

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

THE STATE OF OHIO ex rel.	:	
DANA SKAGGS, et al.,	:	
	:	Case No. _____
Relator,	:	
	:	
v.	:	Judge _____
	:	
JENNIFER L. BRUNNER	:	
SECRETARY OF THE STATE	:	
OF OHIO, et al.,	:	
	:	
Respondent.	:	

AFFIDAVIT OF RICHARD N. COGLIANESE

STATE OF OHIO
COUNTY OF FRANKLIN SS:

Affiant, Richard N. Coglianesse, having been first duly cautioned and sworn, does hereby state as follows on the basis of personal, firsthand knowledge:

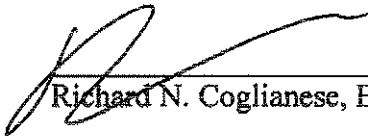
1. I currently serve as Principal Assistant Attorney General at the Ohio Attorney General's Office and am appearing in this matter as counsel for Defendant Secretary of State Jennifer L. Brunner.

2. This affidavit was prepared for filing with Defendant's Notice of Removal to this Court of the case originally captioned as *The State of Ohio ex rel. Dana Skaggs et al. v. Jennifer L. Brunner, Secretary of the State of Ohio, et al.*, Case No. 08-2206 in the Supreme Court of Ohio.


3. I certify the attached materials as a true and accurate copy of the complete record of proceedings before the Supreme Court of Ohio.

4. I certify that a time-stamped copy of Defendant's Notice of Removal will be filed with the Supreme Court of Ohio immediately following the filing of the Notice of Removal in the United States District Court for the Southern District of Ohio.

Further Affiant Sayeth Naught.


Richard N. Coglianesse, Esq.

Sworn to before me and signed in my presence, a Notary Public in and for said State and County, on this 13th day of November, 2008.


Notary Public



DAMIAN W. SIKORA, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date
Section 147.03 R.C.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

08-2206

Case No. _____

ORIGINAL ACTION IN
MANDAMUS

COMPLAINT

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

COUNSEL FOR RELATORS
DANA SKAGGS AND KYLE FANNIN

FILED
NOV 13 2008
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS
676 Stewart Avenue
Columbus, Ohio 43206,

and

KYLE FANNIN
3070 St. John Ct., Apt. 6
Columbus, Ohio 43202,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO,
180 East Broad Street
Columbus, Ohio 43215,

and

THE BOARD OF ELECTIONS OF
FRANKLIN COUNTY, OHIO
280 East Broad Street, Room 100
Columbus, Ohio 43215,

Respondents.

Case No. _____

ORIGINAL ACTION IN
MANDAMUS

COMPLAINT

1. This is an original action in mandamus seeking to compel Jennifer L. Brunner, Secretary of State of Ohio, and the Board of Elections of Franklin County, Ohio to meet their clear legal duty under Ohio statutes in determining the eligibility of provisional ballots cast in the November 4, 2008 election. No federal law claims are asserted; rather, Relators seek a writ requiring respondents to comply with the state law

statutory requirements of R.C. 3505.181, 3505.182, 3505.183 and 3505.18 in determining the eligibility of such provisional ballots to be counted. Relators require this Court's intervention because Respondent Brunner has issued erroneous, after-the-election interpretations of these statutes, reversing and countermanding her own pre-election directions that the disputed provisional ballots are not eligible to be counted. Relators are therefore entitled to a writ of mandamus correcting the misdirected instructions of the Secretary of State regarding the eligibility of the contested provisional ballots to be counted. State ex rel. Colvin v. Brunner, 2008 - Ohio - 5041, ¶ 20 (2008). Moreover, based on the erroneous, after-the-election change in interpretation of the Secretary of State, the members of the Respondent Board of Elections will tie when they vote on whether to count these challenged provisional ballots. R.C. 3501.11(X) provides that, upon a tie vote of the members of the Board of Elections, Respondent Brunner herself is authorized to "summarily decide the question" and her "decision shall be final." As such, Relators lack an adequate remedy in the ordinary course of the law to correct the misdirected interpretation of the Secretary of State even though they have a clear legal right to the relief they seek. A writ of mandamus should issue. State ex rel. Stokes v. Brunner, 2008-Ohio-5097 (2008).

JURISDICTION

2. This Court has jurisdiction of this original action in mandamus pursuant to Article IV, Section 2 of the Constitution of the State of Ohio and Chapter 2731 of the Ohio Revised Code.

PARTIES

4. Relator Dana Skaggs is a citizen of the State of Ohio and a Franklin County elector. Relator Skaggs voted in Franklin County, Ohio in the November 4, 2008 election and brings this action to assure that his vote is not diluted as a result of the misdirected instructions of the Secretary of State to count provisional ballots that are not lawful or valid under Ohio law.

5. Relator Kyle Fannin is a citizen of the State of Ohio and a Franklin County elector. Relator Fannin requested an absentee ballot for the November 4 election, but he never received it. He therefore voted a provisional ballot in the November 4, 2008 election. Relator Fannin brings this action to assure that his vote is not diluted as a result of the misdirected instructions of the Secretary of State to count provisional ballots that are not lawful or valid under Ohio law.

6. Respondent Jennifer L. Brunner is the duly elected and acting Secretary of State of Ohio.

7. Respondent Board of Elections of Franklin County, Ohio is the duly established and acting election authority for Franklin County, Ohio pursuant to R.C. 3501.06.

FACTUAL ALLEGATIONS

8. The unofficial returns of the November 4, 2008 election (the "Election") reflect that Republican Steve Stivers leads Democrat Mary Jo Kilroy by nearly 400 votes in the election for the 15th Congressional District seat; Democrat Nancy Garland leads Republican Jim McGregor by 783 votes in the 20th House District race; and, Democrat Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19th House District (the "Undecided Races"). The outcome of each of these three elections may be determined by the provisional ballots the Franklin County Board of Elections is now reviewing for eligibility to be counted, which process, as of the date of this complaint, is not yet complete. Affidavit of Matthew M. Damschroder ¶ 2 ("Affid. ¶ 2").

9. Over 27,000 provisional ballots were cast in Franklin County in the Election. A voter may cast a provisional ballot if the voter's name does not appear in the poll list; the voter fails to provide required identification at the polling place on the day of the Election; the voter previously requested an absentee ballot; and for other reasons specified in R.C. 3505.181. Affid. ¶ 3.

10. If a voter seeks to cast a provisional ballot, the voter is provided a Provisional Ballot Application prepared by the Board of Elections and a ballot. A true and accurate original of the Provisional Ballot Application used by the Board of Elections in the Election is attached to the Damschroder Affidavit as Exhibit A. The Provisional Ballot Application specifically requires that the voter fill in her name and signature on the provisional voter affirmation required by R.C. 3505.183(B), and fill in the verifying identification information required by R.C. 3505.18 or, alternatively, sign the identification verification affirmation required by R.C. 3505.18(A)(4). The Provisional

Ballot Application is printed on an envelope into which the voter inserts her provisional ballot, which the voter then seals to assure the secrecy of her vote. Affid. ¶ 4.

11. The Board of Elections, upon receipt of the Provisional Ballot Application, is mandated to use the information required to be completed by the voter on the Application to determine the eligibility of the voter to cast a provisional ballot. The voter-provided information is cross-checked against the information of the Board of Elections, and of other county Boards of Elections, to determine the eligibility of the provisional ballot voter. Affid. ¶ 5.

12. Upon completion of the review of a Provisional Ballot Application, if the provisional ballot voter is determined by the Board of Elections to be eligible to vote, the envelope on which the Provisional Ballot Application is printed is opened and the ballot is removed. To assure the secrecy of the provisional voter's ballot choices, the Provisional Ballot Application envelope is then separated from the ballot it contains and the ballot is then commingled with all other provisional ballots cast in the Election. As a consequence, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of any particular provisional voter, rendering impossible any after-the-fact adjudication of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional voter. Thus, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from their Application envelopes. Affid. ¶ 6.

13. R.C. 3505.183(D) provides that all provisional ballots must be counted simultaneously:

No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election.

Thus, the Board of Elections cannot open and count any provisional ballot until the eligibility of each and every Provisional Ballot Application has been reviewed and resolved. Affid. ¶ 7.

14. Initial processing suggests that the majority of the Provisional Ballot Applications submitted in Franklin County on November 4, 2008 were submitted by voters who are eligible under Ohio statutes. As such, their Applications will be opened and their ballots will be counted if this initial processing is confirmed by formal action of the Board of Elections. Initial processing also suggests that a number of the Provisional Ballot Applications submitted in Franklin County on November 4, 2008 are fatally flawed because the voter who tendered the provisional ballot is either not properly registered to vote or voted in an incorrect precinct. If this initial processing is confirmed by formal action of the Board of Elections, these Applications will not be opened or counted. Affid. ¶ 8.

15. While the determination of eligibility of a high percentage of provisional ballot voters is clear, dispute has arisen regarding the eligibility under Ohio statutes of two separate categories of provisional ballots. The first involves Provisional Ballot Applications on which the provisional ballot voter failed to write in both her name and her signature on the required affirmation. The Provisional Ballot Application, a copy of which is attached to the Damschroder Affidavit as Exhibit A, clearly states that the provisional voter is *required* to provide both her name and her signature. The form highlights this requirement in capital letters, underscored, and in bold type: the

provisional ballot voter is directed to "CLEARLY PRINT NAME-(REQUIRED)" and provide the "VOTER'S SIGNATURE-(REQUIRED)." Nonetheless, approximately 3-4% of the Provisional Ballot Applications submitted in Franklin County lack either the name or signature or both that is specifically required by the Application. Affid. ¶¶ 9-10.

16. R.C. 3505.183 specifically provides that both the "name and signature" of a provisional voter must be included in the written affirmation submitted by the elector "in order for the provisional ballot to be eligible to be counted." The wording of R.C. 3505.183(B)(1)(a) could not clearer:

... the following information *shall be included* in the written affirmation [on the Provisional Ballot Application] *in order for the provisional ballot to be eligible to be counted*:

(a) The individual's name and signature;

* * *

[Emphasis added.]

R.C. 3505.183(B)(2) makes clear that the information specified in this provision is "*required* to be included in an affirmation under (B)(1) of this section. . . ." [Emphasis added.]

17. On March 31, 2008, Brian Shinn, Assistant General Counsel, Secretary of State of Ohio, responded to a series of questions from the Board of Elections regarding procedures for counting provisional ballots. In response to a question regarding a voter's failure to fill in both her name and signature on her provisional ballot affirmation, Mr. Shinn, as Assistant General Counsel for the Secretary of State, followed the language of R.C. 3505.183 and directed that an affirmation in a provisional ballot application that

failed to include both the voter's name and signature was invalid under Ohio law and was not eligible to be counted. Mr. Shinn wrote in his e-mail of March 31, 2008:

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

[Emphasis in original.]

Affid. ¶ 11.

18. Mr. Shinn's March 31, 2008 direction that a voter's failure to provide both her "Name AND signature" in her provisional ballot affirmation invalidated the provisional ballot was consistent with both the express language of the statute as well as the Secretary of State's pre-election interpretation of R.C. 3505.183(B)(1)(a). In Directive 2008-101 ("SOS Directive 2008-101"), the Secretary of State instructed that the failure of a provisional ballot voter to provide both her name and her signature on the provisional ballot affirmation rendered it invalid under law and precluded a Board of Election from treating the provisional ballot as eligible to be counted. Rather, the Secretary of State held that a provisional ballot with such an incomplete affirmation "shall neither [be] open[ed] nor count[ed]":

If ANY of the following apply, board staff responsible for processing provisional ballots shall recommend to the board that a provisional ballot not be counted, and a board of elections shall neither open nor count the provisional ballot:

* * *

c) The individual did not provide the following:

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

* * *

[Bold emphasis in original;
bold italics emphasis added.]

