

In The Supreme Court Of Ohio

State ex rel. Robert W. Parrott, *et al.*, :
Relators, :
vs. : Case No. 08-0410
Secretary of State Jennifer Brunner : Original Action in Prohibition
Respondent. :

BRIEF OF RESPONDENT SECRETARY OF STATE JENNIFER BRUNNER

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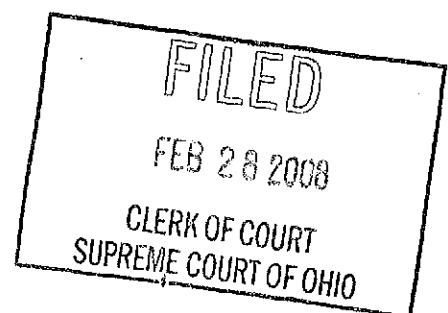


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INTRODUCTION

The Union County Board of Commissioners, Relator herein, brings to this Court an elections matter it has already litigated—and lost—in the appropriate forum of the Common Pleas Court of Franklin County. That elections question is whether Respondent Secretary of State Brunner had the legal authority to issue Directive 2008-01—a directive Relators do not like. Having lost at their first bite at the apple, the Board then could have pursued the legal remedy available to it by way of an appeal to the Franklin County Court of Appeals, and ultimately, to this Court. Instead the Union County Board of Commissioners has attempted to circumvent established appellate procedure by filing this original action in prohibition in this Court. This action should be summarily dismissed.

The Franklin County Common Pleas Court correctly held that the Relator Board lacked standing to challenge Directive 2008-01. In an unavailing attempt to overcome its fatal lack of standing, the Union County Board of Commissioners has enlisted a single member of the Union County Board of Elections, Robert W. Parrott, to join this action as an additional Relator. Relators once again request a judicial ruling that the Secretary of State lacked authority to issue Directive 2008-01. More specifically, Relators allege that Directive 2008-01 requires the implementation of a voting system in Union County different than that selected by the Union County Board of Elections and the Board of Commissioners. Relators' Petition, at ¶ 13. Relators also contend that the directive unlawfully directs the expenditure of funds by the Board of Elections without an appropriation by the County Commissioners. *Id.* at ¶ 16.

However, Relators' new lawsuit in this Court, though clothed as an action in prohibition, still fails for a number of reasons. First, the doctrine of laches bars Relators from seeking relief as this action was filed only days before the March 4, 2008 primary election, and Relators had

ample opportunity to file an earlier challenge to the Secretary's Directive. Second, although disguised as an extraordinary action, Relators' really seek declaratory and injunctive relief. Therefore, the Court should decline to hear this matter for lack of subject matter jurisdiction. Third, even if the Court were to proceed on the merits of Relators' petition, despite its plethora of fatal procedural defects, the Court should deny their request for a writ of prohibition because Relators have not met the elements required for issuance of that extraordinary writ. Specifically, Relators cannot show that Secretary Brunner exceeded her authority by issuing Directive 2008-01. The Secretary of State was elected by Ohio voters statewide to serve as the chief elections officer of the state and is statutorily vested with power to issue directives to the boards of election to govern the administration of elections. Ohio courts have repeatedly affirmed this authority and Relators' substantive assertion that Directive 2008-01 exceeds the Secretary's authority is ill-founded. Finally, Relators cannot establish standing – as to either the Board of County Commissioners or Relator Parrott – to bring this action. Thus, the Court should dismiss this action both on the merits and for its numerous procedural defects.

STATEMENT OF FACTS

On January 2, 2008, Secretary of State Brunner issued Directive 2008-01 to all the county boards of election in Ohio. Directive 2008-01 instructs the boards of elections in all counties using electronic touchscreen voting machine (a “direct recording electronic,” or “DRE” machine) to “provide an optical scan ballot to any to voter who requests it as an alternative method to casting a ballot on a DRE voting machine.” Directive 2008-01, attached as Respondent's Exhibit A, Vol. I, at A-1. In order to meet the minimum number of optical scan ballots to provide for each precinct, the boards are instructed to “multiply[] the number of ballots cast in each precinct at a like election by 10%.” *Id.* Furthermore, since every Ohio board of elections already uses

paper ballots and a central count optical scan tabulating system for the casting and counting of absentee ballots, provisional ballots, emergency ballots, and curbside voting ballots, the Directive “is similar to the procedures already in place for counties using a DRE.” *Id.* The Secretary issued Directive 2008-01 for multiple reasons. The directive ensures that backup paper ballots are available to relieve bottlenecks and long lines should they occur at the March 4, 2008 primary (as occurred in some DRE counties in the 2004 presidential election.) Additionally the directive was issued to “avoid any loss of confidence by voters that their ballot has been accurately cast or recorded” as the Secretary is aware that many Ohio voters have concerns about the security and accuracy of votes cast on DRE’s based on evaluations of DRE’s that have been conducted throughout the nation and that these voters desire to vote on a paper ballot rather than a DRE. Finally, there are some voters who are just afraid of computers and Directive 2008-01 gives these voters the opportunity to vote on a system with which they feel most comfortable. Thus, this directive recognizes that elections officials can take steps to make the franchise more readily available to each and every registered voter.

On January 9, 2008, the Union County Board of Elections (“Board of Elections”) took the highly unusual and statutorily unauthorized step of voting on a motion to disregard the Secretary’s directive. The vote resulted in a 2-2 tie. See Testimony of Robert Parrott, attached as Respondent’s Exhibit C, Vol. III, at 89. Pursuant to Ohio law, the Union County Board of Elections did not follow proper procedure in forwarding the tie vote to the Secretary of State. See Findings of Fact and Conclusions of Law (Feb. 19, 2008), at 5, *Union Cty. Commsrs. et al. v. Brunner*, Franklin Cty. CP No. 08 CVH 02 2032, attached as Respondent’s Exhibit E, Vol. IV. As a result, she was delayed in her ability to break the tie vote pursuant to her statutory authority in R.C. 3501.11(X). When the Board of Elections did submit its tie vote to Secretary Brunner,

the Secretary issued a decision breaking the tie and voted in favor of following her directive. See Union County Board of Elections Meeting Minutes (Feb. 5, 2008), attached as Respondent's Exhibit A, Vol. I, at K-2. Union County Prosecutor David Phillips subsequently announced to the Board of Elections that he would file suit on behalf of the Union County Board of Commissioners against the Secretary of State. *Id.* Mr. Phillips stated that "this would take [the lawsuit] out of the hands of the Board of Elections and put it in the Commissioners." *Id.* The Board of Elections never gave authorization or permission to Mr. Phillips to file any lawsuit on its behalf. Affidavit of David Moots, ¶¶ 11, 19, attached as Respondent's Exhibit D, Vol. IV.

