APPEAL NO. 08-4585

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
_____

State of Ohio ex rel., Dana Skaggs, et al.,

Relators-Appellants

v.

Jennifer L. Brunner
Secretary of the State of Ohio, et al.,

Respondents-Appellees
_____

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
_____

EMERGENCY MOTION OF RELATORS/APPELLANTS FOR AN
ORDER PURSUANT TO APPELLATE RULE 8
FOR INJUNCTIVE RELIEF PENDING APPEAL
_____

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ATTORNEYS FOR RELATORS-APPELLANTS

Pursuant to Appellate Rule 8, Relators Dana Skaggs and Kyle Fannin move the Court for an emergency order enjoining (a) Respondent the Ohio Secretary of State, (b) the Franklin County Board of Elections (who is a relator solely as a result of the District Court's November 17, 2008 order of realignment), and (c) their respective agents, servants, employees, attorneys, and those persons in active concert or participation with them, from opening the provisional ballot application envelopes cast in Franklin County, Ohio as part of the November 4, 2008, general election, pending this Court's consideration of this appeal.

The basis for this Motion is set forth in the attached affidavits (Exhibits A-E) and Memorandum in Support and Relators' Merit Brief, which has been filed contemporaneously herewith. Relators specifically note that such relief is necessary *prior to Friday, November 21, 2008, at 9:00 a.m.*[1] to avoid the irreparable harm resulting from the opening of the provisional ballot application envelopes.

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[1] The current stipulation to defer the opening of the provisional ballots expires on November 21, 2008, at 9:00 a.m. The District Court indicated that a decision on the merits would be issued by 5:00 p.m. on November 20, and an in-court hearing is scheduled for 4:00 p.m. on November 20, at which time Movants will seek, in the first instance, injunctive relief from the District Court pending appeal. Because of time constraints and the obvious irreparable harm which will result absent relief, the instant motion is being filed concurrently with the Notice of Appeal *and* Relators' Merit Brief. If any relief is provided pending appeal, prompt notice will be provided to this Court.

Respectfully submitted,

/s/ John W. Zeiger
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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).]

This was the original remedy sought here. Relators, who are all Ohio residents, sought a remedy available under the Ohio Constitution, against Ohio Respondents for violations of an Ohio election statute. No federal claim was advanced. Specifically, in violation of Ohio Revised Code Sections 3505.181,

3505.182, and 3505.183, the Ohio Secretary of State ("Secretary Brunner") has provided erroneous interpretations of Ohio's election laws to the Franklin County Board of Elections (the "Board") for determining the eligibility of provisional ballot applications—*ballots which remain pending for consideration before the Board*. Relators sought mandamus relief before the Ohio Supreme Court "to correct the error and to require proper instructions in lieu of those erroneously given."

Relators' efforts to have this matter promptly heard by the Ohio Supreme Court were immediately thwarted. In violation of this Court's precedent, one Respondent, but not the other, removed this action to the Southern District of Ohio, thus divesting the Supreme Court of any authority to proceed. The District Court then refused to remand the case, having accepted Secretary Brunner's defense that that Relators' request that she honor Ohio elections law was impacted by a Consent Order (i.e., settlement) entered into by Secretary Brunner and unrelated parties on the eve of the November election. This Court had previously rejected such an argument in City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007). Nevertheless, the District Court proceeded and then, construing the meaning of Ohio statutes, granted Secretary Brunner summary judgment, holding that one statute trumped the plain language of another, thus forcing the Board to count

provisional ballots which, *at least prior to the election*, Secretary Brunner had stated should not be counted.

Thus this appeal necessarily raises, in the first instance, the significant constitutional issue of the District Court's expansion of federal court subject-matter jurisdiction, which is, of course, specifically circumscribed under Article III of the Constitution. It is clear that jurisdiction is lacking over this state law dispute, and thus the District Court improvidently proceeded in this matter. Yet, even if the District Court's jurisdiction could somehow be constitutionally extended to permit resolution of state law issues among non-diverse parties, the District Court effectively rewrote the Ohio Election laws. Specifically, the mandatory eligibility requirements of Section 3505.183(B)(1) of the Ohio Revised Code, which are designed to prevent voter fraud, have been effectively eliminated. This judicial rewrite, made in violation of multiple cannons of statutory construction, is improper. As this Court has stated, *"the judiciary's job is to enforce the law [that the legislature] enacted, not to write a different one that judges think superior."* Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005) (emphasis added).

In short, Relators have a strong likelihood of success on the merits. And the other elements compelling injunctive relief are equally strong. That irreparable harm will arise absent injunctive is clear in two substantial respects. First, even

with the benefit of this Court's expedited consideration of this appeal, there is an imminent risk that the provisional ballot application envelopes will be opened, the envelopes discarded, and the provisional votes counted. *This could occur as early as November 21, 2008, at 9:00. a.m.* 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 Affidavit of Matthew Damschroder, who is the Board's deputy director:

> 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.
>
> [Damschroder Aff'd ¶ 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 consideration of this appeal.

Second, although Relators did not seek the District Court's exercise of jurisdiction over this state court dispute, the unfortunate irony is that the District Court's orders create an unconstitutional result under the Fourteenth Amendment. It is settled that under <u>Bush v. Gore</u>, 531 U.S. 98 (2000), the manner and procedure by which provisional ballots are counted by different county board of elections must be the same.