SOS Directive 2008-101 is attached as Exhibit C to the Damschroder Affidavit and may be accessed at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-101.pdf>.

19. The Prosecuting Attorney's Office of Franklin County, Ohio has likewise advised the Board of Elections that R.C. 3505.183(B)(1)(a) requires that the provisional voter must provide both her name and her signature on the provisional ballot affirmation statement for the ballot to be eligible to be opened and counted. Affid. ¶ 13.

20. The Board of Elections was prepared to follow the pre-Election instructions of the Secretary of State and disqualify as fatally flawed all provisional ballots that did not comply with Mr. Shinn's instruction that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ." However, on Monday, November 10, after the Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve Stivers by nearly 400 votes for the 15th Congressional District seat, Bob DeRose, a lawyer for the Kilroy Committee, sent an e-mail to the Board of Elections challenging the determination of the Secretary of State that R.C. 3505.181(B)(1)(a) requires that the affirmation in the Provisional Ballot Application, to be eligible to be counted, must contain both the name and the signature of the provisional ballot voter. Mr. DeRose went so far as to assert that a provisional ballot must be

counted even if it lacks both the printed name and the signature of the provisional ballot voter. Affid. ¶¶ 14-15.

21. Mr. DeRose sent electronic copies of his e-mail of November 10, 2008 to a number of people, including Mr. Shinn, Assistant General Counsel, Ohio Secretary of State. Mr. DeRose's e-mail was sent at 10:29 a.m. At 6:04 p.m. the same day, Mr. Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . ." Rather, in response to the DeRose request, Mr. Shinn directed that the Board of Elections deem eligible those Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." Mr. Shinn went so far as to indicate that if a voter's signature is found anywhere on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e.; it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." Affid. ¶ 16. Secretary of State Brunner concurred with Mr. Shinn's after-the-election change in interpretation of the provisions of R.C. 3505.183(B)(1)(a), and adopted it as her own, on Wednesday, November 12, 2008. Affid. ¶ 17.

22. As a result of the Secretary of State's reversal of the instruction that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . .," the members of the Board of Elections will tie when they vote on whether it should reject and not count

Provisional Ballot Applications that fail to include both the voter's "Name AND signature" on the affirmation as required by R.C. 3505.183(B)(1)(a). Affid. ¶ 18.

23. The tie vote by the members of the Board of Elections will result in the Secretary of State determining the eligibility of the Provisional Ballot Applications that do not bear both the "Name AND signature" of the voter on the required affirmation. Given the number of such disputed provisional ballots, the determination of the eligibility of these Applications could prove decisive in one or more of the three Undecided Races. Affid. ¶ 18.

24. When members of the Board of Elections vote on the eligibility of the Applications that fail to set forth both the "Name AND signature" of the voter, the Board will also confront a decision as to the eligibility of a second category of Provisional Ballot Applications that are facially deficient under Ohio statute.

25. R.C. 3505.181 requires that a provisional voter provide specific identification verification at the poll or, alternatively, at the Board of Elections within ten (10) days after the Election. R.C. 3505.18 sets forth the items of identification that are acceptable. These include such simple measures as the voter writing in her Ohio driver's license number or the last four digits of her social security number on the Provisional Ballot Application. See "Step 2: Voter Identification" as set forth on the Franklin County Provisional Ballot Application that is attached to the Damschroder Affidavit as Exhibit A. These statutorily imposed identification verification requirements are necessary to assure that the person who tenders the Provisional Ballot Application is, in fact, the person named on the Provisional Ballot Application. Affid. ¶¶ 21-22.

26. Nonetheless, in approximately 10% of the Provisional Ballot Applications under review in Franklin County, the provisional voters failed to provide the required Voter Identification information or, alternatively, complete the Identification Affirmation sections of the Provisional Ballot Application ("Step 2") even though the Application clearly states, "To be completed by the Voter." Affid. ¶ 23. Having failed to provide the provisional voter identification verification information required by R.C. 3505.181, these Provisional Ballot Applications are facially deficient, invalid under law, and are not eligible to be counted.

27. The members of the Board of Elections will tie when they vote on whether to treat the Provisional Ballot Applications that fail to provide the voter identification verification information or affirmation required by R.C. 3505.181 as fatally flawed and therefore ineligible to be counted. The Secretary of State will break the tie vote on this issue, on information and belief and based on her after-the-election relaxation and liberalization of the otherwise mandatory requirements of Ohio's voting statutes, by ruling that the Applications on which the voter failed to provide the voter identification verification information or affirmation required by R.C. 3505.181 are nonetheless valid and eligible to be counted.

28. There will not be time for judicial review after the Secretary of State makes her decision if the Provisional Ballot Applications are opened on or before November 19 as currently scheduled. Once a Provisional Ballot Application is opened and the ballot it contains is separated from the Application, it will be impossible to determine whether the ballot was eligible to be counted under Ohio statutes or not. Affid. ¶ 24. Simply stated, once the provisional ballots are opened, it will be impossible to

correct the error if this Court were subsequently to decide that the votes associated with these facially deficient Applications are in fact ineligible to be counted.

CAUSE OF ACTION

29. Relators incorporate by reference paragraphs 1-28 as if rewritten herein.

30. The Relators have a clear legal right to require that the Secretary of State comply with Ohio law.

31. Respondents have a clear legal duty to act consistent with Ohio's election statutes in administering the November 4, 2008 election and in determining whether the provisional ballots cast on November 4 comply with Ohio law and are eligible to be counted.

32. The Secretary of State's interpretation of R.C. 3505.183(B)(1)(a) as allowing a provisional ballot to be eligible to be counted even if it does not include both the "individual's name and signature" in the statutorily required affirmation is erroneous and contrary to the express requirements of Ohio law.

33. Similarly, the Secretary of State's interpretation of R.C. 3505.181 as permitting a provisional ballot to be eligible to be counted even though the provisional voter fails to provide the required identification verification information mandated in R.C. 3505.18 is erroneous and contrary to the express requirements of Ohio law.

34. Ohio's election laws specifically impose the duty of correctly completing the statutorily mandated provisional voter affirmation and the statutorily required identification verification information on the provisional voter. The statutes do not impose a duty upon Ohio's poll workers to complete these items on behalf of provisional voters or to check that provisional voters have filled out their Provisional Ballot

Application correctly or completely. Under Ohio's election statutes, the duty to complete these items of information fully and correctly rests on the provisional voter, and only the provisional voter.

35. Inasmuch as the Secretary of State will impose her erroneous interpretations of these statutorily mandated requirements and inasmuch as the Board of Elections will follow the erroneous interpretations of the Secretary of State on these two issues or, alternatively, the Secretary of State will impose her erroneous interpretations pursuant to her authority under R.C. 3501.11(X) to break ties among the members of the Board of Elections, Relators lack an adequate remedy in the ordinary course of the law to protect their rights as electors and prevent an illegal diminution of their votes.

ANCILLARY RELIEF REQUESTED

36. Relators incorporate by reference paragraphs 1-35 as if rewritten herein.

37. Unless restrained or enjoined by an ancillary temporary restraining order or other injunction, the Respondents will erroneously and illegally determine that the contested provisional ballots are eligible to be counted as the Secretary of State has directed; they will open each of the contested Provisional Ballot Application envelopes and separate the ballot contained therein from its Application; and they will commingle the contested provisional ballots with those that do not have these infirmities and are therefore legally eligible to be counted. In doing so, Respondents will make it impossible to determine which votes are eligible to be counted under Ohio law and which are not.

Affid. ¶ 24.

38. This Court must enter an ancillary injunction to protect its jurisdiction to adjudicate the Relator's request for relief. Without ancillary injunctive relief pending this

Court's merit review of Relator's claims, Relators will be denied their rights as citizens and electors of Ohio and will be irreparably injured.

39. Relators lack an adequate remedy at law and require ancillary injunctive relief pending adjudication of the merits of their claims.

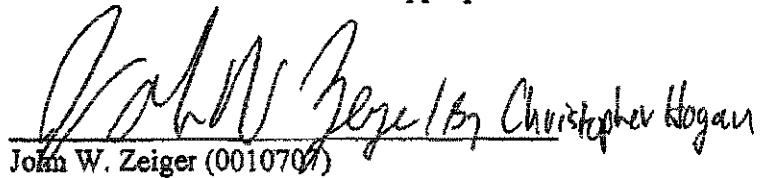
PRAYER

Relators therefore pray that the Court:

- A. Issue a writ of mandamus compelling Respondent Secretary of State to correct her erroneous interpretation of R.C. 3505.183(B)(1)(a) and compelling her to advise the county Board of Elections that any provisional ballot must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted.
- B. Issue a writ of mandamus compelling Respondent Secretary of State to correct her erroneous interpretation of R.C. 3505.181 and compelling her to advise the county Boards of Election that any provisional voter must provide the identification verification information mandated by R.C. 3505.181 on the Provisional Ballot Application or, alternatively, complete the identification affirmation provided in R.C. 3505.18(A)(4), and if the voter fails to do so, her provisional ballot is not eligible to be counted.
- C. Issue a writ of mandamus compelling Respondents to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter affirmation required by R.C. 3505.183(B)(1)(a)

and/or the voter fails to provide on the Application the identification verification information required by R.C. 3505.18 or, alternatively, fails to complete the identification affirmation provided in R.C. 3505.18(A)(4).

- D. Issue a temporary restraining order or other interim ancillary injunctive relief enjoining and restraining the Board of Elections from opening and commingling any provisional ballots until this Court can adjudicate the Relators' request for a writ of mandamus.
- E. Issue such further and other relief as the Court deems appropriate.



John W. Zeiger / By Christopher Hogan

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

Counsel for Relators

859-001.189127

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

08-2206

Case No. _____

ORIGINAL ACTION IN
MANDAMUS

AFFIDAVIT OF MATTHEW M. DAMSCHRODER

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

COUNSEL FOR RELATORS
DANA SKAGGS AND KYLE FANNIN

FILED
NOV 13 2008
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

Case No. _____

ORIGINAL ACTION IN
MANDAMUS

AFFIDAVIT OF MATTHEW M. DAMSCHRODER

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Matthew M. Damschroder, being duly cautioned and sworn, state from personal knowledge:

1. 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.

2. The unofficial returns of the November 4, 2008 election (the "Election") reflect that Republican Steve Stivers leads Democrat Mary Jo Kilroy by nearly 400 votes in the election for the 15th Congressional District seat; Democrat Nancy Garland leads Republican Jim McGregor by 783 votes in the 20th House District race; and, Democrat

Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19th House District (the "Undecided Races"). The outcome of each of these three elections may be determined by the provisional ballots the Board of Elections is now reviewing for eligibility but which have not yet been counted.

3. Over 27,000 provisional ballots were cast in Franklin County in the Election. A voter may cast a provisional ballot if the voter's name does not appear in the poll list; the voter fails to provide required identification at the polling place on the day of the Election; the voter previously requested an absentee ballot; and for other reasons specified in R.C. 3505.181.

4. If a voter seeks to cast a provisional ballot, the voter is provided a Provisional Ballot Application prepared by the Board of Elections and a ballot. A true and accurate original of the Provisional Ballot Application used by the Board of Elections in the Election is attached as Exhibit A. The Provisional Ballot Application specifically requires that the voter provide her name, signature, and verifying identification information or, alternatively, requires her to sign the identification verification affirmation required by R.C. 3505.18(A)(4). The Provisional Ballot Application is printed on an envelope into which the voter inserts her provisional ballot, which is then sealed by the voter.

5. The Board of Elections, upon receipt of the Provisional Ballot Application, is mandated to use the information required of the voter on the Application to determine the eligibility of the voter to cast a provisional ballot. The voter-provided information is cross-checked against the information of the Board of Elections, and of

other county Boards of Elections, to determine the eligibility of the provisional ballot voter.

