

IN THE SUPREME COURT OF OHIO

State ex rel. Robert W. Parrott, et al. :
Relators, : Case No. 08-0410
: :
v. : Original Action in Prohibition
: And for Alternative Writ
Secretary of State Jennifer Brunner :
Respondent. :

RELATORS' MERIT BRIEF IN SUPPORT OF
WRIT OF PROHIBITION AND OTHER WRIT

David W. Phillips (0019966)
Union County Prosecuting Attorney
Counsel of Record

Melissa A. Chase (0042508)
Assistant Prosecuting Attorney
221 West Fifth Street, Suite 333
Marysville, OH 43040
(937) 645-4190, Telephone
(937) 645-4191, Facsimile
dphillips@co.union.oh.us

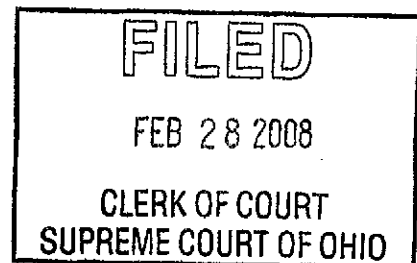
Luther L. Liggett, Jr. (0004683)
Maria J. Armstrong (0038973)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2399, Telephone
(614) 227-2390, Facsimile
lliggett@bricker.com
marmstrong@bricker.com

Co-Counsel for Relators

Marc Dann, Ohio Attorney General
Richard N. Coglianese (0066830)
Counsel of Record

Damian W. Sikora (0075224)
Pearl M. Chin (0078810)
Amy S. Brown (0079650)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215
(614) 466-2872, Telephone
(614) 728-7592, Facsimile

Counsel for Respondent



RELATORS' MERIT BRIEF IN SUPPORT OF
WRIT OF PROHIBITION AND OTHER WRIT

Table of Contents

Table of Authorities iii

Propositions of Law v

Introduction 1

Statement of the Case 2

Statement of Facts 3

Law and Analysis 8

 Standard of Review..... 8

 Argument 9

Proposition of Law 1. The Secretary of State is Without Authority to Issue
 or Enforce a Directive that Exceeds Her Statutory Authority and Usurps
 the Exclusive Authority Reserved to Counties to Select Voting Systems
 Pursuant to Ohio Revised Code §3506.02.....9

Proposition of Law 2. The Secretary of State is Without Authority to
 Enforce a Directive that Exceeds Her Statutory Authority and Usurps the
 County’s Discretion to Select A Ballot on Demand System Under Ohio
 Revised Code §3505.11(B)(1).13

Proposition of Law 3. The Secretary of State’s Authority to Issue
 Directives Cannot Supersede or Contradict the Law.15

Proposition of Law 4. Prohibition is Appropriate to Challenge a Secretary
 of State’s Vote to Break a Tie By A County Board Of Elections.17

Proposition of Law 5. Issues Related to A Directive that Affects All
 Elections Without Limitation Or Expiration Are Not Moot.23

Proposition of Law 6. An Alternative Writ Under Ohio Revised Code
 2503.40 is Appropriately Granted to Prohibit the Secretary of State From
 Enforcing A Directive That May Cause Hardship For the Boards of
 Elections Or Create Confusion Or Delay At the Polls On Election Day.27

Conclusion 29

Certificate of Service 30

Appendix:

- Exhibit A: Affidavit of Robert W. Parrott.
- Exhibit B: 1/2/08 Respondent's Directive 2008-01.
- Exhibit C: 1/8/08 Parrott request for Prosecuting Attorney's Opinion.
- Exhibit D: 1/8/08 Prosecuting Attorney's Opinion.
- Exhibit E: 2/5/08 Respondent's Tie-break Vote.
- Exhibit F: 1/15/08 Respondent's Letter to Hardin County Board of Elections.
- Exhibit G: 2/20/08 Letter from Respondent to Hardin County Board of Elections; and 2/22/08 Letter from Commissioner Crates.
- Exhibit H: Cost estimates for implementing Directive
- Exhibit I: 2/4/08, Union County Commissioners' Resolution not to fund.
- Exhibit J: Respondent's Letter Regarding Posters
- Exhibit K: Respondent's Directive 2008-21
- Exhibit L: Respondent's Advisory 2008-04
- Exhibit M: Decision, *Union County Comm'rs v. Sec'y of State* (February 19, 2008), 08-CVH-02-2032.
- Exhibit N: Transcript of Testimony, *Union County Comm'rs v. Sec'y of State* (February 19, 2008), 08-CVH-02-2032.
- Exhibit O: Statutory Authority:

Ohio Revised Code § 1.51	1
Ohio Revised Code §3203.40	2
Ohio Revised Code §3501.17	3
Ohio Revised Code §3501.30	7
Ohio Revised Code §3505.11	9
Ohio Revised Code §3505.181	11
Ohio Revised Code §3505.182	18
Ohio Revised Code §3505.183	23
Ohio Revised Code §3506.02	2

RELATORS' MERIT BRIEF IN SUPPORT OF
WRIT OF PROHIBITION AND OTHER WRIT

Table of Authorities

Case Law:

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)23

Ferency v. Austin, 666 F.2d 1023, 1025 (6th Cir. 1981)24

First National Bank of Boston v. Bellotti, 435 U.S. 765, 774 (1978)25

In re Huffer (1989), 47 Ohio St.3d 12, 546 N.E.2d 130.....26

In re Protest Filed with the Franklin County Board of Elections by Citizens for the Merit Selection of Judges Inc. (1990), 49 Ohio St.3d 102, 551 N.E.2d 15026