On that same day – February 5, 2008 – the Union County Board of Commissioners filed a complaint for declaratory judgment and temporary and permanent injunction in the Union County Common Pleas Court. Pursuant to R.C. 3501.05, which provides the Secretary with the option of seeking "a change of venue as a substantive right" in any case in which she is a party, the Court granted the Secretary's motion to transfer venue to Franklin County Common Pleas Court. The Franklin County court dissolved the *ex parte* temporary restraining order granted by the Union County Common Pleas Court and requested that the parties file briefs on the question of whether the Union County Board of Commissioners had standing to prosecute its action against the Secretary. Because of time constraints the matter proceeded to trial without a preliminary ruling on standing. However, the Court reserved judgment on the issue of standing while considering the merits of Plaintiffs' claims.

The Board of Commissioners alleged before the Franklin County Common Pleas Court that the cost of implementing Directive 2008-01 would approximate \$86,000. The Commissioners also alleged that in order to comply with the Directive, the county would have to implement a new voting system, hire an additional set of poll workers to maintain additional poll

books and implement new procedures, and purchase new ballot boxes and privacy screens.

However, the following facts were established at trial on February 14, 2008:

- Union County has 30,197 registered voters. See Respondent's Exhibit A, Vol. I, at G-2. In the March 2004 primary presidential election, the total number of electors in Union County who cast a ballot amounted to 9,924. *Id.* at H-3. Based on that number, Union County would need 992 ballots – or 10% of 9,924 – to comply with the Directive.
- Franklin County has 772,789 active voters. *Id.* at G-1. That county has determined that it only needs to spend \$13,500 to implement the requirements of Directive 2008-01. *Id.* at J-1.
- Pickaway County, a county comparable in population to Union County, has 30,371 active voters. *Id.* at G-2.
- The testimony of Johnda Perkins, Director of the Pickaway County Board of Elections, establishes that Pickaway County is spending around \$1,000 to print ballots in an amount of 15% of the turnout from the 2004 Presidential primary. Testimony of Perkins, Respondent's Exhibit C, Vol. III, at 165.
- Pickaway County is not hiring a separate set of poll workers to implement the directive nor are they using two poll books. *Id.* They are also using coin bags that they had previously purchased for use as ballot boxes. *Id.* at 166. According to Pat Wolfe, Elections Administrator for the Secretary of State, this method of securing ballots is sufficient for the purposes of complying with Directive 2008-01. Testimony of Wolfe, Respondent's Exhibit C, Vol. III, at 186. A
- Even prior to Directive 2008-01, Union County has run both a DRE system and a central count optical scan balloting system on election day. Testimony of Teresa Hook, Deputy Director of Union County Board of Elections, Respondent's Exhibit C, Vol. III, at 148.
- Union County already has a high speed optical scanner – the M650 manufactured by ES&S – that it can use to quickly and accurately tally votes cast on paper ballots. *Id.* They have already been using the M650 to count paper ballots cast in the precinct on election day such as curbside ballots. *Id.*
- Directive 2008-01 adds nothing to a poll worker's duties on election day. It only requires a poll worker to give the voter a paper ballot if a voter so requests. Testimony of Robert Parrott, *supra*, at 97-106; Testimony of Patricia Wolfe, *supra*, at 194-95.
- Union County already employs extra poll workers as floaters to help people who are to cast provisional paper ballots. They have at least one of these floaters per

polling location and in the larger polling locations they have two or three. Testimony of Hook, *supra*, at 149-50.

- Union County already has secure metal boxes to place paper ballots and they have privacy screens for those casting paper ballots. Testimony of Parrott, *supra*, at 103, 106.
- Union County also trains its poll workers on the proper way to handle paper ballots. Testimony of Parrott, *supra*, at 109. Union County trains their poll workers on both the DRE system and the proper manner for casting a paper ballot for provisional, curbside, and emergency ballots. Testimony of Gary Lee, *supra* at 159; Testimony of Hook, *supra*, at 148.
- Union County has ordered 5,300 paper ballots, half of which are for use in the precincts on election day. Testimony of Parrott, *supra*, at 79; Ballot order form, Respondent's Exhibit A, Vol. I, at F-1.

Upon conclusion of trial, the Franklin County Common Pleas Court issued its decision dismissing the Board of Commissioners' complaint based on its lack of standing to bring the claim. The Court also found that it lacked jurisdiction to issue any declaratory relief because the Board failed to name the Board of Elections as a necessary party. See Findings of Facts and Conclusions of Law, *supra*, at 24-25, attached as Respondent's Exhibit E, Vol. IV.

After the Franklin County Common Pleas Court issued its decision, the Union County Board of Election met and again determined that it would not file a suit against the Secretary of State. Moots Affidavit, ¶ 19, attached as Respondent's Exhibit D, Vol. IV. The Board of Elections then revised its estimate of costs to comply with Directive 2008-01 downward from \$86,000 to \$13,000. *Id.* at ¶ 23. Accordingly, the Board of Elections has requested from the County Commissioners a line item transfer of their budget in this reduced amount, so that no new funds need be appropriated to comply with the Directive.¹ *Id.* at ¶ 28. The Board members

¹ The Board of Elections was scheduled to meet with the County Commissioners on February 28, 2008 to accomplish the line item transfer. Counsel for the Respondent just learned, on the morning of the scheduled meeting, that the Commissioners cancelled the meeting in order to confer with Union County Prosecutor David Phillips about the possible transfer of funds.

have discussed the possibility of filing suit against the Union County Commissioners pursuant to R.C. 3501.17, should the County Commissioners refuse to accept this reduced request for transfer of funds. *Id.* at ¶ 31.

