

**CASE NO. 08-4585**

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**STATE OF OHIO ex rel. DANA SKAGGS, ET AL.,  
Relators-Appellants,**

**v.**

**JENNIFER L. BRUNNER,  
Defendant-Appellee.**

**ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF OHIO,  
CASE NO. 2:08-CV-1077**

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**BRIEF OF DEFENDANT-APPELLEE  
JENNIFER L. BRUNNER**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Under Ohio law, no provisional ballot may be opened and counted until all provisional ballots are ready to be opened and counted. R.C. 3505.183(D). Furthermore, the boards of elections must certify their final vote tallies from the November 4, 2008 general election by Tuesday, November 25, 2008. R.C. 3505.32(A). Therefore, even though this case concerns vital issues and may determine whether thousands of Ohioans will be disenfranchised as a result of mere technical errors on provisional ballot envelopes, the importance of officially certifying the November 2008 general election is of utmost importance, and the Secretary agrees that oral argument in this case should be waived. If, however, this Court believes that oral argument would aid it in reaching a decision in this case, the Secretary stands ready to participate.

## **ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court correctly concluded that it is has federal question jurisdiction to hear this case.
2. Whether the District Court correctly ruled that the otherwise proper provisional ballots cast by registered and eligible electors in the proper precincts must be counted notwithstanding the absence of a printed name or signature on the envelope containing the ballot.

## **INTRODUCTION**

The Plaintiffs in this case seek to disenfranchise approximately 1,000 Ohioans who cast provisional ballots in Franklin County. Even though these voters are properly registered to vote and cast ballots in the appropriate precinct, the Plaintiffs seek to disqualify their ballots because of minor technical errors in the manner in which their provisional ballot envelopes were completed. The Plaintiffs seek to use the power of the State to simply disqualify votes because voters did not follow technical rules in completing the provisional ballot affirmation form printed on the provisional ballot envelope provided them at their polling location. These errors were not corrected by poll workers even though the poll workers had an affirmative legal duty to do so.

This Court should affirm the decision of the district court and refuse to disenfranchise voters based upon a hyper-technical reading of Ohio's statutes concerning provisional ballots.

## STATEMENT OF THE CASE

On November 13, 2008, Appellants Dana Skaggs and Kyle Fannin filed an original action in mandamus against Secretary of State Jennifer Brunner in the Ohio Supreme Court. The Complaint also listed the Franklin County Board of Elections as a nominal defendant, although none of the allegations was addressed to the Board and no specific relief was sought against the Board.

What the Complaint did seek was an Order compelling Secretary Brunner to reject approximately 1,000 provisional ballots cast in Franklin County by eligible voters on November 4, 2008 due to alleged technical defects on the provisional ballot envelope. Although there has never been any question as to the eligibility and qualifications of the voters who cast these ballots, the Appellants argued that the Secretary had a clear legal duty to reject the ballots because of alleged defects in the provisional ballot affirmation forms (a form printed on the face of the provisional ballot, the envelope in which each provisional ballot is stored until the Board verifies the voters eligibility).<sup>1</sup>

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<sup>1</sup> It should be noted that use of the term “provisional ballot *application*” is inconsistent with the statutory text of both the Ohio Revised Code and HAVA. A voter is not required to “apply” for a provisional ballot, but is entitled to one upon the execution of a written affirmation. R.C. 3505.181(B); 42 U.S.C. 15482(a)(2). Indeed the fact that a provisional ballot was provided to each of the voters involved in this case serves to support the conclusion that no fatal defects were present in the affirmation forms, as it would have constituted poll worker error for the poll worker to provided a provisional ballot to these voters had they not first executed a satisfactory written affirmation.

The Plaintiffs originally sought a judicial order requiring the Ohio Secretary of State to instruct the Franklin County Board of Elections to reject four different categories of provisional ballots:

- 1) Ballots which had the voter's printed name but no signature;
- 2) Ballots which had the voter's signature but no printed name;
- 3) Ballots which had both a printed name and signature but in the wrong locations;
- 4) Ballots which did not show whether the voter provided proper identification to the poll worker before casting a provisional ballot.

The Plaintiffs eventually admitted in district court that the State could not legally reject ballots of the fourth category, that is, where the form did not show whether the voter provided proper identification. The Plaintiffs acknowledged that a poll worker has a mandatory duty to indicate that ID information, on the provisional ballot envelope.

Appellants alleged that the Secretary's decision to count these provisional ballots was a violation of her own Directive 2008-101, which governs the counting of provisional ballots. Directive 2008-101, issued October 24, 2008, was adopted as an Order of the District Court on that same day, in the case, *Northeast Ohio Coalition for the Homeless v. Brunner*. [Case No. 2:06-cv-896, R. 142]. The Complaint also sought an order that would compel the Secretary to reject

provisional ballots that were “defective” as a result of poll worker error. However, the District Court had previously issued, on October 27, 2008, an Order stating that “no provisional ballot cast by an eligible elector should be rejected because of a poll worker’s failure to comply with duties mandated by R.C. 3505.181, which governs the procedure for casting a provisional ballot.” Accordingly, on October 28, 2008, the Secretary issued Directive 2008-103, stating “pursuant to the court order, I hereby instruct the boards of elections **that 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, (emphasis added in original). The Complaint thus presented a direct challenge to the legitimacy of not only the Secretary’s direction to the board, but also to the validity of the District Court’s order.

Based on these facts, and before the Supreme Court of Ohio served the summons upon the Board of Elections, the Secretary filed a Notice of Removal from the Supreme Court of Ohio to the federal District Court for the Southern District of Ohio.<sup>2</sup> Both the Appellants and the Board of Elections filed motions to remand [RR. 11, 12], which the District Court denied on November 17, 2008. [R. 20]. At the same time, the District Court granted the Secretary’s motion to realign the parties, re-designating the Board of Elections as a plaintiff.

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<sup>2</sup> The Secretary of State removed this case to federal district court at 9:06 a.m. on November 14, 2008. The Franklin County Board of Elections did not file a notice of appearance in the Ohio Supreme Court until November 14, 2008. The Ohio Supreme Court does not show the time the notice of appearance was actually filed.

