

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

STATE *ex rel.* SKAGGS, *et al.*

Relators,

v.

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

Respondents.

Case No. C2:08CV-1077

Judge Marbley

DEFENDANT FRANKLIN COUNTY BOARD OF ELECTIONS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants, Franklin County Board of Elections, moves this Court for partial summary judgment on the issue of whether the lack of a voter's signature on the provisional ballot envelope requires that the ballot not be opened nor counted that this Court remand this case to the Supreme Court of Ohio. The reasons supporting this motion for remand are set forth in the attached memorandum of law which is incorporated here by reference.

Respectfully submitted,

RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO

/s/ Patrick J. Piccininni
Patrick J. Piccininni (0055324)
TRIAL COUNSEL
Anthony E. Palmer, Jr. (0082108)
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*Counsel for Respondent Franklin County Board of
Elections*

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On November 13, 2008, Plaintiff/Relators filed for a writ of mandamus in the Ohio Supreme Court against Jennifer Brunner, the Ohio Secretary of State and the Franklin County Board of Elections ("FCBOE"). The crux of the Plaintiff's sought the following relief:

- 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.

Due to the fact that a temporary restraining order was requested, upon receipt of the Petition that was hand delivered to the statutory counsel for the FCBOE, a notice of appearance was filed with the Ohio Supreme Court. The next morning, counsel for Secretary Brunner filed a notice of removal, despite the fact FCBOE would not consent to the removal of this lawsuit to federal court. Secretary Brunner then filed a motion to realign the parties to defeat this obvious

defect. Additionally, this Court agreed with Secretary Brunner that FCBOE is a nominal party whose consent is not required.¹ Said motion was granted by this Court on November 17, 2008.

This motion for partial summary judgment deals solely with the issue of where the voter fails to sign their name to the provisional application. Judgment on this issue should be rendered in favor of the Relators and the realigned party FCBOE because the voter's signature is necessary to protect the integrity of the process and allow the FCBOE and its counsel to comply with its statutory duties. As a result of hearings in this matter, the parties are to file motions for summary judgment.

II. FACTS

On October 24, 2008, in response to a supplement complaint filed in the related case of *NEOCH v. Brunner, et al*, United States District Court for the Southern District of Ohio Case No. C2-06-896, this Court directed the Ohio Secretary of State to issue Directive 2008-101, which directed the County Boards of Elections on how to process provisional ballots cast in the November 2008 General Election.² The Directive stated:

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 FCBOE objected to the motion to realign and deem it a nominal party. One of the rationales for this is that FCBOE has an duty to investigate cases of election fraud, and the outcome of this case could impact on those duties.

² The NEOCH plaintiffs have filed notices to intervene in this action. However, given the Court of Appeals opinion in the original case, the standing issues questioned by the Appellate Court remain. It appears that limited standing conferred on the NEOCH plaintiffs as a result of the 2006 consent order have transformed that case into a mystical talisman to justify removal of any election case to Federal Court.

- (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
- (s) A completed affirmation under R.C. 3505.183(B)(4) . . .

(Emphasis added). On October 27, 2008, the SOS issued, in response to a concern by the Court, Directive 2008-103, which stated:

Therefore, pursuant to the court order, I hereby instruct the boards of elections that provisional ballots may not be rejected for reasons that are attributable to poll worker error including a poll worker's failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R.C. 3505.181.

As a result of the these two directives and in response to several inquires by representatives of the Kilroy for Congress campaign, on November 13, 2008 at 5:45 p.m., Mr. Shinn, an employee of Secretary Brunner informed the FCBOE that if a person fails to provide a signature, the vote may be counted. (See Exhibit A, email from Brian Shinn to Michael Stinziano and Matthew Damschroder). On November 14, 2008, the FCBOE met in special session to vote on issues related to provisional ballots. William Anthony, one of the Board members, made a motion to accept those provisional ballots that failed to contain the signature of the voter. That motion resulted in a tie vote. That matter is to be decided by the SOS in accordance with R.C. §3501.11(X).

Simultaneously occurring, was the above captioned action, in which the Court ordered the parties to file motions for summary judgment by November 18, 2008 at 5:00 p.m. This

motion for partial summary judgment is being requested to compel Secretary Brunner to correct her directive to instruct the county boards of elections not to count provisional ballots that do not contain the signature of the voter. As there are no genuine issues of material fact and construing all the facts in favor of the Secretary Brunner, reasonable minds can come to but one conclusion—that FCBOE is entitled to judgment on this issue as a matter of law³.