LAW AND ARGUMENT

I. Relators' Claims Are Barred By The Doctrine Of Laches.

This Court has “consistently required relators in election cases to act with the utmost diligence.” *State ex rel. Brinda v. Lorain County Board of Elections*, 2007 Ohio-5228, ¶ 9, 115 Ohio St. 3d 299, quoting *Blankenship v. Blackwell*, 2004-Ohio-5596 ¶ 19, 103 Ohio St. 3d 567. When a relator does not exercise the necessary diligence in bringing an action, “laches may bar the action for extraordinary relief in an election-related matter.” *Id.*, quoting *State ex rel. Choices for South-Western Schools v. Anthony*, 2005-Ohio-5362, ¶ 20, 108 Ohio St. 3d 1.

The doctrine of laches bars an action when the following elements are met: (1) an unreasonable delay or lapse of time in asserting a right; (2) the absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party. *Id.*, citing *State ex rel. Polo v. Cuyahoga County Board of Elections* (1995), 74 Ohio St. 3d 143, 145. All of these elements are present in the instant case.

Secretary of State Brunner issued Directive 2008-01 on January 2, 2008. Respondent's Exhibit A, Vol. I. at A-1. Both Robert Parrott and the Union County Commissioners were aware of the directive at that time and could have filed a legal challenge of the Directive anytime thereafter. On January 8, 2008, Board Member Robert Parrott asked the Union County Prosecutor for a legal opinion concerning whether Secretary of State Brunner had the legal authority to issue Directive 2008-01 and the Prosecutor issued an eight page written opinion on the same day. See Findings of Fact and Conclusions of Law, *supra*, at 4, attached as

Respondent's Ex. E, Vol. IV. On January 9, 2008, the Union County Board of Elections tied 2-2 on whether to follow the requirements of Directive 2008-01. That tie vote was forwarded to the Secretary of State.² On February 4, 2008, the Union County Commissioners voted to authorize the Union County Prosecutor to file litigation against the Secretary concerning the implementation of Directive 2008-01. See Resolution No. 60-08 of Union Cty. Bd. of Commsrs., attached as Respondent's Ex. B, Vol. III, at tab 8. On February 11, 2008, the Franklin County Common Pleas Court, in the case of *Union County Commissioners v. Brunner*, issued a ruling stating that the Union County Common Pleas Court's attempt to issue an *ex parte* temporary restraining order against Secretary of State Brunner was void *ab initio*. Findings of Fact and Conclusions of Law, *supra*, at 9, attached as Respondent's Ex. E, Vol. IV. On February 19, 2008, the Franklin County Common Pleas Court entered a decision dismissing the Commissioners' claim on the basis of standing and the failure to join all necessary parties. *Id.* at 25. On February 22, 2008, the Union County Board of Elections voted to comply with the requirements of Directive 2008-01 and to purchase ballots and supplies. Moots Affidavit, ¶ 20, attached as Respondent's Ex. D., Vol. IV. Finally, on that same day and 51 days after Directive 2008-01 was promulgated, Robert Parrott and the Union County Commissioners filed this action in prohibition.

Neither Parrott nor the Union County Commissioners has alleged any facts to excuse their delay in bringing this litigation. They have simply glossed over this 51-day delay. Because they have no legitimate reason for such a delay, this Court should apply laches to their claim.

² Pursuant to Ohio law, the Union County Board of Elections did not follow proper procedure in forwarding the tie vote to the Secretary of State. As a result, she was delayed in her ability to break the tie vote pursuant to her statutory authority. Findings of Fact and Conclusions of Law, *supra*, at 5, attached as Respondent's Ex. E, Vol. IV.

There can be no doubt that Robert Parrott and the Union County Commissioners were aware, or at least had constructive knowledge, of the requirements of Directive 2008-01. Parrott is a member of the Union County Board of Elections and should have actual knowledge of the directive as soon as it was issued. Under Ohio law, the Secretary is legally obligated to put all directives on her website by the close of business on the date they are issued. RC 3501.05(B). Thus, there was actual or at least constructive knowledge of the requirements of this directive.

Finally, both Secretary of State Brunner and the Union County Board of Elections have suffered prejudice as a result of this delay. This Court has always recognized that “expedited election cases be filed with the required promptness,” *State ex rel. Fishman v. Lucas County Board of Elections*, 2007-Ohio-5583, ¶ 8, 116 Ohio St. 3d 19, quoting *State ex rel. Carberry v. Ashtabula* (2001), 2001-Ohio-1625, 93 Ohio St. 3d 522, 524, because these cases “implicate the rights of electors....” *Id.*, quoting *State ex rel. Ascani v. Stark County Board of Elections* (1998), 1998-Ohio-586, 83 Ohio St. 3d 490, 494.

With absentee balloting already occurring, the 2008 Presidential primary election in Ohio has already begun. RC 3509.01. Furthermore, Union County has hired and trained poll workers to comply with Directive 2008-01. See Moots Affidavit, ¶ 32, attached as Respondent’s Ex. D, Vol. IV. Secretary Brunner, who has the statutory responsibility to establish election policy for the State of Ohio, and the Union County Board of Elections, which has the statutory duty to administer elections in Union County as prescribed by law and the direction of the Secretary, have an overriding interest in ensuring that the 2008 presidential primary election runs smoothly. To have a court order that Directive 2008-01 be withdrawn greatly hampers their ability to carry out their statutory mandates concerning the conduct of elections.

The U.S. Supreme Court has overturned an injunction against a State election law, in part, on the basis of proximity to elections. *Purcell v. Gonzalez* (2006), 127 S. Ct. 5. In his concurrence, Justice Stevens noted that by allowing the election to proceed without any injunction provided all courts with a better factual record under which to judge the challenged statute. *Id.* at 8 (Stevens, J., concurring). “Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.” *Id.* Based upon the proximity of the March 4, 2008 Presidential Primary Election, this Court should follow the reasoning of the U.S. Supreme Court and refuse to interfere with elections administration this close to election day.