After denying the motion to remand, the District Court conducted a hearing on Appellants' motion for a temporary restraining order. However, before the Court could issue its decision, Appellants withdrew the motion. Instead, the parties agreed to file cross-motions for summary judgment the next day, November 18, 2008.

On November 20, 2008, the District Court granted summary judgment in favor of the Secretary, and denied the motions filed by Appellants and the Board. [R. 41]. Appellants then filed their Notice of Appeal. Although the district court found there was virtually no likelihood of success on the merits, it granted an injunction pending appeal prohibiting the Franklin County Board of Elections from processing any provisional ballots until November 28, 2008 at 9:00 a.m. The reason the district court granted the injunction was because once a provisional ballot is opened, it cannot be separated from the other ballots cast in the election.

## STATEMENT OF FACTS

The Complaint in this case seeks to disenfranchise approximately 1,000 Franklin County voters who cast provisional ballots on November 4, 2008 *and who were in fact properly registered and eligible to vote* and cast their ballots in the correct precinct. Appellants have not alleged that any of the provisional ballots in question were fraudulent, or cast by ineligible voters, or cast in the wrong precinct. Rather, the argument is that these voters should be disenfranchised because Appellants believe there were disqualifying technical errors made on the provisional ballot affirmation Forms that accompanied the ballots themselves, errors made by election officials, not voters.

Under the Help America Vote Act, 42 U.S.C. 15301 et seq. (“HAVA”), a person must be 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 Ohio, a voter may cast a provisional ballot by executing a written affirmation in the presence of an election official. R.C. 3505.181(B)(2). The written affirmation is printed on the provisional ballot envelope into which the voter inserts the provisional ballot. The envelopes are then submitted to the county board of elections for a determination of the voter’s eligibility; only if the voter is determined to be eligible will the envelope be opened and the provisional ballot counted.

Appellants concede that all provisional ballots of questionable eligibility have already been culled. Their Complaint alleges that 1,000 provisional ballots should be rejected because the affirmations are defective, either because (1) they contain the individual's printed name, but no signature; or (2) they contain the individual's signature, but no printed name.<sup>3</sup> During oral argument, Appellants and the Board identified a third category of alleged defect: the individual's name and signature both appear on the face of the form, but somewhere other than in the blanks designated for that information. (This "defect" is not discussed in Appellants' Appellate Brief, but will be addressed by the Secretary).

These "defects" in the affirmation forms are not valid reasons to reject the provisional ballots. Ohio law is clear that neither a printed name nor a signature is a necessary prerequisite for a ballot to be counted, and in fact expressly provides for ballots to be counted when they contain one piece of information but not the other. Moreover, Ohio law imposes an affirmative legal duty upon *poll workers*, not voters, to ensure that the provisional ballot affirmation forms are fully and properly filled out. If information is missing from the form, it necessarily is the result of poll worker error, and federal law (specifically the District Court's order of October 27, 2008 referenced in Directive 2008-103) forbids the rejection of an otherwise proper provisional ballot that is irregular due to error by the poll worker.

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<sup>3</sup> The Complaint also challenged affirmation forms that lacked both signature and printed name, as well as affirmation forms upon which the poll worker failed to indicate what form of identification the individual presented in order to receive the provisional ballot. Those two issues have been resolved, and are not part of this appeal.

Unfortunately, this case is further complicated by the Franklin County Board of Elections' decision to use its own provisional ballot envelope. Under Ohio law, Secretary of State Jennifer Brunner is the State's chief elections officer. R.C. 3501.04. She has the authority to instruct the boards of elections on the proper conduct of the election, R.C. 3501.05(b), (c), and she further has the legal authority to prescribe the forms to be used in an election. R.C. 3501.05(g). The Secretary of State's form, Form 12-B, contemplates that the poll worker must witness the provisional voter sign the envelope. The form does not purport to impose a requirement that the provisional voter print his own name. Instead, the Secretary's form allows, consistent with the requirements of Ohio law, the poll worker to print the voter's name on the form. The Secretary's form is completely consistent with the requirements of R.C. 3505.182.

The Franklin County Board of Elections decided to reject the Secretary's form and developed its own affirmation form for inclusion on provisional ballot envelopes. Franklin County's form did not require that the poll worker actually print the voter's name on the form. Thus, the underlying problem in this case is actually caused by Franklin County's refusal to use the Secretary of State prescribed form and to require that all of its poll workers actually check provisional ballot envelopes before accepting them to make sure that the provisional voter filled the form out correctly.

## SUMMARY OF ARGUMENT

Appellants' Brief focuses almost entirely upon the question of federal jurisdiction: should the District Court have remanded the case back to state court? However, the district court correctly denied the Plaintiffs' motion to remand this case to the Ohio Supreme Court. Federal courts have jurisdiction in all cases arising under the constitution or laws of the United States. 28 U.S.C. § 1331. The Plaintiffs' complaint was brought under three separate federal questions:

- 1) An allegation of vote dilution brought under the Fourteenth Amendment;
- 2) An allegation that the Secretary of State violated an order of the United States District Court; and
- 3) An explicit challenge of a second order of the United States District Court.

This Court has previously ruled that removal is appropriate in situations where a Plaintiff challenges a federal court's orders directly through a separate action in State court. *EBI-Detroit, Inc. v. City of Detroit*, 279 Fed. Appx. 340 (6th Cir. 2008). Thus, the subject matter of this litigation is clearly within the rubrics of a federal court's jurisdiction.

Furthermore, the removal in this case was procedurally appropriate. While the general rule is that all defendants must join in a removal petition for it to be

successful, two exceptions to that rule apply in this case. First, removal was appropriate because the Franklin County Board of Elections had not been served with a summons in the original State court action. *Klein v. Manor Healthcare Corp.*, 1994 U.S. App. LEXIS 6086, \* 12 (6th Cir. 1994). Second, removal was appropriate in this case because the Franklin County Board of Elections was a nominal party. *Id.* The Board of Elections had previously tied 2-2 on whether to count the disputed ballots. Thus, the decision on whether to count the ballots rested solely with the Secretary of State and her decision is binding upon the Franklin County Board of Elections. R.C. 3501.11(x).