With the District Court's ruling, *they are not*. The 15th Congressional District, which is one of the races at issue, includes areas from three Ohio counties: Franklin, Union, and Madison. In Union and Madison Counties, the board of elections previously considered provisional ballots pursuant to the provisions of Ohio Revised Code § 3505.183(B)(1)(a). As such, as evidenced in the affidavits of representatives from each of these counties (Exhs. C and D), Union and Madison Counties *deemed ineligible and thus did not count ballots* where (1) the voter failed to provide his signature executing the affirmation statement under Section 3505.181(B)(2), or (2) where the voter failed to provide both his or her printed name and signature executing the affirmation. Of course, this process is hardly

surprising inasmuch as it is compelled by the Ohio Revised Code and was the process always followed *prior* to the election.

But Secretary Brunner's newly minted instructions that the statutory rules be ignored, and suspect provisional ballots simply be counted, was not communicated to Union or Madison counties, both of which are perceived as predominately Republican counties. Apparently was also not communicated to Delaware County, another perceived Republican County, as reflected by the Affidavit attached as Exhibit E. The new "rules" were reserved for Franklin County, which is predominately Democrat.

Now with the District Court's ruling, one of set of rules *will be* applied in Franklin County; a different set of rules *was* applied in Union and Madison Counties. Thus, the voters in the 15th Congressional District are subject to differing standards solely on the basis of the county in which they reside.

This is an unconstitutional result under the Equal Protection Clause. As the Supreme Court has held, "the standards for accepting or rejecting contested ballots may not vary . . . from county to county." Bush, 531 U.S. at 105. That is, there cannot be arbitrary and disparate treatment to voters in . . . different counties." Id. at 107. In particular, the Court noted, "the right to vote as a legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." Id.

at 104. Thus, "[a] state must impose uniform statewide standards in each county in order to protect the legality of a citizen's vote. Anything less implicates constitutional problems under the equal protection clause of the Fourteenth Amendment." <u>Pierce v. Allegheny County Board of Elections</u>, 324 F. Supp. 2d 684, 697 (W.D. Pa. 2003).

Applying a different rule now, as the District Court does, means unequal treatment. The only means to avoid this unconstitutional result—which is by definition an irreparable harm—is for injunctive relief pending appeal to ultimately ensuring that the provisional ballots cast in Franklin County are considered consistent with the statutory framework prescribed by the General Assembly and, further, in the manner and process undertaken in Union and Madison Counties.

Finally, injunctive relief *through December 5, 2008*, does not harm the public or the election process. Provided an injunction pending appeal does not extend beyond that date, both the Board and Secretary Brunner will be afforded sufficient time to count ballots, administer any recount, and certify election results.

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"). [Damschroder Aff'd ¶ 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, Exh. 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 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.**

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.]

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/or 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**)." [Damschroder Aff'd. ¶ 10; Exh. A.]   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, or have the name and/or signature in an incorrect location. [Id. ¶ 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. [Rec. Entry 3, p. 32, Exh. B to Original 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* …. [Rec. Entry 3, p. 32, Exh. B to Original Damschroder Aff'd (e-mail) (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. [Rec. Entry 3-2, p. 1, Exh. D to Original 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). . . ." [Rec. Entry 3, p. 20, Original Damschroder Aff'd ¶ 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. [Rec. Entry 3-2, p. 1, Exh. D to Original Damschroder Aff'd (e-mail chain containing DeRose e-mail).]

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) . . . ." [Id.] 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. . . ." [Id.]

F.   The Expiring Standstill Agreement.

As a result of Secretary Brunner's post-election change of course, Relators, on November 13, 2008, filed an Original action in the Ohio Supreme Court seeking mandamus relief to correct Secretary Brunner's incorrect instruction to the Board. On November 14, 2008, Secretary Brunner, without obtaining the consent of the Board, removed the action to the District Court. [Rec. Entry 2 (notice of removal).] Relators promptly objected to the District Court's exercise of jurisdiction, and Relators, as well as the Board, filed respective motions to remand the action to the Ohio Supreme Court on November 14, 2008. [Rec. Entries 11 and 12.]

On November 17, 2008, the District Court granted Secretary Brunner's motion to realign the Board as a Respondent, and determining that the District Court had subject matter jurisdiction to retain the removed action. [Rec. Entry 20 (order).] Thereafter, the parties agreed to submit cross motions for summary

judgment, and they further agreed that no provisional ballot applications would be opened prior to 9 a.m. on Friday, November 21, 2008. The District Court's decision, issued November 20, 2008, effectively requires the Board to follow Secretary Brunner's erroneous post-election instructions. Thus, absent relief from this Court, the disputed provisional ballots will be irretrievably commingled _by 9 a.m. this Friday_.

Simply put, Secretary Brunner's post-election reversal of course is inconsistent with the plain language of Section 3505.181, and it is inconsistent 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 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 ARGUMENT

A.   Relators Are Likely To Succeed on the Merits.

Congress made "conspicuously" clear in 42 U.S.C. § 15482(a)(4) that "the issue of whether a provisional ballot will be counted as a valid ballot" is left "to the States." Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 577 (6th

Cir. 2004). Indeed, the Ohio General Assembly has prescribed specific mandatory requirements for determining the eligibility of a provisional ballot.