Finally, this Court has recognized that even short periods of delay before filing a case is sufficient to trigger the defense of laches. See, e.g., *State ex rel. Vickers v. Summit County Board of Elections*, 2004-Ohio-5596, 97 Ohio St. 3d 204, (waiting 19 days to file a protest was sufficient to trigger a defense of laches); *State ex rel. Newell v. Tuscarawas County Board of Elections*, 2001-Ohio-1806, 93 Ohio St. 3d 592, (waiting 14 days after a protest was denied before filing a lawsuit was a sufficient to trigger laches); *State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 2000-Ohio-295, 88 Ohio St.3d 187, 189, (“We have held that a delay as brief as nine days can preclude our consideration of the merits of an expedited election case.”); *Carver v. Stankiewicz*, 2004-Ohio-812, 101 Ohio St.3d 256 (denying an extraordinary writ because the Relators waited 19 days before filing their claim). In this particular case, Relators waited 51 days from the issuance of Directive 2008-01 to legally challenge it. Such a delay triggers laches and this Court should deny their request for extraordinary relief on that basis alone.

II. This Court Lacks Subject Matter Jurisdiction Over The Relators' Claims.

Relators' action should also be dismissed because they have improperly invoked this Court's original jurisdiction. The Ohio Constitution vests this Court with original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, and procedendo. *State ex rel. Smith v. Industrial Comm'n.* (1942), 139 Ohio St. 303, 304, syllabus ¶ 1. The Supreme Court lacks jurisdiction to hear an original action seeking injunctive relief. *Id.* Furthermore, a prohibition action is limited solely to cases where the respondent has used, or is threatening to use, judicial or quasi-judicial power. *State ex rel. Burech v. Belmont County Board of Elections* (1985), 19 Ohio St. 3d 154, 155. It does not extend to control executive or ministerial decisions. *State ex rel. Hensley v. Nowak* (1990), 52 Ohio St. 3d 98, 99. Finally, a prohibition action should not be used to short-circuit appropriate appellate review. Because Relators have improperly invoked this Court's jurisdiction by violating all three of these simple rules, this Court is without jurisdiction to grant them the relief they seek.

A. Relators' action is a disguised request for declaratory judgment and a prohibitory injunction and therefore falls outside of this Court's original action jurisdiction.

This Court has long recognized that if the allegations in a complaint indicate that the real object sought in a complaint for an extraordinary writ are declaratory judgment and a prohibitory injunction, the complaint must be dismissed. *State ex rel. Evans v. Blackwell*, 2006-Ohio-4334 ¶ 19. 111 Ohio St. 3d 1; *State ex rel. Grendell v. Davidson*, 1999-Ohio-130, 86 Ohio St. 3d 629 634; *State ex rel. Youngstown v. Mahoning County Board of Elections*, 1995-Ohio-184, 72 Ohio St. 3d 69, 70. Regardless of the manner in which Relators have couched their petition and prayer for relief, they are actually seeking a declaratory judgment that Directive 2008-01 exceeds the Secretary's authority and they are asking this Court to enjoin its enforcement.

In *Evans*, supra, this Court refused to grant a writ of mandamus against then-Secretary Blackwell's decision to transmit an initiated statute to the Ohio General Assembly before all protests were completed in the common pleas courts. The Court recognized that what Evans really sought was a declaratory judgment that the Secretary's actions violated Ohio law and a prohibitory injunction against the clerks in the General Assembly from keeping the initiated statute on their rolls. *Evans*, 2006 Ohio 4334 at ¶¶ 17-19. The type of relief sought in *Evans* is identical to the relief the Relators seek in this case. Relators in reality want this Court to issue a declaratory judgment that the Secretary of State ordered Union County to maintain a certain type of voting system accompanied by prohibitory injunction enjoining her from enforcing the requirements of Directive 2008-01. Regardless of how Relators couch their relief, it is clear that they are asking this Court to exercise original action jurisdiction in a declaratory judgment case. As a result, this Court should reject their request on the basis of its subject matter jurisdiction.

B. A Writ of Prohibition Is Inappropriate Because Secretary of State Brunner Has Not Exercised Judicial Or Quasi-Judicial Authority.

This Court has recognized that prohibition should only be used to control judicial or quasi-judicial actions. *State ex rel. Burech v. Belmont County Board of Elections* (1985), 19 Ohio St. 3d 154, 155. Quasi-judicial power is "the power to hear and to determine controversies between the public and individuals which require a hearing resembling a judicial trial * * *. And it is only when that sort of power has been usurped by an administrative officer that he is amenable to the writ of prohibition." *State ex rel. Hensley v. Nowak* (1990), 52 Ohio St. 3d 98, 99, citing *State ex rel. Methodist Book Concern v. Guckenberger* (1937), 57 Ohio App. 13, 16-17, *aff'd.* (1937), 133 Ohio St. 27.

Thus, this Court has rejected a request for a writ of prohibition in a case concerning an administrative officer's search of a liquor permit holder on the basis of such an action not being

the exercise of quasi-judicial authority. See *Hensley*, supra. This Court recognized that the execution of search warrants is so quintessentially executive in nature that even the judge who participates in one acts as an adjunct law enforcement officer, not as a judicial officer. *Id.* Similarly, in elections matters where this Court has granted a writ of prohibition, it has been *after* a board of elections held a quasi-judicial hearing to determine whether a particular candidate was qualified for the ballot. See, e.g., *State ex rel. Craig v. Scioto County*, 2008-Ohio-706.

In the case at bar, Secretary of State Brunner has not exercised judicial or quasi-judicial authority, nor has any type of judicial or judicial-like proceeding occurred. Instead, the Secretary simply issued a directive concerning ballot supplies on election day pursuant to her executive authority as Ohio's chief elections official. Her directive is clear that in case a person wants to vote a paper ballot on election day, they should be given a paper ballot. Her action was not quasi-judicial. The Relators appear to admit as much in alleging that the Secretary is imposing a voting system on Union County. Although their allegation is completely false – since the Union County Board of Elections has already decided to implement both an electronic voting system and a central count voting system for use in the precincts on election day – an order by a secretary of state to use a particular voting system would be an executive in nature, not judicial or quasi judicial. Secretary of State Brunner did not exercise either judicial or quasi-judicial authority when she issued Directive 2008-01. This Court should dismiss Relators' petition on this basis.