6. Upon completion of the review of a Provisional Ballot Application, if the provisional ballot voter is determined by the Board of Elections to be eligible to vote, the envelope on which the Provisional Ballot Application is printed is opened and the ballot is removed. To assure the secrecy of the provisional voter's ballot choices, the Provisional Ballot Application envelope is then separated from the ballot it contains and the ballot is then commingled with all other provisional ballots cast in the Election. As a consequence, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of any particular provisional voter, making an after-the-fact assessment of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional ballot voter impossible. Thus, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from the Application envelopes.

7. R.C. 3505.183(D) provides that all provisional ballots must be counted simultaneously:

No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election.

Thus, the Board of Elections cannot open and count any provisional ballot until the eligibility of each and every Provisional Ballot Application has been reviewed and resolved.

8. Initial processing suggests that the majority of the Provisional Ballot Applications have been submitted by voters who are eligible under Ohio statutes. As such, their Applications will be opened and their ballots will be counted if this initial processing is confirmed by the Board of Elections. Initial processing also suggests that a number of the Provisional Ballot Applications are fatally flawed because the voter who tendered the provisional ballot is either not properly registered to vote or voted in an incorrect precinct. If this initial processing is confirmed by the Board of Elections, these Applications will not be opened or counted.

9. While the determination of eligibility of a high percentage of provisional ballot voters is clear, dispute has arisen regarding the eligibility under Ohio statutes of two separate categories of provisional ballots.

10. The first involves Provisional Ballot Applications on which the provisional ballot voter failed to provide both her name and her signature. The Provisional Ballot Application, attached as Exhibit A, clearly indicates that the provisional voter is *required* to provide both her name and her signature. The form highlights this requirement in capital letters, underscored, and in bold type: the provisional ballot voter is directed to "CLEARLY PRINT NAME-**(REQUIRED)**" and provide the "VOTER'S SIGNATURE-**(REQUIRED)**." Nonetheless, approximately 3-4% of the Provisional Ballot Applications lack either the name or signature or both that is specifically required by the Application.

11. On March 31, 2008, Brian Shinn, Assistant General Counsel, Secretary of State of Ohio, responded to a series of questions from the Board of Elections regarding procedures for counting provisional ballots. In response to a question regarding a voter's

failure to provide both her name and signature on a provisional ballot application, Mr. Shinn, as Assistant General Counsel for the Secretary of State, gave the following instruction:

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

[Emphasis in original.]

A copy of Mr. Shinn's e-mail of March 31, 2008, which was sent directly to me by Mr. Shinn, is attached as Exhibit B.

12. Mr. Shinn's March 31, 2008 instruction that a voter's failure to provide both her "Name AND signature" was consistent with the Secretary of State's pre-Election reading of R.C. 3505.183(B)(1)(a) which states in pertinent part:

... 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;

In Directive 2008-101 ("SOS Directive 2008-101"), the Secretary of State instructed that the failure of a provisional ballot voter to provide both her name and her signature on the Provisional Ballot Application precluded a Board of Election from treating the provisional ballot as eligible and required that the Provisional Ballot Application "shall neither [be] open[ed] nor count[ed]":

If ANY of the following apply, board staff responsible for processing provisional ballots shall recommend to the board that a provisional ballot not be counted, and a board of elections shall neither open nor count the provisional ballot:

* * *

c) The individual did not provide the following:

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

* * *

[Bold emphasis in original;
bold italics emphasis added.]

SOS Directive 2008-101 is attached as Exhibit C and may be accessed at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-101.pdf>.

13. Consistent with the direction of the Secretary of State in SOS Directive 2008-101 and Mr. Shinn's e-mail instruction of March 31, 2008, the Prosecuting Attorney of Franklin County, Ohio has advised the Board of Elections that Ohio statutes require that the provisional ballot voter must provide both her name and her signature to be eligible to have her Provisional Ballot Application opened and her ballot counted. A true and accurate copy of the correspondence of the Prosecuting Attorney of Franklin County, Ohio is attached as part of the e-mail chain attached as Exhibit D.

14. The Board of Elections was prepared to follow the pre-Election instructions of the Secretary of State and disqualify as fatally flawed all provisional ballots that did not comply with Mr. Shinn's conclusion that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ."

15. However, on Monday, November 10, after the Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve Stivers by nearly 400 votes for the 15th Congressional District seat, Bob DeRose, a lawyer for the Kilroy Committee, challenged the determination of the Secretary of State

that R.C. 3505.181(B)(1)(a) requires that the Provisional Ballot Application, to be eligible to be counted, must contain both the name and the signature of the provisional ballot voter. Mr. DeRose went so far as to assert that a provisional ballot must be counted even if it lacks both the printed name and the signature of the provisional ballot voter. Mr. DeRose's e-mail of 10:29 a.m., November 10, 2008, addressed to the Board of Elections is attached as part of the e-mail chain attached as Exhibit D.

16. Mr. DeRose sent electronic copies of his e-mail of November 10, 2008 to a number of people, including Mr. Shinn, Assistant General Counsel, Ohio Secretary of State. Mr. DeRose's e-mail was sent at 10:29 a.m. At 6:04 p.m. the same day, Mr. Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a)..." Rather, in response to the DeRose request, Mr. Shinn directed that the Board of Elections deem eligible those Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." Mr. Shinn went so far as to indicate that if a voter's signature is found on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e.; it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." A true and accurate copy of Mr. Shinn's e-mail of Monday evening, November 10, 2008 is attached as part of the e-mail chain attached as Exhibit D.

17. On Wednesday, November 12, 2008 at 6:19 p.m., Mr. Shinn confirmed that Secretary of State Brunner concurred with, and had adopted, his November 10 directions to count provisional ballots on which the affirmation does not bear both the name and the signature of the provisional voter. A true and accurate copy of Mr. Shinn's November 12 e-mail is attached as part of the e-mail chain attached as Exhibit D.

18. As a result of Mr. Shinn's reversal of the instruction that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a)..." internal discussions indicate the Board of Elections will tie in its vote on whether it should reject as ineligible Provisional Ballot Applications that do not bear both the voter's "Name AND signature" as required by R.C. 3505.183(B)(1)(a).

19. In the case of a tie vote by the members of the Board of Elections, the Secretary of State determines the eligibility of the Provisional Ballot Applications that do not bear both the "Name AND signature" of the voter. R.C. 3501.11(X). The Secretary of State has already prejudged the issue, indicating that she will direct that Provisional Ballot Applications that do not bear both the "Name AND signature" of the voter must nonetheless be determined to be eligible to be counted. Given the number of such disputed provisional ballots, the determination of the eligibility of these Applications could prove decisive in one or more of the three Undecided Races.

20. When the Board of Elections votes on the eligibility of the Applications that fail to set forth both the "Name AND signature" of the voter, the Board will also confront a decision as to the eligibility of a second category of Provisional Ballot Applications that are facially deficient under Ohio statute.

21. R.C. 3505.181 requires that a provisional voter provide required identification verification at the poll or, alternatively, at the Board of Elections within ten (10) days after the Election. The required verification mandated in R.C. 3505.18 includes such simple measures as writing in the voter's Ohio driver's license number or the last four digits of the individual's social security number on the Provisional Ballot Application. See Step 2: Voter Identification of Exhibit A attached.

22. The identification verification requirements of R.C. 3505.181 are necessary to assure that the person who tenders the Provisional Ballot Application is, in fact, the person identified on the Provisional Ballot Application.

23. Nonetheless, in approximately 10% of the Provisional Ballot Applications under review, the provisional voters failed to complete the Voter Identification or the Identification Affirmation sections of the Provisional Ballot Application ("Step 2") even though the Application clearly states, "To be completed by the Voter." As a result, these voters have failed to provide the statutorily required Identification Verification information.

24. Internal discussions indicate the Board of Elections will tie when it votes on whether to treat the Provisional Ballot Applications that fail to provide the voter identification verification information or affirmation required by R.C. 3505.181 as fatally flawed and therefore ineligible to be counted or, alternatively, to treat such Provisional Ballot Applications as eligible to be counted. Again, the Secretary of State will break the tie vote on this issue, but there will not be time for judicial review after the Secretary of State makes her decision if the Provisional Ballot Applications are opened on or before November 19 as currently scheduled. Once the Provisional Ballot Applications are

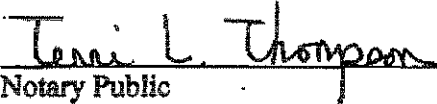
opened and the ballot is separated from the Application, it will be impossible to determine which ballots were eligible under Ohio statute and which were not. Simply stated, once the provisional ballots are opened, it will be impossible to correct the error if this Court were subsequently to decide that the votes associated with these facially deficient Applications are in fact ineligible to be counted.

Further Affiant sayeth naught.



Matthew M. Damschroder

Sworn to before me and subscribed in my presence this 13th day of November, 2008.



Notary Public



TERRI L. THOMPSON
Notary Public, State of Ohio
My commission expires 08/24/2009

859-001:189115

Attachment not scanned

From: Shinn, Brian [mailto:bshinn@sos.state.oh.us]
Sent: Monday, March 31, 2008 1:00 PM
To: Damschroder, Matthew M.; Piccininni, Patrick J.
Cc: White, Dennis L.; Wedekind, Michael; Thomsen, Katherine
Subject: RE: Provisionals
Importance: High

Denny and Matt,

Todd and I have discussed most of the situations below. It is my understanding that your board would appreciate written responses.

Generally, most issues about provisional ballot affirmation statements are covered by Directive 2007-06 on pages 14-16, which explains the provisions of R.C. 3505.183 with regard to provisional ballot affirmation statements.

Under R.C. 3505.183(B)(1), the board is required to examine its records to determine whether the person who cast the provisional ballot is registered and eligible to vote. The only information that is **REQUIRED TO BE INCLUDED IN THE AFFIRMATION FOR THE VOTE TO BE COUNTED IS:** 1. [3505.183(B)(1)(a)] the voter's name and signature; 2. [3505.183(B)(1)(b)] a statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted; and 3. [3505.183(B)(1)(c)] a statement that the individual is eligible to vote in the election in which the provisional ballot is being voted. All other information is optional and is intended to aid the board in identifying whether the voter is registered in the jurisdiction. Contrary to Franklin County's provisional ballot envelope, date of birth is **NOT REQUIRED**. Even if the voter did not provide ID, the provisional ballot still may be counted under R.C. 3505.183(B)(4)(a)(vii) if the voter completed the affirmation statement under R.C. 3513.18(A) OR R.C. 3513.181(B).

Answers to your specific questions:

- 1) More than one ballot in the provisional ballot envelope – apparently some of your poll workers for whatever reason instructed voters to complete a party ballot or even both party ballots and an issues-only ballot. Unlike the absentee ballot statutes, there is no specific statute that says that a provisional ballot cannot be counted if there are multiple ballots in a provisional envelope. If your board determined that the voter was eligible to vote in the primary for a party, then that ballot should be counted only. If the person is only eligible to vote issues, then the issues-only ballot would be counted. If the person did not name a party on the envelope or on a form 10-W or 10-X, then the issues-only ballot is the one that would be counted. All other ballots should not be counted and should be voided. The poll workers in these precincts should be questioned and instructed **NOT** to issue multiple ballots in the future.
- 2) Poll worker did not sign affirmation statement – the ballot should still be counted if the voter provided the required information outlined above. No statute makes the poll worker signature necessary for the ballot to be counted.
- 3) Poll worker signed but did not check box for ID. As stated above, if the statutory requirements are met, then the ballot may be counted without ID being provided as

EXHIBIT

B

long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.

- 4) If only column one of Franklin County's provisional ballot envelope is completed then the ballot still may be counted for the reasons stated above (because column one contains all the information and statements required by statute) as long as the board can identify the voter as a registered voter in the jurisdiction where the voter cast the provisional ballot.
- 5) Voter did not print his or her name on column one but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.
- 6) Voter was issued an absentee ballot, and the voter brought it to polling place on election day. Rather than instructing the voter to deliver the absentee ballot to the board of elections or issuing the voter a provisional ballot, the poll worker had the voter complete a provisional ballot envelope and placed the voted absentee ballot in it. The ballot can be counted IF the affirmation statement was properly completed as described above and IF the board can determine that no other absentee ballot was cast by the voter. The voter should not be disenfranchised due to the poll worker's error.