To remedy Secretary Brunner's violation of those mandatory requirements established by the Ohio General Assembly, Relators, who are all Ohio residents, sought a remedy available under the Ohio Constitution, against Ohio Respondents for violations of an Ohio election statute. Although no federal claim was advanced, Secretary Brunner removed it to the District Court.

It is clear, we respectfully submit, that the District Court improvidently extended its jurisdiction to address a state law dispute. That subject-matter jurisdiction is lacking is clear in multiple respects. From a procedural standpoint, the District Court allowed the removal to stand even though all Respondents had not "consented" to the removal, thus violating the "rule of unanimity," which recognizes that a defendant's notice of removal is ineffective unless *all defendants have been properly joined in the notice*. Harper v. AutoAlliance Intern., Inc., 392 F.3d 195, 201 (6th Cir. 2004).

The removal was also substantively defective. No federal subject-matter jurisdiction existed. No federal claim was asserted, and under the well-pleaded complaint rule, this is dispositive. Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006). Secretary Brunner's defenses do not serve as a basis for removal. Nor does the District Court's prior Consent Order in an unrelated case,

as made clear by this Court in <u>City of Warren v. City of Detroit</u>, 495 F.3d 282, 287 (6th Cir. 2007).

Nevertheless, even if the District Court's jurisdiction could somehow be constitutionally extended to permit resolution of state law issues among non-diverse parties, the District Court effectively rewrote the Ohio Election laws. Specifically, the mandatory eligibility requirements of Section 3505.183(B)(1) of the Ohio Revised Code, which are designed to prevent voter fraud, have been effectively eliminated. This judicial rewrite is in violation of multiple cannons of statutory construction. As this Court has stated, "the judiciary's job is to enforce the law [that the legislature] enacted, not to write a different one that judges think superior." <u>Rittenhouse v. Eisen</u>, 404 F.3d 395, 397 (6th Cir. 2005).

Thus, as extensively explained in their contemporaneously filed Merit Brief, Relators are likely to succeed on the merits.

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

The nature of the irreparable harm which will be sustained here is obvious. Once the provisional ballot envelopes are opened, the bell cannot be unrung. Coupling this with the unconstitutional result of disparate treatment of voters within the same voting district, the Court has before it the quintessential example of irreparable harm.

C.   **The Public Interest Favors Enforcement Of Ohio's Election Statutes.**

The public interest would clearly be served by a temporary injunction that merely preserves this Court's ability to ensure the proper enforcement 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.

D.   **There Is No Harm To The Public.**

Nor is the public damaged. As set forth in substantial detail in the affidavits of Dana Walch, who served as Director of Elections for the Secretary of the State of Ohio, in both the 2000 and 2002 general elections, and Matthew Damschroder, who is the Deputy Director of the Board (Exhibits A and B), an injunction pending appeal *will not* unduly delay the processing of the official results of the 2008 general election or cause any material injury to the public interest so long as the injunction pending appeal does not extend beyond Friday, December 5, 2008.

CONCLUSION

For these reasons, injunctive relief should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 20, 2008, the foregoing document was served on

all parties or their counsel of record through the CM/ECF system if they are

registered users or, if they are not, by placing a true and correct copy in the United

States mail, postage prepaid, to their address of record.

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

859-001:189264

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

AFFIDAVIT OF MATTHEW M. DAMSCHRODER IN SUPPORT
OF INJUNCTION PENDING APPEAL

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.

The Dispute Regarding Eligibility Of The
Incomplete Provisional Ballots

      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

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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 eligibility of a high percentage of the Provisional Ballot Applications is undisputed, controversy exists as to the eligibility of three groups of provisional ballot applications under R.C. 3505.183(B)(1)(a). This statute provides:

> ... 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;

Although R.C. 3505.183(B)(1)(a) provides that the voter must include her "name and signature" on the provisional ballot voter affirmation application "in order for the provisional ballot to be eligible to be counted," the Secretary of State, following a request from the Kilroy campaign, has directed the Board of Elections that Provisional Ballot Applications on which the voter failed to complete the provisional voter affirmation by leaving out her (i) signature, and/or her (ii) name or (iii) by providing her name and/or signature at an incorrect location and not as part of her completion of the provisional voter written affirmation, nonetheless are valid and eligible to be counted. In short, the Secretary of State is directing the Board of Elections to include provisional ballots which

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do not comply with R.C. 3505.183(B)(1)(a) as eligible to be counted in direct contravention of that statute.

10.   The Secretary deems these three disputed groups of Provisional Ballot Applications valid and eligible to be counted even though the Franklin County Provisional Ballot Application, attached as Exhibit A, clearly states, as mandated by R.C. 3505.183(B)(1)(a), 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)**" to complete the provisional voter affirmation. Nonetheless, approximately 3-4% of the Provisional Ballot Applications lack either the name or signature or both that is specifically required by the Application, or have the name and/or signature in an incorrect location.

11.   The Franklin County Board of Elections met on Thursday, November 13, 2008 to consider whether these three groups of disputed provisional ballots should be considered eligible to be opened and counted. Based on the direction of the Secretary of State that each of these groups were eligible to be opened in spite of the direct mandate of R.C. 3505.183(B)(1)(a) to the contrary, the Board of Elections tied 2-2 on each of three motions as to whether these categories of contested provisional ballots were eligible to be opened and counted. Under Ohio law, the Secretary of State will break the tie and determine the eligibility of each of the three categories of provisional ballots, in the absence of judicial intervention, pursuant to R.C. 3501.11(X).