C. This Court Lacks Jurisdiction Over This Case Because Relators Are Simply Trying To Appeal An Adverse Decision Of The Franklin County Common Pleas Court Directly To This Court.

This Court has long ago decided that it does not have the ability to hear direct appeals from common pleas courts unless the constitution provides for such a mechanism. See, e.g.,

Hoffman v. Staley (1915), 92 Ohio St. 505. The Union County Board of Commissioners filed a lawsuit against the Secretary of State in the common pleas court claiming that she lacked the legal authority to issue Directive 2008-01. It lost that lawsuit when the court determined that the Board lacked standing and had failed to name all necessary parties as required by the declaratory judgment statute. The Board could have filed an appeal in the Tenth District Court of Appeals and asked the appellate court to expedite the appeal, but the Board chose not to. Instead, it has attempted to effectively appeal that decision directly to the Supreme Court of Ohio by filing this case. This Court should reject the Board's invitation to directly review a decision of the Franklin County Common Pleas Court and should dismiss this case.

III. Relators Are Not Entitled to a Writ of Prohibition.

Even if the Court were to find that Relators are not barred by laches from bringing this suit, and have brought a proper original action within the Court's jurisdiction, the Court should deny Relators' petition for a writ of prohibition because Relators fail to establish the elements for that relief: (1) that the Secretary exercised quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that no other adequate remedy exists in the ordinary course of law. *State ex rel. Brady v. Blackwell*, 2006-Ohio-5752, ¶ 27, 112 Ohio St.3d 1. As set forth above, the Secretary's issuance of Directive 2008-01 involved no exercise of quasi-judicial power, and Relators have an adequate remedy at law in the form of an expedited appeal to the Tenth District Court of Appeals. See Part II.B and C.

Furthermore, Relators are not entitled to a writ of prohibition because they cannot show that Directive 2008-01 was an unlawful exercise of the Secretary's power. Ohio elections law simply does not support Plaintiffs' contention that the Secretary of State has acted outside the scope of her authority in issuing Directive 2008-01. The Secretary of State is the State's chief

elections official. R.C. 3501.04 and 3501.05. As such, the Secretary retains broad powers and authorities regarding the “conduct of elections as prescribed in Title 35 of the Revised Code.” R.C. 3501.04. The Secretary is authorized to issue instructions by directives and advisories to members of the boards as to the proper methods of conducting elections. R.C. 3501.05(B) and (C). The Secretary may also “determine and prescribe the forms of ballots, cards of instructions, pollbooks, tally sheets and certificates of election,” R.C. 3501.05(G), and “compel the observance by county election officers of the requirements of election laws.” R.C. 3501.05(M). Ohio courts have also recognized the authority of the Secretary of State to direct the boards in administering elections. *State ex rel. Donegan v. Cuyahoga County Bd. of Elections* (2000), 136 Ohio App.3d 589, 596. All boards of elections must follow those directions so long as the directives are not in conflict with other provisions of state law. *State ex rel. White v. Franklin County Board of Elections* (1992), 65 Ohio St.3d 5, 8.

There is no merit to Plaintiffs’ contention that the Directive goes beyond the Secretary’s authority by requiring the Board to adopt a new voting system in violation of R.C. 3506.02. As set forth previously, the Board of Elections already authorized the use of two different voting systems within the county. Testimony of Hook, attached as Respondent’s Exhibit C, Vol. III, at 148. While the Board uses the DRE system as the Board’s primary system for Election Day voting, the Board has also authorized the use of central count optical scans to count provisional, absentee, and curbside ballots. In issuing Directive 2008-01, the Secretary did not proscribe a new voting system. Rather, she exercised her lawful authority to issue instructions and advisories to the boards of election on the use and production of ballots on election day.

R.C. 3506.02 and Attorney General Opinion No. 2005-06 -- cited by Relators in paragraphs 7 and 13 of their Petition – are completely inapplicable to this case and cannot serve

as a basis for finding that Secretary of State Brunner exceeded her authority when she issued Directive 2008-01. By its own terms, R.C. 3506.02 applies to voting machines, marking devices, and automatic tabulating equipment. These are defined statutory terms. R.C. 3506.01 defines “marking device” as “an apparatus operated by a voter to record the voter’s choices through the piercing or marking of ballots enabling them to be examined and counted by automatic tabulating equipment.” R.C. 3506.01(A). “Automatic tabulating equipment” is “a machine or electronic device, or interconnected or interrelated machines or electronic devices, that will automatically examine and count votes recorded on ballots.” R.C. 3506.01(C). Likewise, “voting machines” are defined as “mechanical or electronic equipment for the direct recording and tabulation of votes.” R.C. 3506.01(E).

When the Attorney General issued Opinion 2005-06, he was addressing the question of whether the Secretary of State had the power to unilaterally order boards of elections to purchase and use a specific type of voting machine or automatic tabulating equipment. Directive 2008-01, which requires boards of elections to provide paper ballots to those voters on election day who wish to vote in that manner, does not in any way implicate either R.C. 3506.02 or Opinion 2005-06. Directive 2008-01 concerns the distribution and use of ballots. A “ballot” is defined as “the official election presentation of offices and candidates, including write-in candidates, and of questions and issues, and the means by which votes are recorded.” R.C. 3506.02(B). By Relators’ own admission, the paper ballots supplied at precincts pursuant to Directive 2008-01 do not meet the legal definition of “voting machines,” “marking devices, or automatic tabulating equipment” in R.C. 3506.02. See Plaintiffs’ Answer to Defendant’s Request for Admission Nos. 1, 2, and 3, attached as Respondent’s Exhibit A, Vol. I., at D-7 to D-8. The Commissioners also admitted that R.C. 3506.02 applies only to “voting machines,” “marking devices,” and

“automatic tabulating equipment,” as those terms are defined in R.C. 3506.01, and not to ballots. Id., No. 5 and 6, at D-8.