You may contact me if you have any questions about these explanations.

Brian Shinn



**JENNIFER BRUNNER
OHIO SECRETARY OF STATE**

160 EAST BROAD STREET, 15TH FLOOR
COLUMBUS, OHIO 43215 USA
TEL: 1-677-767-6446 FAX: 1-614-464-0649
WWW.SOS.STATE.OH.US

DIRECTIVE 2008-101
October 21, 2008

**To: ALL COUNTY BOARDS OF ELECTIONS
MEMBERS, DIRECTORS, AND DEPUTY DIRECTORS**

Re: Guidelines for Determining the Validity of Provisional Ballots

This directive is issued as a means to settle ongoing litigation now pending in the United States District Court for the Southern District of Ohio, Case No. C2-06-0896 and captioned Northeast Ohio Coalition for the Homeless v. Brunner.

This directive provides guidelines for Ohio's boards of elections in processing and counting provisional ballots. This includes guidelines on determining the validity of provisional ballots under Ohio law and, generally, the timeframes during which boards may process provisional ballots to determine their eligibility for counting. This directive complements, but does not supersede, Directive 2008-01, Guidelines for Provisional Voting.

I. DEFINITIONS

A. For purposes of this directive, "members of the board" means a majority vote of at least a quorum of the members of the board of elections taken at a public meeting.

B. For purposes of this directive, "processing" provisional ballots means:

- handling provisional ballots in provisional ballot envelopes ("envelopes") as they are cast at a board of elections office or other designated site or as they are returned from precincts on election night;
- moving or storing provisional ballots at a board of elections office or other designated site;
- reviewing envelopes and affirmation statements to initially determine the presumptive eligibility of provisional ballots to be counted;
- sorting provisional ballots in their envelopes into categories of eligible, questionable, and ineligible, and if a board so states in its policy and procedures, into subcategories of ineligible; and
- the making by board of elections staff of a recommendation to the members of the board as to the eligibility and/or ineligibility of provisional ballots cast in the county for the election in question.



C. For purposes of this directive, "counting" provisional ballots means:

- marking the envelope of provisional ballots that the members of the board have determined are not eligible to be counted;
- moving, and storing in their envelopes provisional ballots that the members of the board have determined are not eligible to be counted;
- opening the envelopes of provisional ballots that the members of the board have determined are eligible to be counted;
- removing provisional ballots from their envelopes that the members of the board have determined are eligible to be counted and separating them from their envelopes so as to sever the voter's identity from the ballot, thereby preserving the secrecy of the ballot;
- preparing provisional ballots to be counted for scanning by automatic tabulating equipment;
- scanning provisional ballots;
- tabulating votes cast by provisional ballots determined by the board to be eligible to be counted; and
- reporting numbers of provisional votes as part of the board's official canvass of the election.

II. TIMEFRAME FOR PROCESSING PROVISIONAL BALLOTS

Generally speaking, and except as otherwise provided in R.C. 3501.183(E)(2) and in this directive, boards of elections may begin processing provisional ballots beginning the day after an election. Boards may continue to process provisional ballots during the ten (10) days after an election, and may continue to do so after the tenth day, if necessary, until all provisional ballots have been processed. All provisional ballot processing must be completed by the end of the official canvass, which must be completed not later than the twenty-first day after the election.

III. DELEGATION OF PROCESSING TO BOARD STAFF

Ultimately, the four members of boards of elections must determine the validity of all votes cast in an election and must certify the results of all elections. However, nothing in Ohio law requires that the members of a board of elections must personally, physically complete all tasks associated with preparing for that certification. Thus, boards of elections may, under a policy adopted by the board, delegate the processing and some aspects of counting provisional ballots, as discussed throughout this directive, to board staff. Such processing must be done in bipartisan teams according to the instructions provided in this directive. To the extent consistent with Ohio law and this directive, boards may establish and follow additional policies and procedures for processing provisional ballots.

If a board delegates the processing of provisional ballots, it must first adopt a policy setting forth procedures for the processing of provisional ballots that includes the factors listed in I. above. Under a board's policy, board staff responsible for processing provisional ballots must make a recommendation to the board as to the eligibility of each provisional ballot cast in the county, either on an individual basis, or as to groups or categories of similarly situated provisional ballots.

IV. BOARD DETERMINES VALIDITY OF PROVISIONAL BALLOTS

Ultimately, the members of the board (see I.A. above) of each board of elections must determine the eligibility or ineligibility of all provisional ballots cast within the county in accord with Ohio law and this directive.. Boards may not delegate this task.

Each board of elections must then cause the ballots to be counted by board staff, and must include the tabulation of that count in its official canvass of the election results and, to the extent required, its certification of the election results to the Secretary of State.

V. GENERAL REMINDERS ON PROCESSING PROVISIONAL BALLOTS IN ENVELOPES

It is imperative that boards remember that R.C. 3505.183(D) provides that no provisional ballots may be counted in a particular county until the board of elections for that county determines the eligibility, pursuant to R.C. 3505.183 and this directive, of ALL provisional ballots cast in that county. This means that the board staff responsible for processing provisional ballots must completely process all provisional ballots and make a recommendation to the board to allow the board to vote on the eligibility of provisional ballots cast before the board or board staff may begin the procedures for counting provisional ballots.

It is also imperative that boards remember that provisional ballots, like all other ballots or other sensitive election materials, must be handled by bipartisan teams and must be stored in a secure location. This office has required boards to implement a system of storage using double lock and key – one key held by Democrats and one key held by Republicans – and provisional ballots must be stored in that environment.

It is also imperative that board members and staff remain cognizant at all times of the importance of maintaining the secrecy of the votes cast by a provisional voter, and act accordingly when opening and removing provisional ballots from their envelopes.

VI. GROUNDS FOR COUNTING OR INVALIDATING PROVISIONAL BALLOTS

Ohio Revised Code ("R.C.") 3505.183 is the primary statutory lens through which boards of elections must view provisional ballots and affirmations in order to determine the eligibility of those provisional ballots for counting. It sets forth the steps through which a board or its staff must go to determine the eligibility of a provisional ballot for counting.

A. Step 1 – Additional Information Required from Voter in Some Cases

R.C. 3505.183(E)(2) provides that boards of elections may not examine the provisional ballot affirmation on the provisional ballot envelope of any provisional ballot for which an election official has indicated the provisional voter must provide additional information to the board of elections in order to ensure that the provisional ballot will count. Thus, checking for this statement by an election official must be the first step in determining a provisional ballot's eligibility to be counted.

1. No additional information required

If no such statement by an election official appears on the provisional ballot envelope then the board staff responsible for processing provisional ballots may proceed to Step 2.

2. Additional information required

If such a statement by an election official appears on a provisional ballot envelope then the board staff responsible for processing provisional ballots must segregate that ballot and store it, still in its envelope, in accordance with this directive until the provisional voter provides the required additional information.

a) Additional information required during 10 days after election

Pursuant to R.C. 3505.181(B)(8), there are only four categories of provisional voters who are required to provide additional information to the board of elections during the ten days after the day of an election in order for their ballots to be counted:

(1) An individual who has but is unable to provide to precinct election officials any of the forms of identification required under R.C. 3505.18(A)(1), and who has a social security number but is unable to provide the last four digits of his or her social security number under R.C. 3505.18(A)(2);

(2) An individual who is challenged under R.C. 3505.20 and is determined to be ineligible to vote or whose eligibility to vote cannot be determined by election officials

(3) An individual who does not have any of the forms of identification required under R.C. 3505.18(A)(1), who cannot provide the last four digits of the individual's social security number under R.C. 3505.18(A)(2) because the person does not have a social security number, and who declines to execute an affirmation (SOS Form 10-T) under R.C. 3505.18(A)(4); and

(4) An individual who has, but declines to provide to precinct election officials, any of the forms of identification required under R.C. 3505.18(A)(1), and who has a social security number but declines to provide to the precinct election officials the last four digits of his or her social security number.

b) This section is specific to the aforestated court action and its attempted settlement. Contacting voters to provide additional information during ten days

If a board of elections or board staff determine during the 10-day period that a provisional voter falls into one of the four categories listed above, the board must attempt once to contact the voter by telephone, if a telephone number is available, to remind the voter:

- (1) that he or she is required to provide additional information to the board by the tenth day after the election for the provisional ballot to count; and
- (2) what additional information is required.

If a board of elections does not have a telephone number for a particular voter, it need not conduct an exhaustive search to attempt to locate a telephone number for that voter, but should document any efforts undertaken to contact the voter.

During the first five days after the day of an election a board of elections may communicate the information listed in the list immediately above by postcard or letter rather than by telephone.

c) Additional information required at post-election challenge hearing

If a voter's registration is challenged by another Ohio voter under R.C. 3503.24 and the board of elections considering the challenge postpones the hearing until after the day of the election, the voter must vote provisionally at that election and must provide additional information to the board at the hearing, if so requested, in order to ensure that his or her provisional ballot will count.

Upon receipt of the required additional information under this step of this directive, the board staff responsible for processing provisional ballots may proceed to Step 2.

3. Failure to provide additional required information

A provisional ballot that is cast by any voter who is required by Ohio law or this directive to provide additional information to a board of elections cannot be counted unless and until that voter provides the required information, pursuant to R.C. 3505.181(A)(7). After the board of elections determines that the required information was not provided, the board staff responsible for processing provisional ballots shall proceed to Step 5.

B. Step 2 – Preliminary Analysis on Provisional Ballot Eligibility

R.C. 3505.183(B)(1) provides that the first step in determining the eligibility of provisional ballots to be counted is to determine the following:

- a) Whether the person who cast the provisional ballot is registered to vote;
- b) Whether the person who cast the provisional ballot is eligible to vote in the particular election in question; and
- c) Whether the person who cast the provisional ballot completed the affirmation on the provisional ballot envelope.

1. Not Registered or Not Eligible

If the person who cast the provisional ballot is either not registered to vote or is not eligible to vote in the particular election in question (e.g., wrong precinct), then the board may not count that ballot, and this is pursuant to R.C. 3505.183(B)(4)(a)(i) and (ii).

2. Registered, Eligible, and Affirmation Completed

If the person is properly registered to vote and is eligible to vote in the particular election in question, and the person who cast the provisional ballot completed the affirmation statement on the envelope, then the board staff responsible for processing provisional ballots must proceed to examine the affirmation statement executed by the person who cast the provisional ballot. Pursuant to R.C. 3505.183(B)(1)(a), (b), and (c), that affirmation must contain at least the following three items of information:

- a) The name and signature of the person who cast the provisional ballot;
- b) A statement that the person who cast the provisional ballot is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
- c) A statement that the person who cast the provisional ballot is eligible to vote in the particular election in which he or she cast the provisional ballot.

3. Registered, Eligible, but No Provisional Ballot Affirmation

If the person is properly registered to vote and is eligible to vote in the particular election in question, but he or she did not complete the affirmation statement on the envelope, the board staff responsible for processing provisional ballots must proceed, pursuant to R.C. 3505.183(B)(1), to determine whether the voter, or an election official at the direction of the voter, recorded the voter's name in a written affirmation. If neither the voter nor an election official, at the voter's direction, did so, then the provisional ballot cannot count, and the board staff responsible for processing provisional ballot shall proceed to step 5.

C. Step 3 – Additional Analysis on Provisional Ballot Eligibility

1. In addition to the information required in Step 1, above, and pursuant to R.C. 3505.183(B)(2), the board staff responsible for processing provisional ballots must, in determining the eligibility of any provisional ballot to be counted, also examine any information provided by the person who cast the provisional ballot:

- a) that appears in the affirmation on the provisional ballot envelope;
- b) that was made to an election official at the time he or she cast the provisional ballot pursuant to R.C. 3505.182; and
- c) that was made to the board of elections during the ten days after the day of the election.