12.   As of the time of the execution of this affidavit on November 20, 2008, the Secretary of State had not yet announced her decision breaking the three tie votes. Brian

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Shinn, Assistant General Counsel to the Secretary of State, however, has advised the Board of Elections that the Secretary directs that all three categories of disputed provisional ballots are eligible to be counted irrespective of their failure to comply with R.C. 3505.183(B)(1)(a). The Secretary's counsel has made the same assertions in proceedings in the above-captioned litigation. Having previously announced her position, there is little doubt the Secretary will break the tie by determining the provisional ballots in the three disputed categories are eligible to be counted. As such, in the absence of judicial intervention, approximately 1000 provisional ballots that do not facially comply with the explicit requirements of R.C. 3505.183(B)(1)(a) will be counted and included in the official results of the Franklin County election.

13.   Given the closeness of the three undecided races, the determination of the eligibility of the approximately 1000 disputed provisional ballots could prove decisive.

The Schedule For Opening The Disputed Provisional Ballots

14.   In the absence of an injunction, the Secretary of State will break the tie of the Franklin County Board of Elections. She may do so at any time. As soon as she does, it will be the responsibility of the staff of the Board of Elections to open the Provisional Ballot Application envelopes; separate the ballots they contain from the envelopes; commingle the ballots they contain with the other provisional ballots; and then count all of the provisional ballots. As stated in paragraph 6, once the provisional ballots are opened and commingled, it is impossible to determine the vote of any particular provisional voter, making after-the-fact assessment of the legality of the Secretary's decision under R.C. 3505.183(B)(1)(a) impossible. Thus, an injunction pending appeal is

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required immediately to protect the Court's ability to adjudicate the legality of counting the approximately 1000 disputed provisional ballots.

An Injunction Pending Appeal Will Not Unduly Delay The Electoral Process Or Compromise The Public Interest

15.   Although R.C. 3505.32 states that the Franklin County Board of Elections' official count ("official canvas") is to be completed within twenty-one days after the November 4, 2008 election (that is, Tuesday, November 25, 2008), Directive 2008-111 of the Secretary of State provides that the Board is not required to report the abstract of its official canvas (i.e., the number of ballots cast in the county in each statewide election) to the Secretary of State until the close of business on Monday, December 1, 2008. Thus, a dead period during which nothing happens in ballot processing exists between the November 25 deadline for our official count and December 1, 2008 when it is forwarded to the Secretary of State. R.C. 3505.35 provides that the Secretary of State then has until Thursday, December 11, 2008 to total the abstracts of the official canvasses of each of the eighty-eight counties on each statewide election and ballot issue. Under statute, the date for the conclusion of this ballot counting process, absent arbitrary deadlines, is close of business Thursday, December 11, 2008 when the Secretary of State files her official canvas of ballot results in all eighty-eight counties and certifies the statewide elections. Then, on Saturday, December 13, 2008, the Electoral College will meet to elect the President and Vice President of the United States.

16.   Inasmuch as R.C. 3505.35 does not require the Secretary of State to file her official canvas of the election results of the eighty-eight counties and certify the election of statewide candidates until close of business on Thursday, December 11, an injunction pending appeal will not unduly delay or damage the electoral process or

compromise the public interest. Once the Court resolves the eligibility of ballots that do not facially comply with R.C. 3505.183(B)(1)(a), the Board of Elections will need two business days to open, process, and tabulate the provisional ballots (both disputed and undisputed) and complete its official canvas. Inasmuch as the Board's official canvas isn't due under Directive 2008-111 until December 1, 2008, the Board of Elections could complete its work and meet the December 1 deadline even if enjoined from opening the provisional ballots as long as the injunction does not extend beyond close of business on Saturday, November 29, 2008.

17.   Moreover, based on the accompanying Affidavit in Support of Injunction Pending Appeal of Dana Walch, since the Secretary of State can proceed with tabulating the abstracts of the statewide votes of the eighty-seven counties beginning on Tuesday, December 2 and will only need to add the Franklin County totals when they are received and then issue the required certificates of election on Thursday, December 11, an injunction against opening the provisional ballots that extends as late as Friday, December 5, 2008 would not unduly delay or damage the electoral process. If the Board of Elections learned of the Court's decision on Friday, December 5, it could open the provisional ballots and complete its official canvas for delivery to the Secretary of State by close of business Saturday, December 6, 2008. The Secretary of State would then have five (5) full calendar days (Sunday-Thursday, December 7-11) to add the Franklin County canvas to her preexisting totals for the remaining eighty-seven counties and issue the appropriate certificates of election. On such a schedule, the election certification process would still end on the statutorily mandated date of December 11, 2008 but the Court's opportunity to review the legality of the Secretary's direction to count as eligible

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ballots that facially are ineligible to be counted under R.C. 3505.183(B)(1)(a) would not be mooted by the opening of the provisional ballots.