The Secretary of State has been given the specific authority to give instruction to boards of elections concerning the use of polling place supplies and “[t]he board of elections shall follow the instructions and advisories of the secretary of state in the production and use of polling place supplies.” R.C. 3501.30(B). Ballots are polling place supplies and boards are specifically instructed to provide “each polling place the necessary ballot boxes, official ballots, cards of instructions, registration forms, pollbooks or poll lists, tally sheets, forms on which to make summary statements, writing implements, paper, and all other supplies necessary for casting and counting the ballots and recording the results of the voting at the polling location.” R.C. 3501.30(A). Since OAG Opinion 2005-06 does not apply to ballots and RC 3510.30 specifically allows the Secretary of State the authority to instruct boards in the proper production of polling supplies including ballots, it is clear that OAG Opinion 2005-06 cannot be a basis in finding Directive 2008-01 exceeds the Secretary of State’s powers.

This conclusion is further strengthened by examining the responsibilities of the local boards of elections. Boards of elections are independently obligated to “[c]ause the polling places to be suitably provided with voting machines, marking devices, automatic tabulating equipment, stalls, **and other required supplies.**” R.C. 3501.11(I) (emphasis added). Not only must the boards provide the previously defined voting machines, marking devices or automatic tabulating equipment at each precinct, the board must also provide other require supplies such as ballots. Unlike the directive of a previous Secretary of State which went directly to the purchase and use of automatic tabulating equipment, Directive 2008-01 merely deals with the providing an

adequate supply of polling place supplies, in this case, ballots. Thus, R.C. 3506-02 and OAG Opinion 2005-06 are inapplicable to the legal discussion of this case.

There is simply no support in Ohio law for Relators's contention that Directive 2008-01 exceeds the Secretary of State's authority. Accordingly, because Relators fail to establish any of the three elements for a writ of prohibition, the Court should deny Relators' petition for relief.

IV. Relators Lack Standing to Bring This Action.

Before considering the merits of Relators' claim, the Court must engage in a preliminary inquiry as to Relators' standing to bring this action. See *Cuyahoga Cty. Bd. of Commrs. v. State*, 2006-Ohio-6499, ¶ 22, 112 Ohio St.3d 59. As a mandatory inquiry, the Court must consider "whether a litigant is entitled to have a court determine the merits of the issues presented." *Id.*, citing *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320. The concept of legal standing is based on the principle that courts should decide only cases or controversies between litigants whose interests are adverse to each other and should refrain from giving advisory opinions "to avoid the imposition by judgment of premature declarations or advice upon potential controversies." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14. Therefore, in order to have standing to bring a claim, Relators must allege a "**direct and concrete injury** that is in a manner or degree different from that suffered by the public in general." *Cuyahoga Cty. Bd.*, 2006-Ohio-6499, at ¶ 22 (emphasis added).

The doctrine of standing requires the party seeking relief to "allege[] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 321 quoting *Baker v. Carr* (1962), 369 U.S. 186, 204. Requiring parties to establish standing to sue ensures that "the

dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution....” *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732. Thus, the standing requirement prohibits the “use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums.” *Racing Guild of Ohio*, 28 Ohio St.3d at 321.

Applying these well-settled standards, Relators lack standing to bring this action because the relief they request, even if granted, would not prevent the Board of Elections from complying with Directive 2008-01. Therefore, Relators fail to bring a controversy capable of judicial resolution. The Union County Board of Commissioners also lacks standing to bring this extraordinary action because it has failed to allege a specific injury to the County Commissioners resulting from the issuance of Directive 2008-01. Finally, Relator Parrott lacks standing to bring this action either in his capacity as a member of the Board of Elections or in his individual capacity as a taxpayer.

A. Relators lack standing for failure to bring a justiciable controversy capable of judicial resolution.

As a basic requirement for any lawsuit, Relators must establish that they suffered an injury capable of adjudication or judicial resolution. See *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14 (a court can only decide cases or controversies between litigants whose interests are adverse to each other and must refrain from giving advisory opinions); *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732 (parties must establish standing to sue so that “the dispute sought to be

adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution....”).

Even if this Court were to grant the relief requested by Relators, the purported controversy over Directive 2008-01 would not be resolved because the Board of Elections has not been named as party to this action. The Board of Elections has a statutory duty to comply – and, in fact, is in the process of complying – with the Directive. As demonstrated at trial, the Board of Elections has already placed an order for ballots in compliance with the Secretary’s Directive. The Board of Elections has ordered 5,300 paper ballots, half of which are designated for use in the precincts on election day. Testimony of Parrott, *supra*, at 79; Ballot order form, Respondent’s Exhibit A, Vol. I, at F-1. The Board of Elections has voted to comply with the minimum requirements of the directive, and has hired poll workers for the primary election. Moots Affidavit, ¶¶ 19, 20, 32, attached as Respondent’s Ex. D, Vol. IV. The majority of those pool workers have already been trained. *Id.* at ¶ 32. In effect, Relators seek an advisory ruling on the legality of the Directive that would not prevent the Board of Elections from carrying out the Directive’s provisions. Therefore, since Relators have failed to assert an injury that can be redressed or adjudicated in the absence of the Board of Elections, Relators lack standing to bring this action.

B. The Union County Board of Commissioners lacks standing to bring an action in the absence of any injury to the Board itself.

Additionally, the Board of Commissioners lacks standing for failure to demonstrate another threshold requirement of standing – a direct and particularized injury. The Board asserts that Directive 2008-01: (1) interferes with its purported authority under R.C. 3506.02 to select Union County’s voting system, Petition at ¶¶ 7, 13, and (2) infringes on its purported authority to

direct the expenditure of county funds, Petition at ¶ 16. However, Ohio law and the facts of this case show that neither contention has any merit.

