PUBLIC LEGAL NOTICES:

<u>N O T I C E</u>

Your vote, including a vote cast by provisional ballot, will count ONLY if you are voting in the precinct in which you reside.

If you do not know whether your correct precinct is located at this polling place, please ask a poll worker now for assistance.

THIS NOTICE MUST BE PROVIDED TO EACH PROVISIONAL VOTER

NOTICE OF AVAILABILITY OF PROVISIONAL VOTER HOTLINE

To learn if your provisional ballot was counted in the November 4th election, please call the
PROVISIONAL VOTER HOTLINE AT 866-OHIO-VOTE from December 19 to December 31.

You may also inquire whether you need to provide further proof of identity for your vote to count
at the Franklin County Board of Elections.
You may provide additional proof of identity until Friday, November 14, 2008, to your county board of
elections.
Hours to call you Board of elections:
from 8:00 a.m. – 5:00 p.m. Monday through Friday at 614-462-3100

PROVIDING PROOF OF IDENTITY WITHIN 10 DAYS AFTER THE ELECTION

If you cast a provisional ballot because: 1) you were unable or declined to provide proof of identity, or 2) your right to vote was challenged at the polling place, you may provide required proof of identity within 10 days after the election.

A provisional ballot needs additional verification before it can be counted. A board of elections makes that determination within 10 days after an election. Many times, a voter who has voted a provisional ballot may appear in person at the board of elections during the 10-day period after the election and complete certain steps that will allow his or her ballot to be counted. Here are different situations and what you can do:

1. **You have ID but didn't have it with you at the polls and couldn't supply the last 4 digits of your social security number. The board of elections needs ONE of these items below showing your name and address within 10 days after the election for your vote to count:**
   a. Current and valid Ohio driver's license (address need not be current on this form of ID),
   b. Photo identification card issued by the State of Ohio (address need not be current on this form of ID) or the United States government,
   c. Military ID showing your name and current address,
   d. Utility bill issued and dated within one year of the election,
   e. Bank statement issued and dated within one year of the election,
   f. Paycheck issued and dated within one year of the election,
   g. Government check issued and dated within one year of the election,
   h. Another government document dated within one year of the election (e.g. letters; bills for taxes; hunting, fishing and marine equipment operator's licenses; license renewal notices and other notices; court papers; grade reports, transcripts, etc.) "Government office" includes any local (including county, city, township and village governments), state or federal (United States) government office, branch, agency, commission, public college or university or public community college, whether or not in Ohio. The law specifically provides that you cannot use as a "government document" a notice mailed by a board of elections.
   If you do not have or wish to provide any of the above forms of ID, you may supply the board of elections with the last four digits of your social security number.

2. **You had ID but didn't want to provide it and didn't want to provide the last 4 digits of your social security number AND you didn't want to execute an affirmation statement. The board of elections needs ONE of the items listed in 1. above showing your name and address. This item must be supplied in person to the board of elections within 10 days after the election for your vote to count.**

3. **You did not have any required form of ID and do not have a social security number AND didn't want to execute an affirmation statement. The board of elections needs ONE of the items listed in 1. above showing your name and address. This item must be supplied in person to the board of elections within 10 days after the election for your vote to count OR you will need to appear at the board of elections and execute the written affirmation statement.**

4. **You were challenged at the polling place by someone who claimed you were not eligible to vote. The board of elections will tell you what identification or other documentation you need to resolve the challenge. (See Revised Code section 3505.20.) You may call the board and supply the needed information in person within 10 days after the election.**

FRANKLIN COUNTY BOARD OF ELECTIONS
GENERAL ELECTION, NOVEMBER 4, 2008

Provisional Voter Transfer Form

1. Together, the Paper Ballot Judge and Voter use the County Street Guide to determine the correct voting location.
2. In the alphabetic list, first find the voter's street and then house number in the correct range (odd or even or ALL).
3. To the far right of the street row is the voter's precinct where he/she **should vote**.
4. Toward the end of the County Street Guide (green pages), in alphabetic order, find the voter's precinct identified in #3. Write the voter's correct polling place and address below on this form.
5. **Give the voter this form to take to the correct voting precinct.**

_____

Correct Precinct and name of Voting Location where voter **should be** voting.

_____

Address of the Voting Location where you are sending this voter.

By signing below, both the Paper Ballot Judge and Voter agree the information above is correct.

_____	_____
Voter Name (print)	Paper Ballot Judge Name (print)
_____	_____
Voter Signature	Paper Ballot Judge Signature
_____	_____
Voter Name (print)	Paper Ballot Judge Name (print)
_____	_____
Voter Signature	Paper Ballot Judge Signature

Motions

2:08-cv-01077-ALM-NMK The State of Ohio ex rel. Dana Skaggs et al v. Brunner et al

U.S. District Court

Southern District of Ohio

Notice of Electronic Filing

The following transaction was entered by Little, Marion on 11/18/2008 at 5:01 PM EST and filed on 11/18/2008

Case Name:	The State of Ohio ex rel. Dana Skaggs et al v. Brunner et al
Case Number:	2:08-cv-1077
Filer:	The State of Ohio ex rel. Dana Skaggs
	Kyle Fannon

Document Number: 37

Docket Text:
MOTION for Summary Judgment by Plaintiffs The State of Ohio ex rel. Dana Skaggs, Kyle Fannon. Responses due by 12/12/2008 (Attachments: # (1) Exhibit A) (Little, Marion)

2:08-cv-1077 Notice has been electronically mailed to:

Meredith Bell-Platts   mbell@aclu.org, koconnor@aclu.org

Pearl Chin   pchin@ag.state.oh.us

Richard Nicholas Coglianese   rcoglianese@ag.state.oh.us

Carrie L. Davis   cdavis@acluohio.org

Caroline Gentry   cgentry@porterwright.com, dchapman@porterwright.com, eoconnor@porterwright.com

Christopher J Hogan   hogan@litohio.com

Marion H Little   little@litohio.com

Mark Alan McGinnis   mamcginnis@rrohio.com, mctiguelaw@rrohio.com

Anthony E Palmer , Jr   aepalmer@franklincountyohio.gov

Patrick J Piccininni   pjpiccin@franklincountyohio.gov

Damian W Sikora   dsikora@ag.state.oh.us

John Wolcott Zeiger   zeiger@litohio.com

2:08-cv-1077 Notice has been delivered by other means to:

Ronald Joseph O'Brien
Franklin County Prosecutor's Office - 2
369 South High Street
5th Floor
Columbus, OH 43215

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit A
Original filename:n/a
Electronic document Stamp:
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1] [158e77c20e0905603a4b064c4c5fd41ebfbf4c464400d35136e46f7fcfc04cb426
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