2. Additional information often provided by provisional voters includes, but is not limited to, current and former addresses and date of birth. While this information, if provided, must be considered by boards of elections in determining the eligibility of provisional ballots for counting, nothing in Ohio law requires provisional voters to provide this information. Thus, the absence of such information on a provisional ballot affirmation is not sufficient, on its own, to disqualify a provisional ballot.

D. Step 4 – Recommendation to Board on Provisional Ballot Eligibility

During this step, board staff responsible for processing provisional ballots must use the information discussed above, among other things, to determine their recommendation as to the eligibility of particular provisional ballots to be counted.

1. 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.

2. Ballots Not Eligible to be Counted

If ANY of the following apply, board staff responsible for processing provisional ballots shall recommend to the board that a provisional ballot not be counted, and a board of elections shall neither open nor count the provisional ballot:

- a) The individual named on the affirmation is not properly registered to vote;
- b) The individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot;
- c) The individual did not provide the following:

- (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;

- d) The individual has already cast a ballot, including an absentee ballot, for the election in which he or she cast the provisional ballot;
- e) If applicable, the individual has not 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
- f) If applicable, the individual has been afforded a hearing conducted under R.C. 3503.24, which has resulted in the exclusion of the provisional voter's name in the official registration list.
- g) The individual failed to provide or execute any of the following:
 - (1) a current and valid photo identification;
 - (2) a military identification;
 - (3) an original or a copy of any of the following bearing the voter's name and current address:

- (a) utility bill;
- (b) bank statement;
- (c) government check;
- (d) paycheck; or
- (e) other government document;

- (4) the last four digits of the individual's social security number;
or
- (5) an affirmation under R.C. 3501.18(A)(4) (SOS Form 10-T), or one of the two affirmations already discussed in this directive, above.

E. Step 5 – Disqualification of Provisional Ballots and Retention

If a board of elections finally determines that a provisional ballot cannot be counted for any of the reasons identified in Ohio or this directive, then the board, pursuant to R.C. 3505.183(C)(1), shall record:

1. the name of the provisional voter who cast the ballot;
2. the identification number of the provisional ballot envelope, if applicable;
3. the names of the election officials who determined the validity of that ballot;
4. the date and time that the determination was made; and
5. the reason that the ballot was not counted.

The board shall maintain this record for the duration of the retention period that applies to the provisional ballot itself.

Further, if a board of elections finally determines that a provisional ballot cannot be counted for any of the reasons identified in Ohio law or in this directive, that provisional ballot envelope may never be opened, and the board shall not count the votes contained on such provisional ballot. Rather, pursuant to R.C. 3505.183(C)(2), the board shall store that ballot, unopened, for the duration of the retention period applicable to that type of ballot, and shall then destroy that ballot in its envelope. Storage of such provisional ballots shall be made in accordance with the requirements for storage of provisional ballots, generally, as provided in this directive.

VII. ADDITIONAL REQUIREMENTS

R.C. 3505.183 does not expressly provide that a board of elections must attempt to match the signature of the person casting a provisional ballot to the signature on file for that voter, presumably because the statutory scheme contemplates at least one circumstance where a provisional voter does not have to provide a signature (i.e., Step 4, Ballots eligible to be counted, 3. d, above). However, signature matching has long been a hallmark of election security, is explicitly provided for with respect to other types of ballots under Ohio law, and is a basis for

¹ Ohio law provides that notices of election mailed by boards of elections pursuant to R.C. 3501.19, and voter registration notices mailed by boards of elections pursuant to R.C. 3503.19 are not valid "other government documents" for voter ID purposes.

election officials to challenge the right of a person to cast a ballot under Ohio law. As such, when a signature is provided by a provisional voter, boards of elections should, in verifying the identity of that provisional voter, attempt to match the signature with the signature on file for the voter in question.

Boards of election should bear in mind in doing so, though, that signatures do tend to change over time, that there are people who do not sign their name identically every time they sign their name, and that, pursuant to R.C. 3501.05(AA), voters have the right to update their signatures with boards of elections using SOS Form 260.

Very recently, the Supreme Court of Ohio provided, in *State ex rel. Myles v. Brunner*, that in the absence of any evidence of fraud, unduly technical interpretations that impede the public policy favoring free, competitive elections must be avoided. Thus, boards of elections should keep in mind the concerns raised in the immediately foregoing paragraph when matching signatures. Boards should ensure that their primary concern is achieving confidence in the identity of the voter casting the provisional ballot rather than ensuring that every loop and line in a signature precisely and exactly matches the signature on file for the voter.

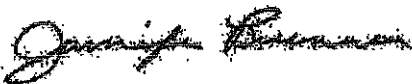
VIII. OBSERVERS

R.C. 3505.165(D) provides that observers, as appointed pursuant to R.C. 3505.21, may be present at all times that the board is determining the eligibility of provisional ballots to be counted and counting those provisional ballots determined to be eligible.

That statute further provides that no person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot. By its plain language, this prohibition applies both to election officials and observers, as well as others.

If you have any questions about this directive or its implementation please contact the elections attorney in this office assigned to assist your county board of elections.

Sincerely,



Jennifer Brunner

From: Shinn, Brian [mailto:bshinn@sos.state.oh.us]
Sent: Wed 11/12/2008 6:19 PM
To: Shinn, Brian; Plocininni, Patrick J.; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: O'Brien, Ron J.; Soulas, Nick A.; Wilson, Antoinette; Dora Rose; Bob DeRose
Subject: RE: Provisional Ballots with Signatures Issues

Michael and Matt,

I met with Secretary Brunner and our legal staff this afternoon. We discussed the provisional ballot issues raised in Mr. DeRose's email (below) that I responded to on Monday.

- 1) Secretary Brunner agrees with my earlier advice that a provisional ballot that contains the signature of a voter but not the written name **MUST BE COUNTED** if the person is a registered elector, the person voted in the correct precinct, and the person was not required to provide additional information to the board but failed to do so. R.C. 3505.182 prescribes the form of the provisional ballot affirmation but is only a substantial compliance statute. Directive 2008-81 (page 6) states that the voter must execute the affirmation and lists the required statements that must be included. "Execute" means sign. Franklin County uses a provisional ballot affirmation that is different from the SOS prescribed form (Form 12-B) in several regards. On our prescribed form, the poll worker is instructed to print the voter's name in the "Election Official Verification Statement." In contrast, Franklin County's form does not require the poll worker to print the person's name in step 3 or step 4. Thus, the Franklin County form omits a safeguard for the voter. While poll workers are trained to review the voter's affirmation statement before completing the poll worker statement, even the best trained poll workers make mistakes. It is not reasonable to assume that a person would sign a provisional ballot affirmation **BUT** refuse to write his or her name in. Directive 2008-101 must be read in conjunction with Directive 2008-103. Consequently, failure to write a voter's name on a provisional ballot affirmation is poll worker error that cannot be held against the voter under Directive 2008-103. Finally, we are all reminded by *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22: "we 'must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections.'" *State ex rel. Ruhlmann v. Luken* (1992), 65 Ohio St.3d 1, 3, 598 N.E.2d 1149; cf. *Stern v. Cuyahoga Cty. Bd. of Elections* (1968), 14 Ohio St.2d 175, 180, 43 O.O.2d 286, 237 N.E.2d 313.
- 2) I will provide more information regarding our interpretation of the voter name but no signature issue tomorrow.
- 3) We stand by our requirement in Directive 2008-109 that a voter with an error or omission on his or her absentee ballot envelope must come to the board office to correct it. The board is not required to send out two staff members for a voter who cannot come to the board office. However, I know at least one board of elections that has decided to do so.
- 4) While the deadline for a voter who is required to provide additional information to the board for a provisional ballot to be counted is the tenth day, boards of elections have until the official canvass to resolve all issues regarding provisional ballots, such as

EXHIBIT

D

confirming voters who moved from one Ohio county to another but failed to update their address. See Directive 2008-101 (Page 2, section II).

Brian Shinn

From: Shinn, Brian
Sent: Wednesday, November 12, 2008 9:42 AM
To: 'Piccininni, Patrick J.'; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: O'Brien, Ron J.; Soulas, Nick A.; Wilson, Antoinette
Subject: RE: Provisional Ballots with Signatures Issues
Importance: High

Michael and Matt,

I respectfully disagree with Patrick on number 1. I believe that Judge Sargus' order regarding poll worker error and Directive 2008-103 should be read liberally and in favor of counting provisional ballots rather than rejecting them solely based upon technicalities.

The form of the provisional ballot affirmation under R.C. 3505.182 is a substantial compliance statute. While Franklin County's form has the voter complete his or her name in column one, your poll workers are trained to review the provisional ballot affirmation before completing the poll worker portion. Your poll worker should have noticed that the voter did not put his or her name in column one and instructed the voter to do so. The voter actually signed the provisional ballot affirmation, so the voter was cooperating and wanting his or her ballot to be counted. That is why I conclude that the omission of a name is poll worker error.

If you can determine based upon the address and signature that the person is a registered elector, voted in the correct precinct, and was not required to provide additional information, why would you not want to count the ballot? Otherwise, you are disenfranchising the person.

We will discuss this issue with Secretary Brunner this afternoon as well as the issue of no signature but name was printed on the affirmation and get back to you.

Brian Shinn

From: Piccininni, Patrick J. [mailto:pjpiccin@franklincountyohio.gov]
Sent: Wednesday, November 12, 2008 7:11 AM
To: Stinziano, Michael P.; Damschroder, Matthew M.
Cc: Shinn, Brian; O'Brien, Ron J.; Soulas, Nick A.
Subject: Provisional Ballots with Signatures Issues
Importance: High

Gentleman: After our discussion of Brian Shinn's email, Directives 2008-101, 2008-103 and the provisional voter envelope we are in agreement that:

1) While Directive 2008-103, provides that a provisional ballot may not be rejected for reasons that are attributable to poll worker error neither the directive nor the court order transformed all

voter errors into poll worker errors. Under Directive 2008-101 many responsibilities remain the voters. Specifically, Directive 2008-101, §VI(D)(2)(c)(1) provides that the Board of Elections shall not open nor count a provisional ballot shall if the voter failed to provide their name and signature as the person who cast the ballot. The directive adopted by the Court states that both are required. The voter shall complete the information. Nothing in Directive 2008-101, 2008-103 nor the various court orders altered that requirement. R.C. §3505.181 puts the obligation on the voter to complete the application any omission of required information is voter error not poll worker error. Thus, the failure of the voter to put their name on the ballot is not poll worker error requiring the ballot be counted. The ballot should not be opened and not counted.

2) As to the situation where the voter completed the entire application but failed to sign the affirmations voter error that will invalidate the provisional ballot. The statute is clear that the voter must complete the written affirmation before a poll worker. RC §3501.011 provides that the signature is that of the voter. The duty mandated in R.C. §3505.181 is on the voter not the poll worker. Failure to do so is a fatal defect.

Patrick J. Piccininni
Assistant Prosecuting Attorney, Civil Division
Franklin County Prosecutor's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215
ppiccin@franklincountyohio.gov
614-462-3520
614-462-6012 (fax)

Please note that this message and/or any attachments may contain confidential attorney work product and/or may otherwise be privileged or confidential and/or protected from disclosure by applicable law. If you are not the intended recipient, please accept my apology, but you are hereby notified that you have received this message in error. Any review, dissemination, distribution or copying of this message is strictly prohibited. If you have received this message in error, please notify me by reply or by telephone at 614-462-3520 and immediately delete this message and any attachments.

Thank you.