First, Directive 2008-01 does not infringe on the Commissioners' purported authority to select the county's voting system. It is true that Union County uses DREs as its primary voting system. But, prior to the issuance of the Directive, Union County already had in place a secondary voting system that used a central count optical scanner for the tabulation of provisional, absentee, and curbside ballots. The Directive does not require the implementation of a new voting system – it simply requires the Board of Elections to provide additional paper ballots similar to those that have already been used in Union County and to count those ballots using the tabulating scanner Union County already uses.

Second, the Directive does not intrude on the Board's statutory authority in R.C. 3506.02 regarding voting equipment. R.C. 3506.02 provides that either the board of elections or the board of county commissioners upon recommendation of the board of elections may adopt "voting machines, marking devices, and automatic tabulating equipment" for use in any county election. R.C. 3506.02(A) and (B) (emphasis added). However, the Board of County Commissioners admitted in the Franklin County Common Pleas Court proceedings that paper ballots supplied at precincts pursuant to Directive 2008-01 do not meet the legal definition of "voting machines," "marking devices, or automatic tabulating equipment" in R.C. 3506.02. See Plaintiffs' Answer to Defendant's Request for Admission Nos. 1, 2, and 3, attached as Respondent's Exhibit A, Vol. I., at D-7 to D-8. The Commissioners also admitted that R.C. 3506.02 applies only to "voting machines," "marking devices," and "automatic tabulating equipment," as those terms are defined in R.C. 3506.01, and not to ballots. *Id.*, No. 5 and 6, at D-8.

Furthermore, the Board of County Commissioners cannot set forth any evidence showing that it **in fact** adopted the voting systems used in Union County. It was the Union County Board of Elections, and not the County Commissioners, who approved and adopted both the use of DREs as the county's primary voting system and central count optical scan ballots as the county's secondary voting system. Union County Board of Elections Meeting Minutes (Sept. 6, 2005), attached as Respondent's Exhibit A, at L-3 to L-4. Pursuant to R.C. 3506.02(A), the Board of Elections exercised its unilateral authority to adopt both voting systems. No approval from the County Commissioners was sought or needed. The Commissioners merely paid for the system already adopted by the Board of Elections. Therefore, Relator Board of Commissioners cannot demonstrate that the Directive infringes on the Commissioners' authority to adopt the county's voting system, when in fact, that decision was made by the Board of Elections.

In an attempt to overcome its problems with standing, the Relator Board alleges that R.C. 305.12 confers standing on the Board of County Commissioners to bring this action. Petition, ¶ 2. That provision states that, "The board of county commissioners may sue and be sued, and plead and be impleaded, in any court. It may bring, maintain, and defend suits involving an injury to any public, state, or county road, bridge, ditch, drain, or watercourse in the county with respect to which the county has the primary responsibility to keep in proper repair, and for the prevention of injury to them." R.C. 305.12. However, Relators' reliance on this statute fails for several reasons. Even if the County Commissioners could assert a cause of action under R.C. 305.12, they are still required to meet the traditional requirements of standing – a particularized injury that is capable of judicial resolution. The statute confers upon the board of county commissioners the status of personhood – i.e. the board of commissioners is "a quasi corporate body, having the authority to sue and be sued as such, and to enter into contracts and obligations

within the scope of their duties duly conferred by law.” *Franklin County v. Gardiner Sav. Inst.*, 119 F. 36, 45 (6th Cir. 1902). And as such, the statute has been applied to determine whether a board of county commissioners can be held liable for the negligent maintenance of roadways and/or bridges. See., e.g., *Ruwe v. Bd. of Cty. Commsrs. of Hamilton Cty.* (1986) 21 Ohio St.3d 80; *Ditmyer v. Bd. of County Commsrs. of Lucas Cty.* (1980), 64 Ohio St.2d 146. However, like any other person or entity who seeks to file suit, a board of commissioners must still meet the requirements of standing.

Finally, to the extent that the Board of County Commissioners asserts standing to bring this claim because it controls the county’s purse strings, this Court has held that elections are autonomous and independent from control by the county commissioners. In the case of *State ex rel. The Columbus Blank Book Mfg. Co. v. Ayres* (1943), 142 Ohio St. 216, the Court held that members of the Boards of Elections act under direct control of and are answerable only to the Secretary of State in his or her capacity as chief election officer of the state. *Id.*, paragraph 2 of syllabus and 222. The Board of Elections performs no county functions and its members are not county officers. *Id.* Thus, because the Board of Elections is not a county unit, the Board was not required to obtain a certificate of approval from the county’s fiscal officer for the purchase of elections supplies. *Id.* Notably, the Court recognized that placing control of elections in the hands of county officers “would do violence to the manifest intent as well as the plain language” of Constitutional provisions regarding elections. *Id.* at 222. See also *State ex rel. Ruggles v. Howser*, 1988 Ohio App. LEXIS 1678, at *6 (“The independence of the county board of elections to effectively and efficiently conduct public elections is so fundamental to the right to vote that political maneuvering in any form which might in any way compromise that independence cannot be tolerated.”); Attorney General Op. No. 84-091, at 1-2 (“As a creature of

statute, a board of county commissioners has only that authority which is expressly granted by statute” and thus has no authority to require the board of elections to use a standard employment form for part-time employees). In light of these authorities recognizing the important state function served by the Board of Elections for the administration of fair elections, there is no support for Relators’ assertion that they have authority to prevent the implementation of Directive 2008-01.

Therefore, in the absence of any particularized injury to the Board of County Commissioners that is capable of judicial resolution or redressability, the County Commissioners simply lack standing to bring this action.

