

**In the United States District Court
For the Southern District of Ohio
Eastern Division**

STATE <i>ex rel.</i> SKAGGS, <i>et al.</i>	:	
	:	Case No. C2:08CV-1077
Relators,	:	
	:	
v.	:	Judge Marbley
	:	
JENNIFER L. BRUNNER	:	
SECRETARY OF STATE OF OHIO,	:	
<i>et al.</i> ,	:	
	:	
Respondents.	:	

DEFENDANT, FRANKLIN COUNTY BOARD OF ELECTIONS
MEMORANDUM CONTRA DEFENDANT OHIO SECRETARY OF STATE
JENNIFER BRUNNER'S MOTION TO REALIGN PARTIES

Defendant, Franklin County Board of Elections (FCBOE) submits the following memorandum contra Defendant Brunner's motion to realign the parties. Contrary to the assertions of Defendant Brunner, the interests of FCBOE are not adverse to those of Brunner. This motion is merely a spurious attempt to cure the unanimity problem that Defendant Brunner has with her previously filed notice of removal. FCBOE has taken no action in contravention of the directives issued.

Defendant Brunner makes the argument that the affidavit of Matthew Damschroder and the advice of the undersigned counsel are evidence of an adverse position of Defendant Brunner. Contrary to the rhetoric employed by the Defendant Brunner, no lengthy disagreement occurred between the Assistant Prosecuting Attorney authorized by the statutory counsel (under the Ohio Revised Code, as the only legal counsel for the Board of Elections. See, R.C. §309.09(A)) for FCBOE and an employee

of the Ohio Secretary of State's office.¹ A review of the email correspondence indicate that it was between counsel and the Director and Deputy Director. The issue presented was set forth in the instructions contained in Directives 2008-101 and 2008-103 and whether all voter errors set are poll worker errors. The plain language of the Directives did not transform voter errors into poll worker errors requiring the inclusion of the process.

Additionally, contrary to the assertions of Defendant Brunner, FCBOE tied on numerous motions where directive appears to provide guidance that is the subject of this lawsuit. As a result of the tie votes, the issue will be decided by Defendant Brunner.

In other words, FCBOE's position has not been decided. FCBOE's decision will be decided in accordance with R.C. §3501.11(X) when Defendant Brunner breaks the tie votes. Thus, at the time the Secretary breaks the tie, the position of all Defendants presumably will be the same.

As to the allegation contained in Defendant Brunner's footnote, no such advice was given to the FCBOE. The only advice given, and adopted by FCBOE, was that additional information in the form of a declaration from the voter and the poll worker regarding whether the poll worker failed in his or her statutory duty to direct the voter to the correct precinct. This was done to comply with the language of Directive 2008-103 and this Court's previous order. If the poll worker failed to properly advise the voter of the correct precinct, that appears to be an error "attributable to poll worker error." This action is in complete compliance with the Directive.

¹ Title 35 contains no provision allowing for the designation of "elections counsel" for the various County Boards of Elections by the Secretary of State. However, R.C. §309.09(A) specifically empowers the Prosecuting Attorney to advise the County Board of Elections.

The only area in which the FCBOE and Defendant Brunner disagree is on the issue of removal. Disagreement on the issue of removal does not create a situation for realigning the parties

The issues presented in the mandamus case are purely state law claims. The attempt to realign the parties is a sham attempt by Defendant Brunner to end run the issue of consent. When this lawsuit was filed, FCBOE immediately filed a notice of appearance with the Ohio Supreme Court (given the exigent circumstances of the case, a prudent course to ensure all notices were received). Notices were faxed to counsel for Respondent and Statutory Counsel for the Secretary of State, the Attorney General (through her duly appointed assistants). At the time of that the notice of removal was filed, Defendant Brunner was aware that FCBOE had filed a notice of appearance in the matter, yet Defendant Brunner omitted that fact when it truthfully claimed that FCBOE had not been served (at the time the notice of removal had been filed Defendant Brunner had not been served either.)

Should Defendant Brunner break the tie votes in a manner adverse to the Relator, those positions then become the position of FCBOE—in other words all interests are aligned. Under the test set forth in *United States Fid & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir 1992), Defendant Brunner's motion must fail because the interests of the parties have not diverged. FCBOE has tied on several motions that are the gravamen of the Relators' complaint—Defendant Brunner must break those ties and those decisions become decision of the Board. The gamesmanship played by Defendant Brunner in this situation is unseemly and should not be countenanced by this Court. This motion has been filed solely because her request to consent to removal was rejected.

For the foregoing reasons, it is requested that this motion be rejected and the parties not be realigned.

Respectfully Submitted,

Ron O'Brien
Franklin County Prosecuting Attorney

/s/Patrick J. Piccininni
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all parties via the Court's ECF system, this 15 day of November, 2008

s/Patrick J. Piccininni
Patrick J. Piccininni (0055324)
Assistant Prosecuting Attorney