From: Shinn, Brian [mailto:bshinn@sos.state.oh.us]
Sent: Mon 11/10/2008 6:03 PM
To: Bob DeRose; Stinziano, Michael P.; Damschroder, Matthew M.
Cc: Megan Kelley; Randy Borntrager; dora@ohlodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Cole); Nickolas, Eric; Piccininni, Patrick J.
Subject: RE: Provisional Ballots with signature issues.

Michael and Matt,

I am writing to respond to some of the concerns raised by Mr. DeRose in his email. I have consulted with Directives 2008-101 and 2008-103 and R.C. 3505.181, 3505.182, and 3505.183. Michael also provided me with a copy of Franklin County's provisional ID envelope.

As a preliminary matter, your board should be using Directives 2008-101 and 2008-103 to determine the validity of provisional ballots rather than any old emails that I sent you after the primary election.

There are three situations regarding provisional ballots described in the email below. Here are my suggestions for handling these:

- 1) The voter provided a signature in the affirmation statement, but neither the voter nor the poll worker wrote the voter's name anywhere on the provisional ballot envelope – if your board can determine from the information provided by checking the address and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name was not recorded falls under the category of poll worker error described in Directive 2008-103.
- 2) The voter's name was written on the provisional ballot ID envelope but no signature – we will consult with Secretary Brunner and get back to you on Wednesday. There is an ambiguity that we need resolved before I can advise you on this situation.
- 3) The voter's name and signature are on the provisional ballot envelope but not necessarily in the correct places. If your board can determine from the information provided that the person is registered to vote, voted in the correct precinct, and that the person was not required to provide additional information/ID within ten days, then the provisional ballot can be counted. The fact that a name and signature were in the wrong place falls under the category of poll worker error described in Directive 2008-103.

The other issue raised by Mr. DeRose's email is whether the board must contact provisional voters who failed to sign the provisional ballot envelope. The only provisional voters whom the board must contact under Directive 2008-101 (section VI.A.2.b on page 4) are provisional voters who are required to provide additional information to the board of elections. Unlike absentee voters under Directive 2008-109, the board is not required to contact provisional voters with errors on their provisional ballot envelope except for those specified in the previous sentence.

Finally, I caution anyone from releasing information about the number of provisional ballots based upon observer information. Observers were sworn not to disclose information that might compromise the secrecy of the ballot.

Let me know if you have any questions.

Brian Shinn
Assistant General Counsel
Ohio Secretary of State Jennifer Brunner

From: Bob DeRose [mailto:bderose@bnhmlaw.com]
Sent: Monday, November 10, 2008 10:29 AM
To: Stinzlano, Michael P.; mmdamsch@vote.franklincountyohio.gov
Cc: Shinn, Brian; Megan Kelley; Randy Borntrager; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Cole)
Subject: Provisional Ballots with signature issues.
Importance: High

Michael and Matt,

I am writing concerning the 800 individuals who were made to cast a provisional ballot and who have signature issues determined by you to be "fatally flawed." As the Kilroy for Congress campaign understands the situation, provisional ballots that either lack a printed name but have a signature in the affirmation or have a printed name but lack a signature in the affirmation, will not be counted and the Board of Elections does not intend to notify the voter to come to the Board to cure the defect. It is the position of the Kilroy for Congress campaign that the Board's position is incorrect because it does not follow the Ohio Revised Code nor the directives of the Ohio Secretary of State.

A review of R.C. §3505.181 provides at Section (B) (2):

The individual [voter] shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is both of the following: (a) A registered voter in the jurisdiction in which the individual desires to vote; (b) Eligible to vote in that election. (*emphasis added*)

Section (B) (2) uses the term "before" as a preposition meaning, "in the presence of an election official." R.C. §3505.181 confers upon the poll worker the duty to have the voter complete the provisional ballot envelope in their presence. The use of the word "before" as a preposition is supported by R.C. §3505.182 where in the Revised Code mandates that a poll worker attest to the voter's completion of the affirmation. In relevant part, R.C. §3505.182 requires the following language to be used on provisional ballots and same is used by the Franklin County Board of Elections; "The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this day of (Month), (Year)." Finally, R.C. §3505.182 requires that the poll worker sign their name to the provisional ballot envelope to attest to the voter's completion of the provisional ballot envelope's affirmation section. Further, in the event an individual declines to sign the affirmation, R.C. §3505.182 directs the poll worker to follow procedures set out in R.C. §3505.181 (B)(6).

R.C. §3505.181 (B)(6) requires that "at the time an individual casts a provisional ballot, ... the appropriate election official shall record...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."

Read together, R.C. §3505.181 and R.C. §3505.182 confer upon the poll worker a duty to make sure that the affirmation section of the provisional ballot envelope is completed correctly by the voter. This duty was codified in SOS Directive 2008-81. The poll worker's duty would include making certain that the voter placed their printed name in the correct section and signed the affirmation. Permitting a provisional ballot to be cast without the necessary information in the voter affirmation section is contrary to the poll

worker's statutory duty, especially since a poll worker is required by statute to record the affirmation or the declination of a voter to affirm. It stands to reason that the poll worker would check each provisional ballot for the information necessary to discharge their statutory duties and when the information is incomplete they would inquire of the voter if they intended not to sign or place their printed name in the affirmation section. The lack of a signature or a printed name on a provisional ballot envelope's affirmation section is the result of a poll worker's error in not checking the provisional ballot before it was cast. Pursuant to SOS Directive 2008-103, "provisional ballots may not be rejected for reasons that are attributable to poll worker error, including a poll worker's ...failure to comply with any duty mandated by R.C. 3505.181." As such, any provisional ballot that lacks a printed name but has a signature, or that has a printed name but lacks a signature, or lacks a printed name and has no signature was cast on November 4, 2008 as a result of poll worker error. It is our understanding that approximately 620 of the 800 provisional ballots contain a signature but lacks a printed name. As to these 620 provisional ballots that were cast by an otherwise eligible voter, meaning that there is sufficient information to confirm the identity of the voter, these should be reviewed for registration, their signature compared to the registration and counted as a vote. It is our understanding that approximately 30 provisional ballots have a printed name but lack a signature. As to these 30 provisional ballots, because you have a name and the precinct where the provisional ballot was cast, the Board of Elections should immediately notify these voters of the defect and have them come into the Board to sign the affirmation. As to the remaining provisional ballots that lack a printed name and lack a signature; to the extent that the Board can determine the voter's identity from other sources, the ID provided by the voter, the Board should notify the voter of the defect and have them come into the Board to cure.

This issue is of extremely high importance and needs to be addressed immediately since time is running out for these individuals to cure their defects. Because of the time sensitive nature of this issue, I have copied Brian Shinn on this email. Also, can you confirm the numbers I cited for each of the signature issue? Thank you.

Bob DeRose
Barkan Neff Handelman Meizlish, LLP
360 S. Grant Avenue
P.O. Box 1989
Columbus, Ohio 43216-1989
614-221-4221
614-744-2300 (Fax)
bderose@bnhmlaw.com
www.bnhmlaw.com

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

Case No. **08-2206**

ORIGINAL ACTION IN
MANDAMUS

RELATORS' MOTION FOR EXPEDITED CONSIDERATION

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

COUNSEL FOR RELATORS
DANA SKAGGS AND KYLE FANNIN

FILED
NOV 13 2008
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators,

vs,

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

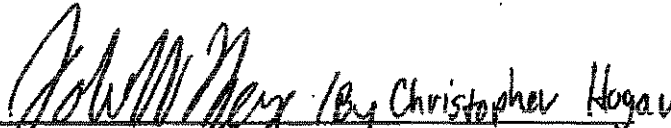
Case No. _____

ORIGINAL ACTION IN
MANDAMUS

RELATORS' MOTION FOR EXPEDITED CONSIDERATION

Pursuant to Supreme Court Rule X, Relators move the Court for an order expediting consideration of this election matter consistent with Section 9 of Supreme Court Rule X and in order to permit the timely counting of ballots and certification of election results by November 25, 2008. The basis for this motion is set forth in the attached Memorandum in Support.

Respectfully submitted,



John W. Zeiger (0010707)

Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900

Counsel for Relators

MEMORANDUM IN SUPPORT

The instant action seeks mandamus relief compelling Respondents to comply with the mandatory requirements of R.C. 3505.181 and R.C. 3505.183(B)(1)(a), which prescribe the requirements for consideration of provisional ballots. As set forth in the Affidavit of Mathew M. Damschroder, filed contemporaneously herewith, provisional ballots currently pending before the Franklin County Board of Elections may be decisive in one or more of three undecided races. It is thus essential that all provisional ballots complying with Ohio law are properly counted and that those ballots which do not comply with the mandatory statutory requirements be excluded.

Yet, as further set forth in the Complaint and accompanying affidavit, the Secretary of State seeks to avoid this very result. Since the November 4, 2008 election, the Secretary of State has directed that the Franklin County Board of Elections consider and count the provisional ballots in a manner flatly inconsistent with Chapter 3505 and, as well, the Secretary of State's own prior directives. Neither this Court nor the public should countenance such post-election gamesmanship.

Section 9 of Supreme Court Rule X sets forth an expedited schedule for consideration of election matters given "the necessity of a prompt disposition of an original action relating to a pending election" and in order to afford "the Supreme Court adequate time for full consideration of the case." The Rule provides:

Because of the necessity of a prompt disposition of an original action relating to a pending election, and in order to give the Supreme Court adequate time for full consideration of the case, if the action is filed within 90 days prior to the election, the respondent shall file a response to the complaint within five days after service of the summons. Unless otherwise ordered by the Supreme Court, relator shall file any evidence and a merit brief in support of the complaint within three days after the filing of the response or, if no response is filed, within three days after the response was due. Respondent shall file any evidence and a merit

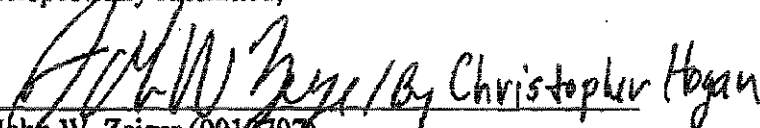
brief within three days after the filing of relator's merit brief, and relator may file a reply brief within three days after the filing of respondent's merit brief. Motions to dismiss and for judgment on the pleadings may not be filed in expedited election cases. The parties shall serve the response, evidence, and merit briefs on the date of filing by personal service, facsimile transmission, or e-mail.

[Emphasis added.]

Although this action is being filed "after" an election, the very concerns underlying Section 9 of Supreme Court Rule X are present here. Indeed, they are even more pronounced given the necessity to complete the tabulation of all votes, including provisional votes by November 25, 2008, which is the statutory date for certification of the election results.

Accordingly, time is of the essence to prevent irreparable harm.¹ Expedited consideration of this matter is therefore requested so that this Court will have the opportunity to consider and resolve this dispute and permit the Franklin County Board of Elections to determine the validity of each provisional ballot, complete the counting of all votes, and certify the election results by November 25, 2008.

Respectfully submitted,


John W. Zeiger (0016707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900

Counsel for Relators

¹ Consistent with the instant request, Relators have, separate and apart from the ordinary service of process by this Court, provided, both by hand delivery and electronic service, copies of the complaint and all related papers upon Respondents.

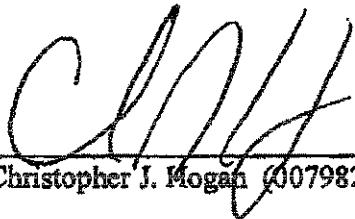
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served this 13th day of November, 2008, via hand delivery and email, upon the following:

The Honorable Nancy H. Rogers
Attorney General
State of Ohio
State Office Tower
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428

Jennifer L. Brunner
Secretary of the State of Ohio
180 East Broad Street
Columbus, OH 43215

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



Christopher J. Mogan (0079829)

859-001:189121

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

Case No.