18. An injunction maintaining the status quo until either November 30 or December 5 would not unduly interfere with or delay any recounts. Although a final certification not subject to recount is required in the election for President and Vice President prior to the meeting of the Electoral College on Saturday, December 13, no recount is expected in that race given the clarity of its outcome. None of the other officeholders affected by the election take office prior to January 2009 nor is it necessary to complete any issue recounts before January 2009. Since a recount can be completed in approximately five (5) days (as the 15th Congressional District recount was in the 2006 election), any recount started by mid-December 2008 can be completed and the results certified prior to year-end. Since a candidate must request a recount within five (5) days after the Board of Elections declares the results of the election, R.C. 3515.02, and since any recount "shall not be later than ten days after the day upon which such application is filed . . .," R.C. 3515.03, any recount will be requested and completed within no more than twenty (20) days of the filing of the Board's official canvas with the Secretary of State. If that canvas is not completed and filed until Sunday, December 7, 2008, any recount can be completed before year-end 2008 even if this Court enters an injunction pending appeal precluding the opening of the provisional ballots that remains in effect no later than Friday, December 5, 2008.

19. Thus, an injunction to maintain the status quo by preventing the opening of the Franklin County provisional ballots will not materially delay, or interfere with, the
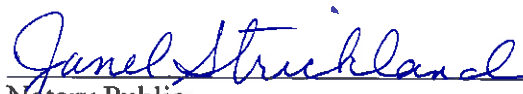
electoral ballot process as long as the merits of the underlying issue are adjudicated, and the injunction pending appeal terminated, on or before Friday, December 5, 2008.

Further Affiant sayeth naught.

_____
Matthew M. Damschroder

Sworn to before me and subscribed in my presence this 20th day of November, 2008.

_____
Notary Public

859-001:189269

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

PROVISIONAL BALLOT APPLICATION · FRANKLIN COUNTY BOARD OF ELECTIONS
WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

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

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

CURRENT ADDRESS

House #/Street _____ APT #

City _____ Zip Code: _____

FORMER ADDRESS:

STREET: _____

CITY: _____

COUNTY: _____

FORMER NAME (If applicable) _____

DATE OF BIRTH REQUIRED

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

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

X _____
VOTER'S SIGNATURE (REQUIRED) _____ Date

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

You must provide one of the following forms of identification documentation

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

☐ The last four digits of my Social Security Number are:

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

☐ Other form of photo identification displaying name and current address:

(specify kind of ID)

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

☐ No identification documentation and I have NO Social Security Number
(complete Identification Affirmation below if applicable)

IDENTIFICATION AFFIRMATION
ONLY FOR VOTERS WHO CHECKED "NO ID" ABOVE
RC 3505.18(A)(1)

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

X _____ Date _____
VOTER'S SIGNATURE

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

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

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

☐ Voter has a LEGAL NAME CHANGE

☐ Voter has an ADDRESS CHANGE

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

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

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

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

☐ The Voter is unable to provide valid identification

☐ The Voter refuses to provide valid identification

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

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

SPL, or MPL (and Precinct):
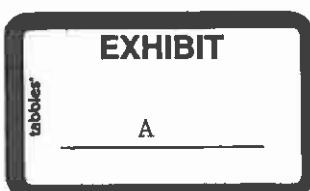(Check Location Street Guide for information)

X _____
POLL WORKER'S SIGNATURE

STEP 4:
VOTE!

After completing this application in its entirety:

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

_____
(Ballot Style Number)

2. **POLL WORKER: Locate the provisional ballot pad(s) with the same ballot style number that you wrote above.**

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

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

THIS SPACE FOR OFFICE USE ONLY

EXHIBIT

tabbies®

A

Provisional Application Worksheet

(for office use only)

Level	ID & Date	ID & Date	ID & Date	ID & Date	ID & Date	ID & Date
1 Initial Review	1	1	1	1	1	1
2 Verification	2	2	2	2	2	2
3 Voter Query Look-up	3	3	3	3	3	3
4 SQL Look-up (restricted use)	4	4	4	4	4	4
5 Bad Signature Review	5	5	5	5	5	5
6 Rejection Review	6	6	6	6	6	6
7 Check Old DWP for Voting	7	7	7	7	7	7
8 Out of County Verification	8	8	8	8	8	8
9 Legal Review	9	9	9	9	9	9
10 Accepted	10	10	10	10	10	10
11 Rejected	11	11	11	11	11	11
Reason for Rejection/Acceptance:						

DO NOT WRITE BELOW THIS LINE: FOR FINAL REVIEW ONLY

12 Approved: Y or N Code: 001

13 Rejected: Y or N Code: 006 200 250 300 450 500 600 800 850

Signatures of Final Reviewers: _____ Date:

_____ Date:

Comments:

APPL APPLICATION
APR APPROVED
DOB DATE OF BIRTH
DWP DISTRICT/WARD/PRECINCT
FIF FOUND IN FRANKLIN CO
INC FORM INCOMPLETE
KE PRECINCT SPLIT NOT ELIGIBLE
NR NOT REGISTERED
NROC NOT REGISTERED IN OTHER COUNTY
NS NO SIGNATURE

ODL OHIO DRIVERS LICENCE
OS ON SYSTEM
PA PROVISIONAL APPLICATION
PW PROVISIONAL WORKSHEET
RAC REGISTERED AFTER CUTOFF
SPB SIGNATURE POLL BOOK
SSN SOCIAL SECURITY NUMBER
U UNDERAGE
VOC VOTED IN OLD COUNTY
VWP VOTED IN WRONG PRECINCT

