

IN THE SUPREME COURT OF OHIO

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

Relators,

vs.

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

Respondents.

Case No. **08-2206**

ORIGINAL ACTION IN
MANDAMUS

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

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

Respectfully submitted,

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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).]

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

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

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

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

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

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

II. STATEMENT OF FACTS

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

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

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

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

B. The Provisional Ballot Verification And Counting Process.

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

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

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

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

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

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

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

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

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

[Emphasis in original.]

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

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

* * *

c) The individual did not provide the following:

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

* * *

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

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

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

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

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

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

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

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

III.

LAW AND ANALYSIS

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

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

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

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

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

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

A. Relators Are Likely to Succeed on the Merits.

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

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

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

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

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

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

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

... the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted: (a) The individual's name and signature

[Emphasis added.]³

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

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

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

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

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

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

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

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


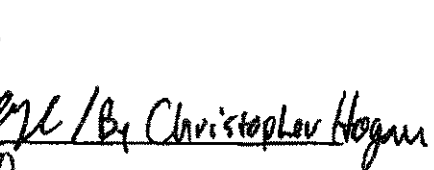
C. The Harm Suffered Absent Temporary Injunctive Relief Clearly Outweighs The Alternative, And The Public Interest Favors Enforcement Of Ohio's Election Statutes.

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

III. CONCLUSION

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

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CERTIFICATE OF SERVICE

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

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