III. LAW AND ARGUMENT

A. Summary Judgment Standard.

Summary judgment should be granted where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In this case, all parties have agreed that there is no genuine issue of material fact. As to the limited issue addressed within the FCBOE’s partial motion for summary judgment, the FCBOE is entitled to judgment as a matter of law.

B. **The voter’s signature must be required on the provisional ballot in order to protect the integrity of the statutory process and to allow the FCBOE and its counsel to comply with their respective statutory duties.**

This Court must uphold the statutory requirement that provisional ballots must include the voter’s signature. Such a ruling would protect the integrity of the statutory process and to allow the FCBOE and its counsel to comply with their respective statutory duties. The express language of Ohio Revised Code Section 3505.183 requires that the provisional ballot include the individual voter’s signature. In addition, the signature requirement is vital to the prosecution of voter fraud, prevents vote dilution, and protects the integrity of the election.

³ By submitting this motion for summary judgment, the FCBOE is not in any way waiving any prior objections to the jurisdiction assumed by this Court.

1. The express language of Ohio Revised Code Section 3505.183 requires that the provisional ballot include the individual voter's signature.

Ohio election law mandates that a provisional ballot shall not be counted if “[t]he *individual* did not provide all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.” Ohio Rev. Code § 3505.183(B)(4)(a)(iii) (emphasis added). Thus, as the plain language expresses, the individual voter is charged with the responsibility to provide all of the information required. The statute does not provide that “the provisional ballot shall not be counted if the *poll worker* did not obtain the information under division (B)(1) of this section” Any reading that replaces the responsibility on the poll worker, not the individual, is contrary to the express provision of Section 3505.183.

The information required to be provided in the written affirmation on the provisional ballot is “the individual’s name and signature.” Ohio Rev. Code § 3505.183(B)(1). Thus, when read in conjunction with the requirement in § 3505.183(B)(4)(a)(iii), the individual voter, not the poll worker, has the responsibility of providing the signature in the written affirmation on the provisional ballot. Therefore, consistent with these provisions of Ohio election law, this Court should hold that the signature of the voter be required in the written affirmation on the provisional ballot in order for the ballot to be legally counted.

2. The signature requirement is vital to the prosecution of voter fraud, prevents vote dilution, and protects the integrity of the election.

A board of elections is statutorily charged with the duty to “[i]nvestigate irregularities . . . or violations of Title XXXV of the Revised Code by election officers and other persons; . . . and report the facts to the prosecuting attorney or secretary of state.” Ohio Rev. Code § 3501.11(J). The Supreme Court has recently recognized the importance of an election board’s duty to ensure

that election laws are followed. *See, Crawford v. Marion County Election Bd.*, --- U.S. ---, 128 S. Ct. 1610 (2008). The *Crawford* Court held that, “There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.” 128 S. Ct. at 1619.

The importance of the FCBOE’s duty in administering and enforcing Ohio election laws cannot be understated. While it is important that participation in the election process is maximized, it is imperative that the rule of law is not compromised at the expense of this goal.

Enforcement of Ohio election law and prosecution of fraudulent voters is important not only because it is likely to deter future voters from committing fraud, but also prevents the lawfully-cast votes from being diluted by the injection of illegally-cast votes. The impact and existence of voter fraud cannot be disregarded. Numerous election fraud cases were referred by the FCBOE to, and investigated by, Franklin County Prosecutor Ron O’Brien⁴ during the 2008 general election cycle. (Affidavit of Ron O’Brien, attached as Exhibit B, ¶ 2.) These cases included voting by non-residents, multiple voting, and “multiple registrations that were forged, fictitious or fraudulent.” (Id.)