Furthermore, the district court properly granted the Secretary's motion to realign parties and to align the Franklin County Board of Elections with the Plaintiffs. The Deputy Director of the board of elections had filed numerous affidavits in support of the Plaintiffs and their legal counsel had specifically advised the board to reject the ballots at issue in this case, thereby effectively advising the Board to ignore the Secretary's advice.

Not only did the district court appropriately determine that removal was appropriate for this case, it also correctly determined that the disputed provisional ballots must be counted. Ohio law mandates that an individual seeking to cast a provisional ballot must execute a written affirmation "before an election official at the polling location" which states that the individual voter is registered to vote and

eligible to vote in that election. R.C. 3505.181(B)(2). Thus, Ohio's poll workers have an affirmative duty to make sure that provisional ballot envelopes are properly completed. Since the poll workers at issue in this case failed to carry out their mandatory duty, these provisional ballots must be counted.

Although the Plaintiffs rely extensively on R.C. 3505.183, the Secretary of State, as Ohio's chief elections officer, has read Ohio's statutes as mandating that the provisional ballots at issue in this case should be counted. Under Ohio law, if Ohio statutes are capable of two or more reasonable interpretations, the Secretary's interpretation is entitled to deference. *Whitman v. Hamilton County Board of Elections*, 97 Ohio St.3d 216 (2002).

## STANDARD OF REVIEW

This court reviews denials of motions to remand to state court de novo, *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 338 (6th Cir. 1989), and examines “whether the case was properly removed to federal court in the first place,” *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871-72 (6th Cir. 2000) (citing *Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996)). In reviewing the district court’s determination concerning its jurisdiction, the district court’s findings of fact regarding jurisdictional issues are reviewed for clear error while its conclusions of law are reviewed *de novo*. *Certain Interested Underwriters at Lloyds, London, England v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994); *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003); *Gafford v. General Electric Co.* 997 F.2d 150, 155 (6th Cir. 1993).

Under this standard, the Court in *Certain Interested Underwriters at Lloyds, supra*, reviewed the underlying factual issues of whether the plaintiff was a real party in interest or a nominal party for the purposes of determining whether the district court properly exercised diversity jurisdiction. The defendants were all citizens of Tennessee, while the Plaintiff, an insurance underwriter, had its corporate citizenship in Great Britain. The defendants argued that the district court improperly exercised jurisdiction because the Plaintiff-underwriter was merely the agent or representative of the Plaintiff’s undisclosed principal -- a syndicate whose

citizenship was also in Tennessee. 26 F.3d at 41. Thus, in order to determine whether there was complete diversity jurisdiction, the Court had to resolve the factual issue of whether the Plaintiff-underwriter was the real party in interest, or purely a nominal party. *Id.* at 42. The Court determined that the Plaintiff-underwriter was indeed the real party in interest because it wrote the policy, processed the claims related to that policy, and were thus liable on the contract. *Id.* at 43. Therefore, the Court affirmed the district court's denial of defendants' motion to dismiss for lack of subject matter jurisdiction. *Id.* at 44. Thus, while this Court must review the legal questions *de novo*, it can only overturn the district court's determination that the Franklin County Board of Elections is a nominal party to this litigation under a clear error standard. See also *Gafford*, 997 F.2d at 155 (applying clear error standard for reviewing the district court's determination of whether defendants met the amount-in-controversy requirement for diversity jurisdiction and thus properly removed to federal court).

## ARGUMENT

### I. THE DISTRICT COURT'S DECISION TO DENY THE MOTION TO REMAND WAS CORRECT AND SHOULD BE AFFIRMED

The majority of Appellants' appellate brief is devoted to the claim that the district court should have remanded the case to state court. The argument for remand has both a substantive and a procedural component. Substantively, Appellants deny their Complaint raises any questions of federal law, and therefore insist the federal District Court lacked subject matter jurisdiction. Alternatively, they argue that removal was procedurally improper because the Secretary was required to get the consent of the Board of Elections, and failed to do so. The District Court correctly rejected both arguments.

#### A. The District Court had Federal Question Jurisdiction

Federal question jurisdiction exists in "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" federal law where: (1) the plaintiff's cause of action is created by federal law; (2) a party's right to relief under state law requires a resolution of a substantial question of federal law in dispute; or (3) the claim is in substance one of federal law. *City of Warren v. City of Detroit*, 495 F.3d 282, 286 (6th Cir. 2007) (citing *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983)). To determine whether a case raises a federal question, courts must apply the "well-pleaded complaint rule," which is to say they

must limit their review to the face of the plaintiff's complaint, to see if it raises a question of federal law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

In their own complaint, Appellants have explicitly pled three separate federal questions:

(1) They have sought relief for vote dilution under the Fourteenth Amendment to the United States Constitution. [Complaint, ¶¶ 4-5];

(2) They contend that the Secretary has violated Directive 2008-101, which she is only obliged to follow by virtue of a federal court order. (Hence, the determination of whether she did in fact violate Directive 2008-101 will inevitably require interpretation of the federal court's order). [Complaint, ¶¶ 18, 27]; and

(3) They explicitly challenge the Court's October 27, 2008 Order, which determined that, as a matter of law, the duty to ensure provisional ballot affirmation forms are complete falls upon the poll workers, not the voters, and therefore incomplete forms reflect poll worker error and cannot be disqualified. [Complaint, ¶¶ 32, 34].

**1. Non-Race-Based Voter Dilution is a Federal Claim**

Paragraph 4 of the Complaint states that Appellant Dana Skaggs "brings this action to assure that his vote is not diluted" by the counting of provisional ballots he deems unqualified. Appellant Kyle Fannin makes the same vote dilution claim in paragraph 5 of the Complaint. The Fourteenth Amendment prohibits vote

dilution, in recognition of the fact that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). And when it comes to allegations of dilution as a result of fraud or counting ineligible ballots, the Fourteenth Amendment is the source for a right or remedy.