08-2206

ORIGINAL ACTION IN
MANDAMUS

**MOTION OF RELATORS DANA SKAGGS AND KYLE FANNIN FOR AN ORDER
PURSUANT TO CIVIL RULE 65 AND SUPREME COURT RULE X, SECTION 2, FOR
TEMPORARY INJUNCTIVE RELIEF PENDING THE COURT'S CONSIDERATION
OF RELATORS' REQUEST FOR MANDAMUS RELIEF**

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

COUNSEL FOR RELATORS
DANA SKAGGS AND KYLE FANNIN

FILED
NOV 13 2008
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS, et al.,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO, et al.,

Respondents.

Case No. _____

ORIGINAL ACTION IN
MANDAMUS

**MOTION OF RELATORS DANA SKAGGS AND KYLE FANNIN FOR AN ORDER
PURSUANT TO CIVIL RULE 65 AND SUPREME COURT RULE X, SECTION 2, FOR
TEMPORARY INJUNCTIVE RELIEF PENDING THE COURT'S CONSIDERATION
OF RELATORS' REQUEST FOR MANDAMUS RELIEF**

Pursuant to Civil Rule 65 and Supreme Court Rule X, Section 2, Relators Dana Skaggs and Kyle Fannin move the Court for an order temporarily restraining Respondents the Ohio Secretary of State, the Franklin County Board of Elections, and their agents, servants, employees, attorneys and those persons in active concert or participation with them from opening the provisional ballot application envelopes cast as part of the November 4, 2008 general election, pending this Court's consideration of the merits of Relators' request for mandamus relief.

Respectfully submitted,

 By Christopher Hogan

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

Counsel for Relators

MEMORANDUM IN SUPPORT

"[I]f the secretary of state 'has, under the law, misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of mandamus.' If the secretary's 'advice [to the board of elections] is an erroneous interpretation of the election laws there must be some remedy to correct the error and to require proper instructions in lieu of those erroneously given.'"

[State ex rel. Colvin v. Brunner, 2008-Ohio-5041
¶ 20 (2008).]

Such relief is sought here. In violation of Ohio Revised Code Sections 3505.181, 3505.182, and 3505.183, the Ohio Secretary of State has provided erroneous interpretations of Ohio's election laws to the Franklin County Board of Elections for determining the eligibility of provisional ballot applications. By this action, Relators seek mandamus relief "to correct the error and to require proper instructions in lieu of those erroneously given."

Even with the benefit of this Court's expedited consideration of Relators' request, there is a risk that the provisional ballot application envelopes will be opened, the envelopes discarded, and the provisional votes counted. Such an occurrence would irreparably alter the status quo because the provisional ballots, once opened, are separated from the provisional voters' application (which is the sole document containing voter identifying information) and then commingled with other ballots. As stated in the Damschroder Affidavit, filed contemporaneously herewith:

Upon completion of the review of a Provisional Ballot Application, if the provisional ballot voter is determined by the Board of Elections to be eligible to vote, the envelope on which the Provisional Ballot Application is printed is opened and the ballot is removed. To assure the secrecy of the provisional voter's ballot choices, the Provisional Ballot Application envelope is then separated from the ballot it contains and the ballot is then commingled with all other provisional ballots cast in the Election. As a consequence, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of any

particular provisional voter, making an after-the-fact assessment of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional ballot voter impossible. Thus, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from the Application envelopes.

[Affidavit of Matthew Damschroder ¶ 6
(emphasis added).]

In short, the opening of the provisional ballots would ring a bell that cannot later be unrung. No legal remedy can change this fact. Thus, injunctive relief is necessary to maintain the status quo pending this Court's issuance of mandamus relief compelling the Secretary of State to comply with Ohio Election Laws.

II. STATEMENT OF FACTS

A. The November 4, 2008 Election And The Provisional Voting Process.

Unofficial returns from the November 4, 2008 election (the "Election") indicate that Republican Steve Stivers leads Democrat Mary Jo Kilroy by nearly 400 votes in the election for the 15th Congressional District seat; Democrat Nancy Garland leads Republican Jim McGregor by 783 votes in the 20th House District race; and, Democrat Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19th House District (the "Undecided Races"). [Affidavit of Matthew M. Damschroder ¶ 2 ("Damschroder Aff'd").] The outcome of each of these three elections may be determined by the provisional ballots the Board of Elections is now reviewing for eligibility but which have not yet been counted. [Id.] More than 27,000 provisional ballots were cast in Franklin County in the Election. [Id. at ¶ 3.]

Pursuant to Section 3505.181 of the Ohio Revised Code, a voter may cast a provisional ballot if his or her name does not appear in the poll list; he or she fails to provide required identification at the polling place on the day of the Election; the voter previously requested an

absentee ballot; and for other specified reasons. [See also id.] If the voter wishes to cast a provisional ballot, he or she is provided a Provisional Ballot Application prepared by the county Board of Elections and a ballot. [Id. at ¶ 4, Exhibit A to Damschroder Aff'd (Franklin County Provisional Ballot Application).] The Provisional Ballot Application specifically requires that the voter provide her name, signature, and verifying identification information or, alternatively, requires her to sign the identification verification affirmation required by R.C. 3505.18(A)(4). The Application is printed on an envelope into which the voter inserts his or her provisional ballot. [Damschroder Aff'd ¶ 4.] The voter then seals the envelope. [Id.]

B. The Provisional Ballot Verification And Counting Process.

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

To maintain secrecy, the Board of Elections then separates the Provisional Ballot Application from the ballot it contains and commingles the ballot with all other provisional ballots cast in the Election. [Id.] Thus, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of any particular provisional voter, making an after-the-fact assessment of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional ballot voter impossible. [Id.] Thus, consistent with

the Board of Elections' statutory mandate, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from the Application envelopes. See Ohio Rev. Code § 3503.183(D) ("No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county").

C. Initial Processing Reveals Significant Flaws In A Number Of Franklin County Provisional Ballot Applications.

Initial processing by the Franklin County Board of Elections suggests that the majority of the Provisional Ballot Applications have been submitted by Franklin voters who are eligible under the applicable statutes. [Damschroder Aff'd ¶ 8.] Such processing also suggests, however, that a number of the Provisional Ballot Applications are fatally flawed because the voter who tendered the provisional ballot is either not properly registered to vote or voted in an incorrect precinct. [Id.] If this initial processing is confirmed by the Board of Elections, these Applications will not be opened or counted. [Id.] As a result, the eligibility of a high percentage of provisional voters is clear. [Id. at ¶ 9.]

Nonetheless, a dispute has arisen regarding the eligibility, under the Ohio election statutes, of certain categories of provisional ballots. These include, *inter alia*, Provisional Ballot Applications on which the voter failed to provide both his or her name and her signature. [Id. at ¶ 10.] The Franklin County Provisional Ballot Application clearly indicates, in capital letters, underscored, and in bold type: the provisional ballot voter is directed to "CLEARLY PRINT NAME-(REQUIRED)" and provide the "VOTER'S SIGNATURE-(REQUIRED)." [See Exhibit A to Damschroder Aff'd.] Despite the clarity of this language, approximately 3-4 percent of the Franklin County Provisional Ballot Applications lack either the name or signature, or both, that is specifically required by the Application. [Damschroder Aff'd ¶ 10.]

D. The Secretary Of State's Pre-Election Direction, Consistent With The Applicable Statutory Language.

On March 31, 2008, Brian Shinn, Assistant General Counsel to Secretary of State Jennifer Brunner, responded to a series of questions from the Franklin County Board of Elections regarding procedures for counting provisional ballots. [Id. at ¶ 11, Exh. B to Damschroder Aff'd (e-mail).] In response to a question regarding a voter's failure to provide both her name and signature on a provisional ballot application, Shinn advised:

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

[Emphasis in original.]

Shinn's March 31, 2008 instruction that a voter's failure to provide both her "Name AND signature" was consistent with the Secretary of State's pre-Election interpretation of the plain language of Section 3505.183(B)(1)(a) of the Ohio Revised Code, which states in pertinent part: "... 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 (Emphasis added.) In Directive 2008-101 ("SOS Directive 2008-101"), Secretary of State Brunner instructed that the failure of a provisional ballot voter to provide both her name and her signature on the Provisional Ballot Application precluded a Board of Elections from treating the provisional ballot as eligible and required that the Provisional Ballot Application "shall neither [be] open[ed] nor count[ed]":

If ANY of the following apply, board staff responsible for processing provisional ballots shall recommend to the board that a provisional ballot **not** be counted, and a board of elections **shall neither open nor count** the provisional ballot:

* * *

c) The individual did not provide the following:

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

* * *

[Exhibit C to Damschroder Aff'd
(Bold emphasis in original; bold italics emphasis added).]

Consistent with this pre-election direction from Secretary of Brunner and her office's e-mail instruction of March 31, 2008, the Prosecuting Attorney's Office of Franklin County has advised the Franklin County Board of Elections that Ohio statutes require that the provisional ballot voter must provide both her name and her signature to be eligible to have her Provisional Ballot Application opened and her ballot counted. [Damschroder Aff'd ¶ 13, Exh. D to Damschroder Aff'd (e-mail chain containing correspondence with Prosecutor's office).] The Franklin County Board of Elections was prepared to follow the pre-Election instructions of the Secretary of State and to disqualify as fatally flawed all provisional ballots that did not comply with Mr. Shinn's conclusion that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ." [Id. at ¶ 14.]

E. The Secretary Of State's Post-Election Change Of Course At The Prompting Of A Political Campaign Attorney.

On Monday, November 10, after the Franklin County Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve Stivers by nearly 400 votes for the 15th Congressional District seat, Bob DeRose, a lawyer for the Kilroy Committee, challenged the determination of the Secretary of State that R.C. 3505.181(B)(1)(a)

requires a Provisional Ballot Application is ineligible to be counted unless it contains both the name and the signature of the provisional ballot voter. [Exh. D to Damschroder Aff'd (e-mail chain containing DeRose e-mail).] In his e-mail, which was copied to, among others, attorney Shinn, DeRose went so far as to assert that a provisional ballot must be counted even if it lacks both the printed name and the signature of the provisional ballot voter. [Id.]

Later that same day, Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a)..." [Damschroder Aff'd ¶ 16.] Rather, in response to the DeRose request, Shinn directed that the Board of Elections deem eligible Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days..." [Exh. D (e-mail chain containing Shinn's November 10 e-mail).] Shinn went so far as to indicate that if a voter's signature is found on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e., it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." [Id.] In a subsequent e-mail sent November 12, 2008, Shinn confirmed that the Secretary of State agreed with his change of course, and concurred with and adopted his November 10, 2008 direction to the Franklin County Board of Elections. [Id. at ¶ 17; Exh. D to Damschroder Aff'd (e-mail chain containing Shinn's November 12, 2008 e-mail).]

Simply put, this post-election reversal of course is inconsistent with the plain language of Section 3505.181, and it is inconsistent, as set forth below, with the Secretary of State's duty to

advise boards of election in accordance with the applicable Ohio elections law. But, if the Provisional Ballot Applications are opened, there will be no way to determine which ballots were eligible under the Ohio statutes and which were not. And, in the absence of interim injunctive relief, there will be no way to correct the Secretary of State's error in misdirecting the Board of Elections under the applicable statutes.

III.