Signatures by voters on the ballots are a powerful tool in prosecuting voting fraud cases. (See Ex. B, ¶¶ 6, 7.) The signature is essential on the provisional ballot in order to verify the voter’s identity. The signature on the provisional ballot is compared with “the known signature of a voter that is already on file at the Board, either on registration forms, absentee ballot requests, or the poll book for another precinct.” (Id. at ¶ 5.) In fact, in one of the cases referred

⁴ In addition to serving as statutory counsel to the FCBOE, Franklin County Prosecutor Ron O’Brien prosecutes voter fraud and other election law crimes that are primarily contained in Title 35 of the Ohio Revised Code. (Ex. B, ¶ 1.)

to the Franklin County Prosecutor by the FCBOE, an indictment was possible because of “expert opinion by a handwriting expert that the offender signed the fraudulent registration and absentee ballot forms.” (Id. at ¶ 7.) Thus, without the signature on the provisional ballot, a comparison cannot be made in order to ensure the legality of the cast ballot.

Additionally, voter documents must be signed under penalty of election falsification, and Ohio law requires a warning to that effect by the designated place for the voter to sign. (Ex. B, ¶ 6.) As Prosecutor O’Brien maintains in his affidavit: “Those laws are to deter election fraud, but more importantly are essential to the prosecution of a voter fraud case. Fraudulent provisional ballots will not be able to effectively be prosecuted if a signature of the purported voter does not exist.” (Id.)

In sum, the signature requirement is vital to the prosecution of voter fraud, prevents vote dilution, and protects the integrity of the election. This Court should hold accordingly.

IV. CONCLUSION.

For the foregoing reasons, it is requested that partial summary judgment be granted and that this Court issue an order that enjoins the Ohio Secretary of State from interpreting Directive 2008-101 as to allow a provisional ballot application that lacks the required signature by the voter to be deemed valid, opened, and counted. Further, it is requested that this Court issue a writ that requires the Secretary of State to instruct the county boards of elections that any provisional ballot application lacking the required voter signature is invalid and must not be counted.

Respectfully submitted,

RON O'BRIEN
PROSECTING ATTORNEY
FRANKLIN COUNTY, OHIO

/s/ Patrick J. Piccininni

Patrick J. Piccininni (0055324)

TRIAL COUNSEL

Anthony E. Palmer, Jr. (0082108)

Assistant Prosecuting Attorneys

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aepalmer@franklincountyohio.gov

*Counsel for Respondent Franklin County Board of
Elections*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon all counsel of record
by means of the Court's electronic filing system this 18th day of November, 2008.

/s/ Patrick J. Piccininni

Patrick J. Piccininni (0055324)

Assistant Prosecuting Attorney

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.	:	
	:	

State of Ohio	}	
	}	ss
Franklin County, Ohio	}	

AFFIDAVIT

1. I, Ron O'Brien, being first duly sworn, depose and say that I am the duly elected Prosecuting Attorney for Franklin County, Ohio and in that capacity am statutory counsel to the Franklin County Board of Elections but also prosecute the voter fraud and other election law crimes that are primarily contained in Title 35, Ohio Revised Code.

2. During the 2008 general election cycle, numerous election fraud cases were investigated by my office. On November 14, 2008 the Board of Elections voted to refer six additional cases to this office. Such cases have ranged from registration and voting by non-residents, voting twice, voting by non-citizens, and multiple registrations that were forged, fictitious or fraudulent.



3. The Grand Jury returned a twenty-four count election fraud indictment on November 18, 2008 in one of those cases.


4. Ohio statutes require that a voter's signature be contained on a provisional ballot, and that requirement is necessary for two other election law reasons.

5. First, Board of Elections personnel must have a voter's signature to compare with the known signature of a voter that is already on file at the Board, either on registration forms, absentee ballot requests, or the poll book for another precinct. That comparison cannot be done when a signature does not appear on the provisional ballot.

6. Second, all important election documents provided for by Ohio law must be signed under penalty of election falsification, and statutes require a warning above or near the signature. Those laws are to deter election fraud, but more importantly are essential to the prosecution of a voter fraud case. Fraudulent provisional ballots will not be able to effectively be prosecuted if a signature of the purported voter does not exist. A poll worker likely will not be able to visually identify a provisional voter due to the numerous persons met and dealt with on election day. Absent other methods of identification and a confession, any provisional voter fraud cannot effectively be prosecuted.

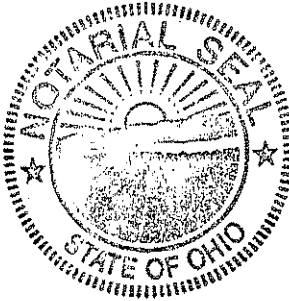
7. The indictment referred to above was possible only because of expert opinion by a handwriting expert that the offender signed the fraudulent registration and absentee ballot forms. Without a signature on a provisional ballot form the ability to prosecute fraudulent forms, voters, or schemes would be virtually impossible.