The concept of “vote dilution” encompasses a number of illegal practices. Most commonly, vote dilution claims arise in the context of redistricting challenges, where the State has enacted a particular voting scheme allegedly as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities. *Mobile v. Bolden*, 446 U.S. 55, 66 (1980). But vote dilution also occurs, for example, when districting is done arbitrarily, to consolidate political power, *Baker v. Carr*, 369 U.S. 186 (1962), or when reapportionment is not based on population, such that sparser populated areas have more seats, proportionally, than more densely populated areas. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In addition, federal courts have recognized that voters must have their votes treated equally. *Bush v. Gore*, 531 U.S. 89 (2000).

Vote dilution as a result of unlawful districting is actionable under the Fourteenth Amendment (and sometimes the Voting Rights Act and even the Fifteenth Amendment). And in certain rare instances, states with extremely

expansive Equal Protection clauses in their State Constitutions (unlike Ohio) have found a state cause of action against redistributive vote dilution. *See, e.g., Hickel v. Southeast Conference*, 846 P.2d 38 (Ak. 1992); *Dortch v. Lugar*, 266 N.E.2d 25 (Ind. 1971).

But for some forms of vote dilution claims, there is a federal Fourteenth Amendment remedy. The U.S. Supreme Court has recognized that “voting fraud impairs the right of legitimate voters to vote by diluting their votes--dilution being recognized to be an impairment of the right to vote.” *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff’d* 128 S.Ct. 1610 (2008) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam)). “The right of suffrage, whether in an election for state or federal office, is one that qualifies under the Equal Protection Clause of the Fourteenth Amendment for protection from impairment, when such impairment resulted from dilution by a false tally.” *United States v. Wadena*, 152 F.3d 831, 845 (8th Cir. 1998). Indeed, the realization that counting false or invalid votes to arrive at a fraudulent tally qualifies as vote dilution goes all the way back to *Baker v. Carr*, 369 U.S. 186 (1962).

However, the Secretary is unaware of any case in Ohio in which a court has said that potential dilution of votes in a federal election based on counting possibly ineligible ballots is actionable under state law. Looking to other states, one finds “vote dilution” described as a concept “actionable under *federal* jurisprudence.”

*Mixon v. Commonwealth*, 759 A.2d 442, 453 (Pa. 2000) (quoting *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000)) (emphasis added). For example, in a case challenging the eligibility of non-resident voters, the South Carolina Supreme Court looked solely to the Fourteenth Amendment, not state law, to find a constitutional protection against vote dilution. *Burriss v. Anderson County Bd. of Educ.*, 633 S.E.2d 482 (S.C. 2006). The same principle, that vote dilution protection is a creature of federal, not state law, has been endorsed in Alabama, *Birmingham v. Smith*, 507 So.2d 1312 (Ala. 1987) and Maryland, *McMillan v. Love*, 842 A.2d 790 (Ct.App.Md. 2004).

State law, at least in Ohio, creates no specific constitutional protection against vote dilution by the counting of ineligible ballots, and state law certainly creates no remedy or private right of action. Appellants Skaggs and Fannin explicitly invoked their *federal* constitutional rights under the Fourteenth Amendment in their own Complaint. Thus, they have raised an issue of federal law on the face of their own well-pleaded complaint, and the District Court correctly determined that it had jurisdiction to hear the case.

## **2. The Complaint Directly Implicates and Challenges Two Federal Court Orders**

On October 24, 2008, the Secretary issued Directive 2008-101, which instructed county boards of elections on various issues relating to the processing and handling of provisional ballots. On that same day, the district court issued an

Order that expressly incorporated Directive 2008-101 as a correct statement of state of federal law. *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:6-cv-896, R. 142.

The Complaint specifically refers to Directive 2008-101. [Complaint, ¶ 18]. Indeed, Appellants cite the Directive as legal authority for their position, and contend that the Secretary’s decision to count these 1,000 provisional ballots conflicts with the Directive. The Secretary disagrees with Appellants’ interpretation of the language in Directive 2008-101. *See, e.g.*, Compl. ¶ 18 (contemplating the meaning of the phrase “his or her name and signature” in the context of Directive 2008-101); *see also* Damschroder Affidavit, Exhibit 4 (documenting email discussions about the meaning of Directives 2008-101 between Secretary of State Elections Counsel Brian Shinn and Franklin County Assistant Prosecutor Patrick Piccininni).

But by making the meaning of Directive 2008-101 an issue in this case, Appellants have unavoidably challenged the federal court’s order adopting the Directive as valid law.

Moreover, on October 27, the district court issued an Order expressly providing that a provisional ballot cannot be legally rejected solely on the basis of poll worker error. That court order prompted the Secretary to issue Directive 2008-103 on October 28. That Directive, among other things, asserts, consistent

with the order from the district court, the twin propositions that if information is missing from a provisional ballot affirmation, it reflects poll worker error, and no provisional ballot can legally be rejected solely on the basis of poll worker error.

The Complaint challenges both principles. Paragraph 34 asserts that the law imposes a duty on voters, not poll workers, to make sure affirmations are filled out correctly. If Appellants are correct, then any omissions would reflect voter error, not poll worker error. And so Appellants seek an order that provisional ballots should not be counted if any information is missing from the affirmation. As explained below, Appellants are legally incorrect on all these assertions. But the relevant point here is that by making these assertions, and seeking judicial relief to establish them as law, Appellants are attacking not only the Secretary's Directives, but the Orders issued by the district court adopting those Directives. Thus, the Complaint on its face presents questions of federal law.

In support of remand, Appellants cite two Sixth Circuit decisions, both of which are distinguishable. *State ex rel. Crotteau v. Chattanooga Women's Clinic*, 1992 U.S. App. LEXIS 12064 (6th Cir. May 18, 1992), stands for the unremarkable proposition that a federal *defense* will not create federal jurisdiction, only a federal issue in the complaint. The Secretary does not dispute this principle, but respectfully suggests that it is irrelevant because her claim of federal

jurisdiction is premised entirely upon the federal issues raised in the Complaint and not at all on any possible federal defenses she might assert.