* COUNT = BALLOT ACCEPTED
NO COUNT = BALLOT REJECTED

001 APPROVED
006 FORM INCOMPLETE
200 NOT REGISTERED
250 REGISTERED AFTER CUTOFF
300 NO SIGNATURE
450 VOTED ABSENTEE
500 SIGNATURE DOESN'T MATCH
600 VOTED IN WRONG PRECINCT
800 UNDERAGE
850 PRECINCT SPLIT NOT ELIGIBLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

AFFIDAVIT OF DANA WALCH IN SUPPORT
OF MOTION FOR INJUNCTION PENDING APPEAL

STATE OF OHIO   )
) ss:
COUNTY OF FRANKLIN   )

I, Dana Walch, being duly cautioned and sworn, state:

1.   I served as Director of Elections in the Office of the Secretary of State of

Ohio from January 1999 through December 2002. After that, I served until September

2004 as Director of Election Reform for the Secretary of State of Ohio. From September

2004 through June of 2005, I served as Director of Legislative Affairs for the Secretary of

State of Ohio.

2.   As Director of Elections for the State of Ohio from January 1999 through

December 2002, I was responsible for overseeing and assuring that the duties of the

Secretary of State relating to the general elections of 2000 (a presidential election year)

and 2002 were fulfilled. I am therefore fully familiar with the responsibilities of the

Secretary of State of Ohio relating to the processing and reporting of the official election

returns in a statewide general election and the realities of the time required to complete them.

3. As part of the process of counting and reporting the official results of a statewide general election such as that held on November 4, 2008, the Secretary of State receives abstracts (summaries) of the canvas (counting) of ballots cast in each of the eighty-eight counties from the Board of Elections of each such county. Pursuant to R.C. 3505.35, the Secretary of State has ten (10) days after the abstracts are received to prepare her "canvas [summary] of such [county] abstracts. . . ." At the conclusion of this period, the Secretary declares the official results of the statewide elections, provides her abstract of results of each statewide election, and issues certificates of election to the winners.

4. The process of preparing the canvas of abstracts of the Secretary of State pursuant to R.C. 3505.35 involves the tabulation (or totaling) of the abstracts provided by the eighty-eight individual counties. It is largely a mathematical function with appropriate controls and auditing protections.

5. Based on my personal experience in the 2000 and 2002 general elections, the Secretary of State needs no more than two or three days to complete the functions required of her after receipt of the abstracts of the canvasses of the County Boards of Election. History in other elections establishes that the Secretary of State can do so comfortably and without undue difficulty in a two to three day timeframe.

6. Directive 2008-111 of the Secretary of State sets Monday, December 1, 2008 as the date upon which the abstracts of the canvasses of the County Boards of Election are to be delivered to the Secretary of State. Since R.C. 3505.35 allows the

Secretary of State ten days thereafter to complete her canvas of such abstracts, the Secretary of State can complete her duties as late as Thursday, December 11, 2008 consistent with R.C. 3505.35.

7. I am advised that Matthew Damschroder, Deputy Director of the Franklin County Board of Elections, has submitted an affidavit stating that the Franklin County Board of Elections can complete its processing of provisional ballots within two days following an appellate decision in this matter. Based upon Mr. Damschroder's Affidavit, and based upon my personal experience as Director of Elections for the Secretary of State in the statewide elections of 2000 and 2002, the Secretary of State will have more than sufficient time to complete her statutory duties within the timeframe mandated by R.C. 3505.35 if she receives the Franklin County abstract of canvas on or before Monday, December 8, 2008. This will allow her at least three days to complete her duties and issue her official canvas by the statutory deadline of Thursday, December 11, 2008. If she has already received the abstracts of canvas of the other eighty-seven counties (or substantially all of them) on December 1, 2008 as requested, the Secretary of State can undertake and complete all necessary work relating to the abstracts of the remaining eighty-seven counties and merely add in the vote totals from the Franklin County abstract when received. In such circumstances, a single day should provide the Secretary with sufficient time to complete her work following receipt of the Franklin County abstract without undue difficulty. As such, if the other eighty-seven counties (or substantially all of them) provide their abstracts of their canvasses on December 1, based upon past experience, the Secretary of State will have substantially more time than is necessary to meet the Thursday, December 11, 2008 deadline if she in fact receives the abstract of the

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canvas of the Franklin County Board of Elections on or before Monday, December 8, 2008.

8.   Inasmuch as there will not be a presidential recount given the decisive totals in the presidential election in Ohio, any requested recounts in other elections can be completed after the Secretary of State reports her official results. Such recounts must be completed prior to January 2009 but, given the timing for recounts in Ohio, they can be completed timely as long as the Franklin County Board of Elections is not enjoined from opening the provisional ballots past Friday, December 5, 2008.
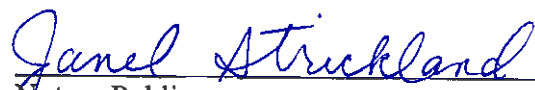
9.   In conclusion, based upon my personal experience as Director of Elections for the Secretary of State of Ohio in two statewide elections, an injunction pending appeal will not unduly delay the processing of the official results of the 2008 general election nor cause any material injury to the public interest as long as that injunction pending appeal does not extend beyond Friday, December 5, 2008.