C. Relator Parrott lacks standing to bring this action in his capacity as a member of the Board of Elections.

Relator Parrott argues that he has standing to file this action on the basis of his membership on the Union County Board of Elections. See Relators’ Petition, ¶ 1. However, in the absence of any particularized or direct injury to himself, Relator Parrott’s status as a member of the Board of Elections does not automatically confer standing to file this lawsuit on behalf of the Board of Elections or other parties. See, e.g., *Baird v. Norton* (6th Cir. 2000), 266 F.3d 408, 410-11 (plaintiffs’ status as Michigan state legislators was not sufficient to give standing to sue U.S. Secretary of Interior); *Bender v. Williamsport Area School Dist.* (1986), 475 U.S. 534, 544 (school board member lacked standing to “step into the shoes of the Board” and invoke its right to appeal).³

The case of *Bender* before the U.S. Supreme Court is particularly instructive. That case involved an appeal filed by one individual school board member both in his individual capacity

³ While these cases examine Article III standing in federal courts, the requirement of a personal injury that is particularized and concrete for standing is adopted by both federal and Ohio courts.

and in his official capacity as a board member. The board member filed this appeal despite the fact that he was the lone dissenter in a decision by the other eight members of the board to forego an appeal. *Id.* at 544. The Court held that the appellant's status as a school board member "does not permit him to step into the shoes of the Board" and file an appeal on its behalf. *Id.* The Court noted that the outcome might be different if, for example, "state law authorized school board action by unanimous consent," or if he had voted with a majority of board members. *Id.* at 545, n.7. However, in the absence of statutory authority or collegial consent, the school board member could not unilaterally file the lawsuit. As a general matter, "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." *Id.* at 544.

In the present case, Relator Parrott has unilaterally filed this action in his capacity as a Board of Elections member without the consent of his fellow members. In fact, the Board of Election declined to file this or any lawsuit against the Secretary of State regarding Directive 2008-01. Moots Affidavit, ¶¶ 11, 19, attached as Respondent's Ex. D, Vol. IV. Parrott has filed this action despite the fact that the Board of Elections voted to comply with the Directive and forego any challenge to the authority of the Secretary. *Id.* at ¶ 19.

Relator Parrott contends that legal action against the Secretary by the Board of Elections regarding Directive 2008-01 is an impossibility because any vote would proceed on party lines with the Secretary casting the tie-breaking vote. See Affidavit of Parrott, at ¶ 5, attached as Exhibit A to Relators' Petition. Therefore, Relator draws the conclusion that he must act in their stead to file this action. However, Parrott does not have standing to file a lawsuit based on the fact that he lost a vote and disagrees with the outcome. See *Baird*, 266 F.3d at 411. In the absence of any individualized injury or abridgment of his legal rights as a board member, Relator Parrott cannot assert standing to bring this action.

D. Relator Parrott lacks standing to bring this action in his individual capacity as a Union County taxpayer.

Relator Parrott also lacks standing to file this action as a Union County taxpayer, as asserted in Relators' Petition, ¶ 10. As explained previously by this Court, a taxpayer action is only appropriate in those circumstances where one can demonstrate a particularized need or special interest different from that of all other Ohio citizens. *State ex rel. Dann v. Taft*, 2006-Ohio-3677, ¶¶ 9-10, 110 Ohio St.3d 252, citing *Racing Guild of Ohio, Local 304, Serv. Employees Internatl. Union, AFL-CIO v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, and *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366. In purporting to bring this action on behalf of the county as a taxpayer, Relator Parrott fails to show any particularized injury that he *personally* suffered due to the Secretary's Directive, or any special interest in the outcome different from other taxpayers. The mere fact that one pays the same taxes as all other citizens of the jurisdiction is insufficient, under Ohio law, to create standing for a taxpayer action. *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677, ¶ 9. The Petition does not even allege any special interest that might give rise to taxpayer standing.

Furthermore, although not asserted in Relators' petition, Parrott lacks standing to bring a statutory taxpayer suit pursuant to R.C. 309.13. That statute authorizes taxpayer suits as a fallback measure where the county prosecuting attorney, after receiving a written request to initiate a lawsuit, fails to bring suit or otherwise initiate proceedings. This Court has long held that "the giving of a written request to the prosecuting attorney and his refusal to bring suit are prerequisites or conditions precedent to the right of the taxpayer to maintain an action." *State ex rel. Houghton v. Pethtel* (1941), 138 Ohio St. 20, 23 (emphasis added). A party who fails to satisfy these prerequisites lacks standing to initiate a taxpayer suit under R.C. 309.13. *State ex rel. Associated Builders & Contractors, Cent. Ohio Chapter v. Jefferson County Bd. of*

Commissioners (1995), 106 Ohio App.3d 176, 182, appeal not allowed (1996), 74 Ohio St.3d 1499; *Wilson Bennett, Inc. v. Greater Cleveland Regional Transit* (1990), 67 Ohio App.3d 812, 818. Relators have not demonstrated that Parrott made the appropriate written request of the Union County Prosecutor. Even if he did, the Prosecuting Attorney did not refuse to file suit. To the contrary, the Union County Prosecutor filed suit *twice*. Thus, Relator Parrott has not met, and cannot meet, the statutory conditions for a taxpayer action.

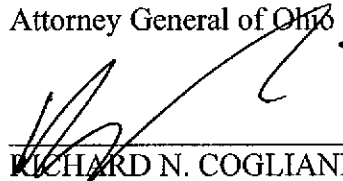
Therefore, in the absence of any individualized injury or special interest different from other taxpayers, Relator Parrott lacks standing to bring a claim against the Secretary for the county's purported expenditures for implementing Directive 2008-01.

CONCLUSION

For the reasons stated above, the Court should dismiss Relators' action on the grounds of procedural defects and on the merits of their writ for prohibition. First, the doctrine of laches bars Relators' claim on the basis of their untimely filing. The Court should also decline from hearing this matter for lack of subject matter jurisdiction to entertain a suit for injunctive or declaratory relief. In the alternative, should the Court consider the merits of Relators' action, the Court should deny Relators' petition for failure to establish any of the requisite elements of a writ of prohibition. Finally, Relators' petition should be dismissed because they lack standing to bring their claims.

Respectfully submitted,

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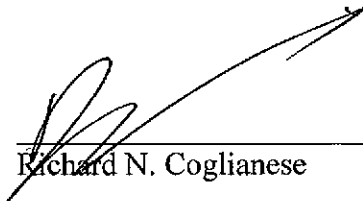
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Brief of Secretary of State Jennifer Brunner* was served via U.S. mail and/or email on February 28, 2008 upon the following:

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