The second case cited by Appellants involved a contract dispute over the supply of municipal water services. *City of Warren v. City of Detroit*, 495 F.3d 282. The City of Warren alleged that Detroit breached its contract and violated state law by overcharging for the water it supplied. Detroit removed the case to federal court. Detroit's theory was that federal jurisdiction existed as a result of prior litigation between Detroit and the Environmental Protection Agency over alleged Clean Water Act violations. The EPA litigation had resulted in the appointment of a Special Administrator whose authority encompassed not only monitoring Detroit's wastewater operations, but also other administrative activities, such as collection of receivables and customer rate setting.

The Sixth Circuit correctly held that the case should be remanded. Warren raised only state law claims: a common law contract claim and a claim under a Michigan statute. The Complaint raised no issues of federal law, and "a substantial, disputed question of federal law [was] not a necessary element of either of Warren's state-law claims." *City of Warren*, 495 F.3d at 287. The Appellate Court considered the Detroit/EPA consent Agreement irrelevant, in part because Warren was not a party to it, but primarily because the outcome of the Warren-Detroit suit would not lead to a conflict with the Special Administrator.

Warren was contending that the law would not permit Detroit to charge a certain rate, and if Warren was correct, then the law would also preclude the Special Administrator from setting that rate or Detroit from agreeing to pay the inflated rate. Appellants suggest that *City of Warren* decides this case, when in fact the two cases are greatly dissimilar. To appreciate why this is so, it is first necessary to consider a more recent decision from the Sixth Circuit on the same subject.

Ironically, the more analogous case arose out of the same Detroit/EPA consent agreement. *EBI-Detroit, Inc. v. City of Detroit*, 279 Fed. Appx. 340 (6th Cir. 2008) (unpublished). EBI-Detroit submitted a bid to build a pumping station and overflow facility, Detroit rejected the bid, and EBI filed suit in state court against the City and the Special Administrator. But this time, when Detroit removed the case to federal court, the removal was successful. The result was different this time because had EBI alleged that the Special Administrator, in electing to award the contract to another bidder, violated the terms of the federal court order appointing him Special Administrator. Thus, the Sixth Circuit could see allegations of federal law violations on the face of the complaint.

The Skaggs/Fannin Complaint is indistinguishable from EBI's, and bears no resemblance to *City of Warren's*. As the district court astutely observed, the Complaint alleges that the Secretary has violated Directive 2008-101, *which is a binding order from a federal court*. Thus, the Secretary stands in the same position

as the Special Administrator did in *EBI*: she is accused of violating a federal court order by a non-party to that order (EBI, like Skaggs/Fannin, can enforce the order without being bound by it).

On the other hand, any comparison between this case and *City of Warren* is deeply flawed. The Detroit/EPA consent agreement called for the appointment of a Special Administrator, who could take specific actions. The Sixth Circuit was unconcerned by the possibility that one of the Administrator's decisions might be undone by a state court ruling. But in this case, Appellants seek to undo and contradict not the fact-finding of a Magistrate, but an Order from a federal judge relating to the very same subject matter. The federal issue could not be more clear, and the District Court correctly determined that it had jurisdiction.

## **B Removal was Procedurally Proper**

Both the Appellants and the Board of Elections<sup>4</sup> challenge the propriety of removal without the consent of all defendants, specifically, the consent of the board of elections. It is true that courts generally require all defendants to join in or consent to a removal petition. *See, e.g., Klein v. Manor Healthcare Corp.*, 1994 U.S. App. LEXIS 6086, \*12 (6th Cir. 1994). But there are three exceptions to that general rule, and two of them apply in this case: the consent of all defendants is not required when (1) the non-joining defendant has not been served with service of

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<sup>4</sup> The Franklin County Board of Elections has inexplicably decided to challenge the order of the district court and as an appellee without actually filing a notice of appeal or cross-appeal.

process at the time the removal petition is filed; or (2) the non-joining defendant is merely a nominal or formal party. *Id.* Consent from the board was unnecessary for a third reason: the District Court correctly recognized that the board was not a true defendant, and re-aligned the parties to make the board a plaintiff.

1. **Consent is Not Required of a Defendant Who has Not been Served with Summons at the Time of Removal**

At the time the removal petition was filed, the Franklin County Board of Elections had not yet been served with a summons and complaint; thus, there was no need to receive the Board's consent in the filing of the removal petition. "The general rule that all defendants join or consent to the removal does not apply when the non-joining defendant has not been served at the time the notice of removal is filed." *Kralj v. Byers*, Case No. 4:06 CV 0368, 2006 U.S. Dist. LEXIS 16404, at \*6 (N.D. Ohio April 5, 2006) (citing *Hicks v. Emery Worldwide, Inc.*, 254 F.Supp.2d 968, 972 n. 4 (S.D. Ohio 2003)). According to the docket in the Supreme Court of Ohio, the Franklin County Board of Elections was not served with the summons and complaint until Monday November 17, 2008, well after the Secretary filed her Notice of Removal on Friday November 14, 2008. Furthermore, the Secretary of State filed her notice of removal at 9:06 a.m. on November 14, 2008. On the same day, the Franklin County Board of Elections filed its notice of appearance in the Supreme Court of Ohio. The Supreme Court does not show what time the notice of appearance was actually filed.

Although Appellants have cited *First Independence Bank v. Trendventures* in support of their position, it is distinguishable from the facts present in this case. The defendant in *Trendventures* had not only filed an appearance but had also been served with the summons and complaint and had even filed an answer to the complaint. *First Independence Bank v. Trendventures*, Case No. 07-CV-14462, 2008 U.S. Dist. LEXIS 6577 at \*19 (E.D. Mich. Jan. 30, 2008). The fact that the board of elections may have filed a Notice of Appearance prior to the Secretary's filing of the Notice of Removal is irrelevant. The only pertinent question is whether or not it had been served with summons.