Further Affiant sayeth naught.

_____
Dana Walch

Sworn to before me and subscribed in my presence this 20th day of November, 2008.

_____
Notary Public

859-001 189270

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

　　　　　Relators.　　　　　　　　　　:　　Case No. 2:08 cv 1077

　　　　　　　　　　　　　　　　　　　:
　　　　　vs.　　　　　　　　　　　　　:　　Judge Marbley

　　　　　　　　　　　　　　　　　　　:
JENNIFER L. BRUNNER　　　　　　　　　:　　Magistrate Judge King
SECRETARY OF THE STATE OF　　　　　　:
OHIO, et al.,　　　　　　　　　　　　:

　　　　　Respondents.　　　　　　　　:

AFFIDAVIT OF TIMOTHY A. WARD

STATE OF OHIO　　　　　　)
　　　　　　　　　　　　　) ss:
COUNTY OF MADISON　　　　)

Timothy A. Ward, being duly sworn, states from personal knowledge that:

1.　　I am Director of the Board of Elections of Madison County, Ohio. I have held this position since February 2007.

2.　　The Madison County Board of Elections met on Wednesday, November 19, 2008 to, among other items, review provisional ballots cast in the November 4, 2008 general election. Based upon Secretary of State Directive 2008-101, our Board rejected a provisional ballot on which the voter had failed to provide a signature on the affirmation even though the poll worker had signed the back of the provisional ballot envelope. As such, this provisional ballot will not be counted.

Further Affiant sayeth naught

Timothy A Ward

Sworn to before me and subscribed in my presence this 20th day of November.

2008.

WILLIAM M. STIDHAM
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES MAY 3, 20 / 2

Notary Public

859-001-189277

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

                                  :   Case No. 2:08 cv 1077

          Relators,   :

                                    :   Judge Marbley

          vs.   :

                                    :   Magistrate Judge King

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

                                    :

          Respondents.   :

AFFIDAVIT OF ROBERT W. PARROTT

STATE OF OHIO   )
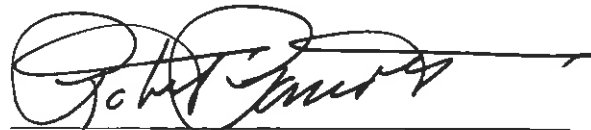   ) ss:
COUNTY OF UNION   )

Robert W. Parrott, being duly sworn, states from personal knowledge that:

1.   I am the Chairman of the Board of Elections of Union County, Ohio. I have held positions with the Board of Elections for approximately 19 years.

2.   The Union County Board of Elections met on Thursday, November 20, 2008 to, among other items, review provisional ballots cast in the November 4, 2008 general election. Based upon Secretary of State Directive 2008-101, our Board rejected a provisional ballot on which the voter failed to provide either their name or signature on the affirmation even though the poll worker had signed the back of the provisional ballot envelope. As such, this provisional ballot will not be counted.

EXHIBIT

D

Further Affiant sayeth naught.

Robert W. Parrott

Sworn to before me and subscribed in my presence this 20th day of November,

KRISTY L. DEARING
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES SEPTEMBER 7, 2013

Notary Public

859-001:189276

AFFIDAVIT OF JANET BRENNEMAN

STATE OF OHIO,

COUNTY OF DELAWARE

Now comes the Affiant, Janet Brenneman, and after being duly cautioned and sworn does hereby state as follows:

I am the Director of the Delaware County, Ohio Board of Elections (BOE) and have been employed continuously with Delaware County BOE since 1989.

My present duties as Director, as identified under Ohio Revised Code §3501.13, and further specified by the Ohio Secretary of State under the authority of Revised Code §3501.05, include overseeing the proper methods of conducting elections in Delaware County.

In performing my duties I have become familiar with the procedures for casting (voting) a Provisional Ballot. Under the Help America Vote Act, ("HAVA"), a person is permitted to cast a provisional ballot if the person's name does not appear on the list of eligible voters for the polling place or if an election official asserts that the person is not eligible to vote. In Directive 2004-55, the Ohio Secretary of State instructed that a signed affirmation statement was necessary for a provisional ballot to be counted. My office has uniformly followed this directive.

Under the Secretary of State guidelines, there are additional requirements for casting a provisional ballot. These are stated in the Poll Worker Manual and Poll Worker Quick Reference Guide issued by the Secretary of State. These guidelines are also explained to poll workers in the Delaware County Poll Worker Manual, pp. 34-36

(Exhibit 1), which is given to every poll worker in Delaware County. Requirements are also printed on the Identification Envelope which is presented to individuals casting a Provisional Ballot.

Every poll worker in Delaware County completes a training class of three hours conducted by BOE staff, at which the poll worker manual is distributed.

Upon identifying a voter who must cast a Provisional Ballot, Poll Workers in Delaware County are trained to explain to the voter what a Provisional Ballot is and the requirements for casting a Provisional Ballot.

In the 2008 General Election, the poll workers were instructed that the provisional ID envelope is to be completed and signed by the voter. (see Exhibit 1) After the voter has completed and signed the ballot envelope, the poll worker also signs and dates the provisional ballot envelope on the front and back, and marks what form of identification was provided by the voter.