Further affiant says naught.

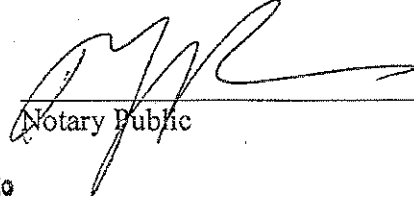

Ron O'Brien
18 Nov 08

Sworn to and subscribed before me in my presence this 10th day of November,

2008.



PATRICK J. PICCININNI
ATTORNEY AT LAW
Notary Public -State of Ohio
My Commission Does Not
Expire RC SEC. 147.03



Notary Public

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate
copy of the original on file with this office.

Damschroder, Matthew M.

From: Shinn, Brian [bshinn@sos.state.oh.us] By Matthew M. Damschroder
Sent: Thursday, November 13, 2008 5:41 PM Date 11-18-08
To: Shinn, Brian; Piccininni, 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
Importance: High

Michael and Matt,

As I indicated yesterday, I am providing our office's interpretation of the second issue raised in Mr. DeRose's e-mail from Monday. The question is whether a provisional ballot with the name of the voter in the affirmation but no signature can be counted.

The following statutes lead us to conclude that it can be counted, assuming that the voter is registered, voted in the correct precinct, and was not required to provide additional information or ID to the board but failed to do so.

R.C. 3505.182 (last sentence) "If the individual declines to execute the affirmation, an appropriate local election official shall comply with division (B)(6) of section 3505.181 of the Revised Code."

R.C. 3505.181(B)(6) "If, at the time that an individual casts a provisional ballot, the individual *** declines to execute such an affirmation *** the appropriate local election official shall record *** the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section."

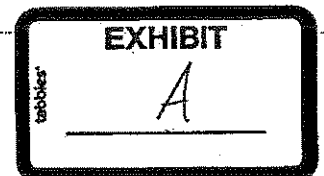
R.C. 3505.181(B)(3) "An election official at the polling place shall transmit the ballot cast by the individual, the voter information contained in the written affirmation executed by the individual under division (B)(2) of this section, or the individual's name if the individual declines to execute such an affirmation to an appropriate local election official for verification under division (B)(4) of this section."

R.C. 3505.181(B)(4) "If the appropriate local election official to whom the ballot or voter or address information is transmitted under division (B)(3) of this section determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election."

Finally, R.C. 3505.183 specifically provides:

(B)(1) To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; otherwise, the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

(a) The individual's name and signature;



(b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted;

(c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.


Thus, a provisional ballot with only the voter's name in the affirmation but no signature MAY BE COUNTED under the statutes cited above. This conclusion is consistent with Directive 2008-101 (page 9, section VII and page 7, section VI.D.1.c.4).

Let me know if you have any questions.

Brian Shinn

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate copy of the original on file with this office.

By 
Date 11-18-08

From: Shinn, Brian

Sent: Wednesday, November 12, 2008 6:20 PM

To: Shinn, Brian; 'Piccininni, 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

Importance: High

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. Ruehlmann 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 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

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate copy of the original on file with this office.

By Matthew M. Damschroder
Date 11-18-08

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 affirmation is 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.

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

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

I hereby certify that this document is a true and accurate copy of the original on file with this office.

By 
Date 11-18-08

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:bshl@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 Bortrager; dora@ohiodems.org; Richard Topper; Mary S. Duffey; Sandy Spader; Keller, Keenan; Svoboda, Brian (Perkins Coie); 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

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate
copy of the original on file with this office.

By 
Date 11-18-08

From: Bob DeRose [mailto:bderose@bnhmlaw.com]
Sent: Monday, November 10, 2008 10:29 AM
To: Stinziano, 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 Columbus, Ohio 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.

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio
I hereby certify that the Board should notify
copy of the original on file with this office.

[Handwritten signature]

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
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614-221-4221
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www.bnhmlaw.com

FRANKLIN COUNTY BOARD OF ELECTIONS
Columbus, Ohio

I hereby certify that this document is a true and accurate
copy of the original on file with this office.

By 
Date 11-18-08