Furthermore, although Appellants speculate that the Secretary's office had not yet been served with the summons and complaint, this fact is irrelevant for the exception at issue. The exception to filing removal without the consent of the other named defendant(s) merely looks to whether the non-moving defendant had received summons and complaint, irrespective of whether the moving defendant had been served with the summons and complaint.

## **2. Consent to Removal is Not Required from a Nominal Party**

The board of election's consent was not required to properly remove this case to the Southern District Court because, as the District Court found, the board is merely a nominal party. "In contrast to a real party in interest, a formal or nominal party 'is one who has no interest in the result of the suit and need not have

been made a party thereto.” *Maiden v. N. Am. Stainless, L.P.*, 125 Fed. Appx. 1, 5-6 (6th Cir. 2004) (quoting *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469, 472 (6th Cir. 1952) (citations omitted)). “Federal Rule of Civil Procedure 17(a) provides that ‘every action shall be prosecuted in the name of the real party in interest.’ Under the rule, the real party in interest is the person who is entitled to enforce the right asserted under the governing substantive law.” *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d at 42-43 (quoting *Lubbock Feed Lots, Inc. v. Iowa Beef Processors Inc.*, 630 F.2d 250, 256-57 (5th Cir. 1980); *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171, 1173 n.2 (9th Cir. 1979); *Iowa Pub. Serv. Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977)).

Appellants do not state any cause of action or state any actual claim against the board and as such the board has no interest in the result of the case. The fact that the board is a nominal party is specifically reflected in the prayer for relief. The only relief Appellants request that is not specifically addressed to the Secretary of State is for a writ compelling the respondents, which would include both the Secretary and the board, to reject any provisional ballots that do not include both the name and signature of the voter on the provisional ballot affirmation. (Prayer C). However, the evidence put forth at the trial level indicates

that the board has been reduced to a purely ministerial role and is therefore a nominal party in this action.

Matthew Damschroder's affidavit, which was submitted in support of Appellants' Complaint, predicted that the board would deadlock 2-2 on whether they should count provisional ballots that do not have the voter's printed name on the envelope.<sup>5</sup> Damschroder Aff. ¶ 24. Mr. Damschroder's prediction was realized on Friday November 14, 2008, when the board did, in fact, tie on whether to count the provisional ballots. When a board of elections ties on such a decision, state law mandates that Secretary of State Brunner break the tie. RC 3501.11(X). In other words, Ohio law mandates that the board must automatically follow the tie-breaking decision of the Secretary. It is for this reason that the board has no specific interest in this litigation—it is merely a nominal party, as the board itself concedes in its Appellate Brief. Because the Franklin County Board of Elections' involvement is merely ministerial its consent is not required in order to properly remove this case to federal court.

Although Appellants cite *Local Union No. 172 v. P.J. Dick, Inc.*, the factual scenario is markedly different than the one at issue in this case. In *Local Union*, defendant P.J. Dick, Inc. was attempting to remove a case to federal court without the consent of the co-defendant Associated General Contractors of America, Inc.,

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<sup>5</sup> The Deputy Director has signed an affidavit claiming that "internal discussions indicate the Board of Elections will tie in its vote on whether it would reject as ineligible Provisional Ballot Applications that do not bear both the voter's "Name AND signature... ." Damschroder Aff. ¶ 18.

Central Ohio Division (“AGC”) on the basis that AGC was a nominal party. *Local Union No. 172 v. P.J. Dick, Inc.*, 253 F. Supp. 2d 1022, 1026 (S.D. Ohio 2003) (“the complaint properly states a claim (or at least an arguable claim) against AGC, and nothing more is required to find that AGC is not a nominal party to this action”). However, the plaintiff had specifically stated a cause of action against AGC. In particular, plaintiff was seeking to enforce a statutory provision which required mandatory arbitration of a labor dispute between the co-defendants. *Id.* at 1027. Therefore, the court held that “AGC was required to have joined in or unambiguously consented to the removal of the case, and its failure to do so cannot be excused on grounds that it is only a ‘nominal’ party.” *Id.* Since the board has tied, there is no claim asserted against them and it is solely in the hands of the Secretary. Therefore the relief sought and the claims stated are solely against the Secretary, leaving the Franklin County Board of Elections as a merely nominal party.

### **3. The Board is No Longer a Defendant**

Although the Franklin County Board of Elections was named as a Defendant in this case, it was evident from the materials attached to the Complaint that the Franklin County Board of Elections’ interests were adverse to those of the Ohio Secretary of State. For that reason, the District Court properly realigned the parties (which effectively ended the need for the board to consent to removal).

It has long been held that “[i]t is our duty, as it is that of the lower federal courts, to ‘look beyond the pleadings and arrange the parties according to their sides in the dispute.’” *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 690 (1941) (quoting *Dawson v. Columbia Trust Co.*, 197 U.S. 178, 180 (1905)). If the parties are not properly aligned, as where one party is made a defendant when in truth and in fact he is not adverse to the plaintiff, or vice versa, the court will realign the parties according to their interests before determining diversity . . .” *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, fn 3 (5th Cir. 1973) (citing 3A Moore’s Federal Practice, 2147-48). In other words, “[c]ourts may realign parties, according to their ultimate interests.” *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1133 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 289 (2006). Moreover, the courts may realign the parties according to their ultimate or true interests, irrespective of whether the realignment has the effect of conferring or denying subject-matter jurisdiction on the court. *Id.* at 1133. In other words, the district court has jurisdiction immediately upon the filing of a notice of removal to look at the complaint and determine the true nature of the parties before deciding whether it holds jurisdiction or not.

“Although realignment questions typically arise in the diversity of citizenship context, the need to realign a party whose interests are not adverse to those of his opponent(s) exists regardless of the basis for federal jurisdiction.”