Provisional ballots without voter signatures received by the BOE have, in past elections been compiled into a list by BOE staff and presented to the board, which has voted not to count those ballots. Provisional ballots with incomplete information were treated in the same manner by both staff and the board.

In the 2008 general election, the BOE received 2,014 provisional ballot envelopes. The provisional ballots are still in the process of being tabulated, but they include both provisional ballot envelopes not signed by the voter, provisional ballot envelopes not completed by the voter, and provisional ballot envelopes that lack both

signature and complete information. These ballots will be tabulated and presented to the

board as in past elections.

FURTHER AFFIANT SAYETH NAUGHT.

Janet Brenneman
Janet Brenneman, Director
Delaware County Board of Elections

SWORN TO AND SUBSCRIBED IN MY PRESENCE ON THIS, THE
20th DAY OF NOVEMBER, 2008.

Terri L. Scott
NOTARY PUBLIC

TERRI L. SCOTT
Notary Public, State of Ohio
My Commission Expires
2-09-2010

PROCEDURES FOR PROVISIONAL BALLOTS

All provisional voters vote a paper ballot, unless they meet the ADA requirements.

New Provisional Packet contains the following
- Provisional instruction page
- Registration Card
- Affirmation Statement
- 12-B Yellow Envelope

Note: HOTLINE NOTICE is now packed separately as a group on the top of the provisional packets in the black bag.

POSITION # 1

Check the precinct street list – make sure the provisional voter is in the correct precinct.
- If the voter's name is in the signature book but has moved within the precinct, they are a regular voter if they meet all other requirements. Have the voter complete a registration card to change the record at the Board office.
- If the voter's name is not in the signature book, you must determine if he/she is authorized to vote in the precinct. Pay attention to the details of the street list. If the address is listed on the precinct street list, and the voter's name does not appear in the signature book, vote a provisional ballot. You must provide the voter with an Authority to Vote slip to be handed to the person handling paper/provisional voters in your precinct.
- If the address is not in your precinct, check the county map to determine the correct polling location and precinct or call the Board of Elections to determine where to send the voter.

PROVISIONAL VOTER will complete
- the 12-B Yellow Envelope on the front
- White Registration Form
- Affirmation Statement if they have no ID or refuse to give ID

POLL WORKER
- Write the Ballot Stub Number and School District on the upper right hand corner of the provisional envelope
- Sign the front of the provisional envelope, turn over and complete top portion of the back
- Mark the form of ID shown
- Sign the back
- Check that the registration card has been completed and signed
- Affirmation Statement is completed (This is not needed if they show ID)

Give the voter the Optical Scan Ballot, leave Stub A on the ballot (Stub must still be attached to the ballot when placed in the Provisional envelope.)

- Write voter's name and address on the blank pages at the back of the Signature Book.
- Voter will sign the Signature Book provisional page (next to poll worker entry).

POSITION # 2
1. Log voter's name (last name first) and address on the Provisional pages of the poll list notebook
2. Enter Optical Scan Ballot Stub Number under the "Authority to Vote No." column
3. Place the provisional voter's completed voter registration card and affirmation form in the envelope provided in your black bag (not the yellow envelope). Be sure this envelope is returned to the Board of Elections office in the black canvas bag on Election Night.
4. Add the voter's name at the bottom of the posting list.

POLL WORKER
- **VOTER** is directed to the Votomatic voting booth.
- **VOTER** marks and folds the ballot, with the stub attached, and places it in the 12-B Provisional Envelope (Do not put completed forms in the yellow provisional envelope.)
- **VOTER** seals yellow envelope and returns it to the registration table. Yellow envelope is put into the metal ballot box.
- **GIVE THE VOTER THE PROVISIONAL HOTLINE FORM AND THE "I VOTED TODAY" STICKER**

Presiding Judge is responsible for returning used and unused provisional ballots and completed forms to the Board Office on election night.

SPECIAL PROVISIONAL VOTER CIRCUMSTANCES

MOVED FROM ANOTHER STATE/VOTER'S NAME DOES NOT APPEAR ON SIGNATURE LIST
- CHECK THE STREET LIST to make sure they are in the correct precinct.
- Have the voter complete a white registration card.
- They are not eligible to vote if they have not been registered to vote 30 days prior to Election Day in the State of Ohio. (October 6, 2008)
- If they give you a hassle, allow them to vote a Provisional ballot and we will check it out at the Board of Elections office.

ABSENTEE VOTER
- Anyone whose name is on the signature list and marked with "ABSENTEE" must also vote a **PROVISIONAL BALLOT** at the polls. If the voter brings the absentee ballot with them to the polls and they have not voted the ballot, YOU **STILL DO NOT TAKE THE BALLOT.**
- Have voter complete the Provisional Ballot Envelope.
- All blanks must be completed.

- Fill in name and address on the **blank lines** of the signature book and have them sign.
- Add name on the yellow pages in the Poll List Notebook.
- Have the voter move on to position 2 judge.

NO IDENTIFICATION
- A voter who cannot provide identification or refuses must complete 3 forms—the provisional form, the registration card and the AFFIRMATION OF VOTER WHO CANNOT PROVIDE IDENTIFICATION form (this does not need to be completed if the voter fills in their Driver's License number or the last 4 digits of their Social Security number).