LAW AND ANALYSIS

As the Court recently reiterated, Ohio law clearly provides for relief in mandamus where "the secretary of state 'has, under the law, misdirected the members of the boards of elections as to their duties'" State ex rel. Colvin v. Brunner, 2008-Ohio-5041, ¶ 20 (Sept. 29, 2008).¹ An action in mandamus lies because, "if the secretary's advice [to the boards of elections] is an erroneous interpretation of the election laws there must be some remedy to correct the error and to require proper instructions in lieu of those erroneously given." Id. In such circumstances, no deference is due the Secretary's interpretation because "we need not defer to the secretary of state's interpretation because it is unreasonable and fails to apply the plain" language of the statutes at issue. State ex rel. Stokes v. Brunner, 2008-Ohio-5392, ¶ 29 (Oct. 15, 2008). Indeed, in Stokes, the Court granted relief in mandamus where the Secretary of State "erroneously advised boards of elections that they are not required to permit duly appointed observers at in-person, absentee-voting locations ..." Id. at ¶ 1. Because such advice was premised on an

¹ Supreme Court Rule X plainly states that the provisions of the Ohio Rules of Civil Procedure are applicable in an original action before the Supreme Court, unless they expressly conflict with this Court's Practice Rules or are otherwise "clearly inapplicable." See, e.g., State ex rel. Yeagley v. Harden, 68 Ohio St. 3d 136, 137 (1993) ("[W]e have applied the Civil Rules in mandamus actions"). One such rule that is not clearly inapplicable is Civil Rule 65, which permits a movant to seek injunctive relief in order to maintain the status quo pending a resolution of the merits of the case. Accordingly, Relators are entitled to seek temporary injunctive relief, pursuant to Civil Rule 65, as part of this original action, in order to simply preserve this Court's ability to ensure the proper enforcement and implementation of Ohio's election laws.

incorrect interpretation of, *inter alia*, Section 3505.21 of the Revised Code, mandamus relief was appropriate. *Id.* at ¶¶ 1, 30.

So, too, in State ex rel. Myles v. Brunner, 2008-Ohio-5097, ¶¶ 4-5 (October 2, 2008), the Court granted a writ of mandamus where the secretary of state issued a memorandum to boards of elections that had advised them to reject certain absentee ballot applications that did not contain a "check" in an affirmation box. Because the applicable statutory provision does not "strictly require that the box" be checked, the Secretary of State's interpretation failed to "apply the plain language" of the statute. *Id.* at ¶¶ 21, 26. Therefore, mandamus relief was appropriate. *Id.* at ¶ 27.²

Since a Writ of Mandamus is the proper remedy for addressing the Secretary of State's failure to comply with Ohio election laws, interim injunctive relief should be entered pending the Court's determination of Relators' request. The traditional factors to be considered for issuance of temporary injunctive relief under Civil Rule 65 track those elements necessary for mandamus relief: (1) whether the movant has shown a strong or substantial likelihood of success on the merits; (2) whether the movant has shown that it will suffer irreparable injury if the injunction is not granted; (3) whether issuance of an injunction will cause substantial harm to the respondent or to third parties; and (4) whether an injunction would serve the public interest. See Corbett v. Ohio Bldg. Auth., 86 Ohio App. 3d 44, 49 (10th Dist. 1992). Here, each of the elements warranting entry of an injunction are present:

² See also State ex rel. Melvin v. Sweeney, 154 Ohio St. 223, 225 (1950) ("[W]here there is an act of an officer requiring the construction of a statute, concerning which there may be an honest difference of opinion, mandamus is the proper remedy to compel such officer to act in accordance with the required construction, or to show cause why he does not.").

A. Relators Are Likely to Succeed on the Merits.

To establish an entitlement to mandamus relief in an action against the Secretary of State, the relator must establish: (1) “a clear legal right to the requested relief”; (2) “a corresponding clear legal duty on the part of the secretary of state to provide it”; and (3) “the lack of an adequate remedy in the ordinary course of the law.” Stokes, 2008-Ohio-5392, at ¶ 13. Each of these elements is clearly present here.

1. Relators, As Ohio Residents And Franklin County Voters, Have A Clear Legal Right To The Requested Relief.

As a threshold matter, each of the Relators in this case, who are all Ohio citizens and Franklin County electors, have standing to seek mandamus relief. Indeed, this Court has a “long line of cases establishing that mandamus is available to enforce public duties, that any duty related to an election is public, and that *a citizen has the capacity to sue even if the duty only generally affects him.*” State ex rel. Barth v. Hamilton County Board of Elections, 65 Ohio St. 3d 219, 221 (1992) (emphasis added). Thus, as a matter of law, Relators have a *clear legal right* to enforce “any duty related to an election,” including the duty of the Secretary of State to ensure compliance with Ohio’s election statutes. See, e.g., id.

2. The Secretary Of State Has A Clear Legal Duty To Ensure Compliance With Ohio’s Election-Related Statutes, And To Not “Misdirect” The County Boards Of Elections.

It is well settled that “election laws are mandatory and require *strict compliance* and that substantial compliance is acceptable only when an election provision expressly states that it is.” Myles, 2008-Ohio-5097, at ¶ 18 (quoting State ex rel. Ditmars v. McSweeney, 94 Ohio St. 3d 472, 476 (2002)). Consistent with this settled proposition, the Court has repeatedly held that the Secretary of State has a clear legal duty, among others, to “[c]ompel the *observance by election officers in the several counties of the requirements of the election laws.*” Id. at ¶ 11 (emphasis

added). See also Stokes, 2008-Ohio-5392, at ¶ 14 (same). Where the Secretary advises or instructs local boards of elections in a manner inconsistent with the express statutory language, she also has a clear legal duty, enforceable in mandamus, to correct her error and to ensure the boards' compliance with the plain statutory language. See Myles, 2008-Ohio-5097, at ¶ 27; Stokes, 2008-Ohio-5392, at ¶ 30.

Consistent with these decisions, Secretary Brunner has a clear legal duty to advise county boards of election in strict compliance with the applicable elections statutes, including Section 3505.183(B)(1)(a) of the Ohio Revised Code. It provides, in pertinent part:

... 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

[Emphasis added.]³

This language plainly establishes both the voter's name and signature as essential requirements for provisional ballot eligibility. Indeed, the Secretary of State's pre-election directives to the Board of Elections clearly recognized the import of this plain language, and instructed that Provisional Ballots were ineligible unless both of these requirements were met.

However, her post-election directives, as reflected in Mr. Shinn's communications to the Franklin County Board of Elections, have now taken an inconsistent position—a position that effectively ignores the plain statutory language. In instructing the Board of Elections to count provisional ballots that do not contain both a name and signature, the Secretary of State has “misdirected” county officials by erroneously applying the applicable elections law. As a result, under Stokes, she has a clear legal duty to correct her error and to ensure that the statutes are properly enforced.

³ Section 3505.182 of the Revised Code provides, in pertinent part, that “Each individual who casts a provisional ballot ... shall execute a written affirmation.”

3. Relators Do Not Have An Adequate Remedy In The Ordinary Course Of The Law.

As a matter of law, Relators lack an adequate remedy at law. As this Court stated in Colvin, “[g]iven the proximity of the . . . election as well as the recognized propriety of mandamus as an appropriate remedy to compel the secretary of state to issue instructions to boards of elections correcting previous erroneous instructions, relators have established that they lack an adequate remedy in the ordinary course of the law.” Colvin, 2008-Ohio-5041, at ¶ 7 (emphasis added). See also State ex rel. Heffelfinger v. Brunner, 116 Ohio St. 3d 172, 175 (2007) (“Given the proximity of the November 6 election, relators have established that they lack an adequate remedy in the ordinary course of law.”). The same elements compelling this conclusion in Colvin are present here: extreme time sensitivity given the necessity for certification of the election results by November 25, 2009, and the Secretary of State’s insistence that the Franklin County Board of Elections act inconsistent with Ohio law.

The nature of the irreparable harm likely to be sustained here is even more pronounced when the Court considers that once the provisional ballot envelopes are opened, the bell cannot be unring. The opened provisional ballots are commingled with all other provisional ballots, and thus it is impossible for the Board of Elections to make an after-the-fact assessment of the eligibility of any particular provisional ballot.

B. Relators Will Suffer Irreparable Harm Absent Temporary Injunctive Relief.

Absent a temporary injunction enjoining the opening of the provisional ballot envelopes, Relators will suffer irreparable harm, in the form described above. Once the provisional ballot envelopes are opened and the ballots intermingled, no legal remedy will be able to “unring the bell.”

C. The Harm Suffered Absent Temporary Injunctive Relief Clearly Outweighs The Alternative, And The Public Interest Favors Enforcement Of Ohio's Election Statutes.

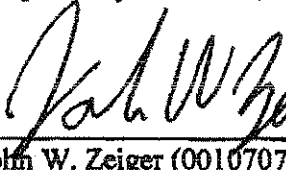
Any harm imposed by an order temporarily enjoining the opening of provisional ballot envelopes is clearly outweighed by the alternative, which would effectively deprive the Court of an opportunity to ensure that Ohio's election laws are properly enforced by the state official who is primarily charged with enforcing them. For the same reason, the public interest would clearly be served by a temporary injunction that merely preserves this Court's ability to ensure the proper enforcement and implementation of Ohio's election laws. Election races, of course, should be determined consistent with the requirements of Ohio law, as opposed to the Secretary of State's current effort to rewrite the rules after the election has been held.

III.

CONCLUSION

For the foregoing reasons, this Court should grant a temporary injunction restraining and enjoining Respondents the Ohio Secretary of State, the Franklin County Board of Elections, and their agents, servants, employees, attorneys and those persons in active concert or participation with them from opening the provisional ballot application envelopes cast as part of the November 4, 2008 general election, pending this Court's consideration of the merits of Relators' request for mandamus relief.

Respectfully submitted,

 / By Christopher Hogan

John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215

(614) 365-9900
(614) 365-7900

Counsel for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served this 13th day of November, 2008, via hand delivery and email, upon the following:

The Honorable Nancy H. Rogers
Attorney General
State of Ohio
State Office Tower
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428

Jennifer L Brunner
Secretary of the State of Ohio
180 East Broad Street
Columbus, OH 43215

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



Christopher J. Hogan (0079829)



The Supreme Court of Ohio
Clerk's Office
65 South Front Street, 8th Floor
Columbus, Ohio 43215-3431
614.387.9000
614.387.9530

Kristina D. Frost
Clerk of Court

Search Results: Case Number 2008-2206

The Supreme Court of Ohio
CASE INFORMATION

GENERAL INFORMATION

Case: **2008-2206** Original Action in Mandamus

Filed: 11/13/08

Status: Case Is Open

State of Ohio ex rel Dana Skaggs et al. v. Jennifer L. Brunner, Secretary of the State of Ohio, et al.

PARTIES and ATTORNEYS

Fannin, Kyle (Relator)

Represented by:

Zeiger, John (10707) , Counsel of Record

Hogan, Christopher (79829)

Little, Marion (42679)

Skaggs, Dana (Relator)

Represented by:

Zeiger, John (10707) , Counsel of Record

Hogan, Christopher (79829)

Little, Marion (42679)

Board of Elections of Franklin County, Ohio (Respondent)

Represented by:


O'Brien, Ronald (17245) , Counsel of Record





Brunner, Jennifer L. (Respondent)

Represented by:

Rogers, Nancy (2375) , Counsel of Record

DOCKET ITEMS

- Most documents that were filed in Supreme Court cases after December 1, 2006, are scanned. They are available for viewing via the online dockets, generally within one business day from their date of filing.
- Supreme Court orders that were issued after January 1, 2007, are also available via the online docket as PDFs. Although original orders issued by the Court bear the signature of the Chief Justice, the signature usually will not appear in the online versions. In all other respects, the online versions will be identical to the original signed orders on file with the Clerk's Office.
- A  symbol in an online docket denotes a scanned filing or an electronic version of a Supreme Court order. Clicking the icon opens an image of the filing or order.

Date Filed	Description
11/13/08  View	Complaint in mandamus of Dana Skaggs and Kyle Fannin <i>Filed by: Fannin, Kyle</i> <i>Filed by: Skaggs, Dana</i>
11/13/08  View	Affidavit of Matthew M. Damechroder <i>Filed by: Fannin, Kyle</i> <i>Filed by: Skaggs, Dana</i>
11/13/08  View	Motion to expedite consideration <i>Filed by: Fannin, Kyle</i> <i>Filed by: Skaggs, Dana</i>
11/13/08  View	Motion for temporary injunctive relief <i>Filed by: Fannin, Kyle</i> <i>Filed by: Skaggs, Dana</i>