*Larios v. Perdue*, 306 F. Supp. 2d 1190, 1195 (N.D. Ga. 2003). The federal courts have employed two different tests in determining the propriety of realignment; the Sixth Circuit has employed what has been labeled the “primary purpose test.” *Id.* (citing *United States Fid. & Guar. Co. v. A & S Mfg. Co., Inc.*, 48 F.3d 131, 132-33 (4th Cir. 1995). Under the primary purpose test “if the interests of a party named as a defendant coincide with those of the plaintiff in relation to the [primary] purpose of the lawsuit, the named defendant must be realigned as a plaintiff . . . .” *United States Fid. and Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) (citing *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987)).

Despite the structure of the Complaint, the district court properly looked past the fact that Appellants named the board as a Defendant and arranged the parties according to their sides in the dispute. In this case, the primary purpose of the litigation indicates that the board is an adversarial party to the Ohio Secretary of State and finds itself more aligned with the Appellants in this case. This is indicated by the affidavit of Matthew Damschroder, the Deputy Director of the Franklin County Board of Elections, which was submitted as the only support for the Complaint. In his affidavit, Mr. Damschroder made it clear that the Board of Elections’ interests in this case were adverse to the Secretary of State. Not only did Mr. Damschroder, in his capacity as the Deputy Director, indicate an alignment

with the Appellants, but so did Patrick Piccininni, counsel for the Franklin County Board of Elections. As evidenced by the emails attached to Mr. Damschroder's affidavit, Mr. Piccininni engaged in a lengthy disagreement with Brian Shinn of the Secretary of State's Office over the interpretation of Directives 2008-101 and 2008-103 and how provisional ballots should be processed and counted. Furthermore, during discussion on these issues before the Franklin County Board of Elections, Prosecutor Ron O'Brien argued to the Franklin County Board of Elections that as the board's legal counsel, the board of elections should follow his legal interpretation, not the Secretary's.<sup>6</sup> In fact, Mr. Damschroder provided Appellants with a second affidavit in support of their motion to stay the district court's decision pending this appeal. This excessive entanglement between the parties indicates that the board was properly realigned as a plaintiff; justifying removal without the board's consent.

The appropriateness of the district court's factual finding concerning the appropriateness of Franklin County Board of Elections being aligned with the Plaintiffs has been further demonstrated in this Court. The Franklin County Board of Elections has filed a brief arguing the district court erred in denying the

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<sup>6</sup> Although the Prosecutor's office has taken the position that poll worker error should not be used to reject a provisional ballot that does not have printed name on Franklin County's unique ballot application, the Prosecutor did convince the board of elections to count provisional ballots cast in the wrong precinct despite the apparent prohibition against doing so in Ohio law under certain circumstances in the future.

Plaintiffs' motion to remand. The Franklin County Board of Elections made this argument without actually filing a notice of appeal or cross appeal.

## **II. THE SECRETARY IS CORRECT TO COUNT THESE BALLOTS**

Leaving aside the procedural arguments, the Secretary can now address the substantive argument at the heart of this case. Both federal and Ohio law is very clear that the provisional ballots Appellants would see discarded contain valid votes and should be counted.

Revised Code Chapter 3505 creates a comprehensive scheme for processing provisional ballots. That scheme imposes multiple affirmative duties upon election officials at the polls, including but not limited to directing individuals to their proper polling places [R.C. 3505.181(C)(1)] and advising them that they have the right to cast provisional ballots. [R.C. 3505.181(B)(1)]. It also imposes a duty upon election officials, not voters, to ensure that the provisional ballot affirmation forms are filled out correctly and completely. R.C. 3505.181(B)(2).

In order to argue that these 1,000 provisional ballots should not be opened and counted, Appellants ask this Court to read one provision of the Revised Code in isolation, R.C. 3505.183(B)(1), and to unnecessarily disenfranchise 1,000 Ohioans for technical defects that in no way call into question whether these individuals were properly registered to vote or were appropriately casting ballots.

However, standing alone or read in tandem with other Code provisions, R.C. 3505.183(B)(1) demonstrates that these ballots must be counted.

**A. R.C. 3505.183(B)(1) and R.C. 3505.181(B)(6) Plainly Require the Counting of a Provisional Ballot that Contains a Printed Name but No Signature**

Appellants have misread the plain language of R.C. 3505.183(B)(1). Section (B)(1) addresses two scenarios: one in which the individual executes an affirmation, and one in which the individual refuses to sign the affirmation. The two scenarios lead to different outcomes, yet Appellants conflate this distinction through selective quotation. R.C. 3505.183(B)(1) states in full:

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.

Appellants call Subpart (a) a mandatory obligation, yet it only applies when the voter agrees to sign the provisional ballot affirmation. When the voter does not

sign the affirmation, you end up with a provisional ballot affirmation that contains a printed name but no signature, and R.C. 3505.183(B)(1) clearly considers that a valid vote. (If refusal to sign invalidated the provisional ballot, there would be no point to requiring the poll worker to print the individual's name on the form).

In fact, the Revised Code goes a step further and imposes an affirmative duty upon election officials to print the voter's name on the affirmation form when the individual does not sign. R.C. 3505.181(B)(6). Clearly, the General Assembly anticipated that some affirmations would arrive at the boards of elections bearing printed names but no signatures, and yet be valid. As the district court observed,

[W]here a voter refuses to sign the PBA, Ohio law requires that his vote be counted. Such a ballot is indistinguishable from a provisional ballot where the individual *forgot* to sign the affirmation.

[Nov. 20, 2008 Order, R. 41, p. 15]. The two provisional ballot affirmations *should* be distinguishable, because if an individual refuses to sign, the election official is required to note that fact on the affirmation form. R.C. 3505.181(B)(6). However, the responsibility to make such a notation belongs solely to the election official; his error cannot be held against the voter or used as a basis for disqualifying the ballot.

In short, R.C. 3505.183(B)(1) stands for the exact opposite of what Appellants claim: an otherwise eligible, qualified provisional ballot must be counted, when the affirmation has a printed name but no signature.

**B. R.C. 3505.181(B)(2) Requires the Counting of a Provisional Ballot that Contains a Signature but No Printed Name**

The second scenario involves an affirmation that contains a signature but lacks a printed name. Here the case for disqualification is *weaker*, at least as regards Appellants' stated concerns of voter fraud. In this scenario, the provisional voter has signed the declaration acknowledging and subjecting himself to the penalties for election fraud. It is unclear what additional fraud protection the printed name provides, such that a signed affirmation lacking a printed name should be rejected since provisional ballot voters sign poll books.

Fortunately, here again, the Revised Code is consistent with sound policy and common sense: the provisional ballot should be counted notwithstanding any alleged technical violation. R.C. 3505.181(B)(2) states:

The individual 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.

Thus, R.C. 3505.181(B)(2) makes the election official a mandatory witness to the execution, that is, the completion, of the provisional ballot affirmation form. “[T]he provision requires more than the mere passive presence of the poll worker, conferring on him a duty to verify the actual completion of the provisional ballot

application form, thereby requiring him to participate actively in the exercise of an eligible voter's franchise." [Order, R. 41, p. 12]. The active role of the election official is confirmed by R.C. 3505.182, which requires the poll worker to sign a Verification Statement attesting that the affirmation form was "subscribed and affirmed before me." As the District Court noted, to "subscribe" means "to sign one's name," and "to affirm" means "to swear under oath." "Thus, the verification statement requires the poll worker to confirm that the voter completed the affirmation by providing both a name and signature." [Order, R. 41, at p. 13]. The absence of one or the other, then, can only be the result of error or nonfeasance by the poll worker. Simply put, a poll worker who was doing her job would never have accepted a provisional ballot affirmation that was signed but unnamed.

**C. Appellants' Reliance on R.C. 3505.183(B)(1) is Misplaced**

Appellants' challenge to these provisional ballots is based wholly on R.C. 3505.183(B)(1) and a belief that it creates a mandatory requirement that both printed name and signature appear on all provisional ballot affirmation forms. According to Appellants, 3505.183(B)(1) (1) "impose[s] a mandatory obligation on county boards of election to reject a provisional ballot application where the voter failed [to] include both his or her written name and signature on the required affirmation; and (2) clearly indicate[s] that it is the voter's obligation to provide this required information on the provisional ballot application." [Brief, p. 31].

However, Appellants' attempt at statutory construction suffers from numerous flaws.

R.C. 3505.183(B)(1) does state (in part) that "the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted: (1) The individual's name and signature." But as previously noted, that mandatory language only applies when the individual agrees to sign. When the individual refuses to sign, a printed name is sufficient. Therefore, it necessarily follows that printed, unsigned affirmations are valid, and the provisional ballots contained in envelopes bearing those unsigned affirmations must be counted upon verification by the Board of Elections that the voter was qualified and eligible to vote.

Appellants' second assertion, that R.C. 3505.183(B)(1) makes it the voter's responsibility to make sure the affirmation is complete, is also without textual support. R.C. 3505.183(B)(1) is written in passive tense; it does not say whose responsibility it is to check the form. But though that section is silent, R.C. 3505.182 is not: it demands a Verification from the election official that the form was completed. What more unambiguous demonstration could there be that it is up to the poll workers to see the work is done correctly?

**D. The Placement of a Signature in the Wrong Place is Not Disqualifying**

Apparently, some voters signed their names in cursive in the blank for “name” and printed their names on the signature line. The argument for disallowing these ballots is tenuous at best, which is why Appellants have apparently and wisely dropped the argument from their Brief.

Two quick points should suffice to address the validity of these ballots. First, there is no statutory requirement that names – in cursive or block print – appear in any particular location on the affirmation. The best Appellants can do is point to R.C. 3505.182, which offers up a sample provisional ballot affirmation form. But R.C. 3505.182 merely suggests that the form should be “**substantially** as follows.” By its plain terms, R.C. 3505.182 requires only “substantial” compliance, not strict compliance. Substantial compliance with an election law is acceptable when, as here, the statute expressly says so. *State ex rel. Stokes v. Brunner*, \_\_\_\_ Ohio St.3d \_\_\_\_, 2008 Ohio 5392, at ¶ 33; *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008 Ohio 566, at ¶ 21. Therefore, R.C. 3505.182 offers no support for the notion that a ballot is invalid unless the affirmation is filled in one particular way.

Second, rejecting these ballots would contradict the principle, repeatedly affirmed by the Ohio Supreme Court, that courts “must avoid unduly technical interpretations [of election laws] that impede the public policy favoring free, competitive elections.” *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22

(quoting *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3). Yet this is precisely what plaintiffs seek to achieve: a rigid, hyper-technical statutory construction that would achieve no valid end but would serve to disenfranchise hundreds of otherwise eligible voters.

**E. The Secretary of State's Legal Determinations are Entitled to Deference.**

Ohio law has long recognized that the Secretary of State is the State's chief elections official. RC 3501.04. If an elections statute is subject to two or more reasonable interpretations, the Secretary of State's interpretation is entitled to deference. *Whitman v. Hamilton County Board of Elections*, 97 Ohio St.3d 216 (2002). Even if the Plaintiffs were correct in their reading of RC 3505.183, it would only result in an ambiguity over whether the ballots at issue in this case should be counted. Because of that ambiguity, Secretary Brunner is entitled to judicial deference in reaching a conclusion that the ballots must be counted. Such deference should be granted by a court not only because Secretary Brunner is the State's chief elections officer, but also because voters should not be disenfranchised based upon a hyper-technical reading of the requirements of Ohio's election law. *State ex rel. Myles v. Brunner*, \_\_\_ Ohio St.3d \_\_\_, 2008 Ohio 5097 (2008).

## CONCLUSION

For the foregoing reasons, this court should affirm the District Court's grant of summary judgment in favor of Secretary Brunner.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), this brief complies with the type-volume limitation of Rule 32(a)(7)(B). The brief was produced using a proportionally spaced 14-point Times New Roman font and contains 9,317 words, as calculated by the word processing program with which it was created and excluding the elements of the brief exempted from the word count by Fed. R. App. P. 32(a)(7)(B)(iii).

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## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2008, the foregoing *Brief* was electronically filed using this Court's CM/ECF system, and that all counsel of record received notification of that filing and copies via the CM/ECF system.

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