Moore v. Ogilvie, 394 U.S. 814, 816 (1969)23

Nemazee v. Mt. Sinai Medical Center (1990), 56 Ohio St.3d 109, 564 N.E.2d 47723

Norman v. Reed, 502 U.S. 279 (1992)23

Renne v. Geary, 501 U.S. 312, 319-20, 111 S.Ct.2331, 2338, 115 L.Ed.2d 288 (1991)25

Rosen v. Brown, 970 F.2d 169, 173 (6th Cir. 1992)24, 25

Smith v. Granville Twp. Bd. Of Trustees (1996), 77 Ohio St.3d 1215; 671 N.E.2d 12779

Socialist Workers Party v., 145 F.3d 1240, 1247.....23

State ex rel. Brown v. Butler Cty Bd of Elections, 109 Ohio St.3d 63, 2006-Ohio-1292, 846 N.E.2d 8, P 228, 9, 21

State ex rel. Brady v. Blackwell, 112 Ohio St. 3d 1, 2006-Ohio-5752, 857 N.E.2d 118120

State ex rel. Brady v. Blackwell, 2006 Ohio 5906, 2006 Ohio App. LEXIS 5863 (Ohio Ct. App., Cuyahoga County Nov. 6, 2006).....20

State ex rel. City of North Olmsted v. Cuyahoga County Bd. of Elections (2001), 93 Ohio St. 3d 529, 533, 757 N.E.2d 31417

State ex rel. Cleveland Electric Illuminating Co v. Cuyahoga Cty. Court of Common Pleas, 97 Ohio St.3d 69, 2002-Ohio-53128, 18

State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections (1997), 80 Ohio St.3d 302, 305, 1997 Ohio 315, 686 N.E.2d 23822

State ex rel. Dublin Sec. v. Ohio Div. of Sec., 68 Ohio St. 3d 426, 1994-Ohio-34014

State ex rel. Herman v. Klopfleisch (1995), 72 Ohio St.3d 581, 583, 651 N.E.2d 99519, 20

State ex rel. Plain Dealer v. Barnes (1988), 38 Ohio St.3d 165, 527 N.E.2d 807.....26

<i>State ex rel. Ruehlman v. Luken</i> (1992), 65 Ohio St. 3d 1, 4-5, 598 N.E.2d 1149	19, 20
<i>State ex rel. Smart v. McKinley</i> (1980), 64 Ohio St.2d 5, 6, 18 O.O.3d 128, 412 N.E.2d 393.	9, 22
<i>State ex rel. The Limited, Inc. v. Franklin Cty. Bd. of Elections</i> (1993), 66 Ohio St.3d 524, 526, 613 N.E.2d 634, 635	20
<i>State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections</i> (1995), 72 Ohio St.3d 289, 291- 292, 649 N.E.2d 1205	9, 22
<i>State ex rel. White v. Franklin Cty. Bd. of Elections</i> (1992), 65 Ohio St.3d 5, 598 N.E.2d 1152	20
<i>State ex. rel Ruggles v. Howser</i> , 1988 Ohio App. LEXIS 1678 (12 th Dist. 1988)	12
<i>State ex. rel. White v. Franklin County Bd. of Elections</i> (1992), 65 Ohio St.3d 5, 6-7, 598 N.E.2d 1152	17
<i>State, ex rel. Riley Construc. Co. v. East Liverpool City School Dist. Bd. of Educ.</i> (1967), 10 Ohio St. 2d 25, 27	8
<i>State, ex rel. Schaffer v. Board of County Comm'rs of Montgomery County</i> (1967), 11 Ohio App. 2d 132, 134	8
<i>Stauffer v. Miller</i> , (1992) 79 Ohio App. 3d 100, 105	12
<i>Suster v. Marshall</i> , 149 F.3d 523 (6 th Cir. 1998)	24, 25
<i>Tatman v. Carley</i> , 103 Ohio St. 3d 1445, 2004 Ohio 4798, 814 N.E.2d 1226	27
<u>Statutory Authority:</u>	
Ohio Revised Code §1.51	14
Ohio Revised Code §2503.40	1, 3, 9, 18, 27, 28
Ohio Revised Code §3501.17	11, 22, 23
Ohio Revised Code §3501.30	9, 14
Ohio Revised Code §3505.11	13, 14, 15
Ohio Revised Code §§3505.181 through 3505.183	15
Ohio Revised Code §3506.02	9, 11
<u>Other Authority:</u>	
Attorney General Opinion 2005-006.....	12, 13

RELATORS' MERIT BRIEF IN SUPPORT OF
WRIT OF PROHIBITION AND OTHER WRIT

Propositions of Law

Proposition of Law 1. The Secretary of State is Without Authority to Issue or Enforce a Directive that Exceeds Her Statutory Authority and Usurps the Exclusive Authority Reserved to Counties to Select Voting Systems Pursuant to Ohio Revised Code §3506.02.

Proposition of Law 2. The Secretary of State is Without Authority to Enforce a Directive that Exceeds Her Statutory Authority and Usurps the County's Discretion to Select A Ballot on Demand System Under Ohio Revised Code §3505.11(B)(1).

Proposition of Law 3. The Secretary of State's Authority to Issue Directives Cannot Supersede or Contradict the Law.

Proposition of Law 4. Prohibition is Appropriate to Challenge a Secretary of State's Vote to Break a Tie By A County Board Of Elections.

Proposition of Law 5. Issues Related to A Directive that Affects All Elections Without Limitation Or Expiration Are Not Moot.

Proposition of Law 6. An Alternative Writ Under Ohio Revised Code §2503.40 is Appropriately Granted to Prohibit the Secretary of State From Enforcing A Directive That May Cause Hardship For the Boards of Elections Or Create Confusion Or Delay At the Polls On Election Day.

RELATOR'S MEMORANDUM IN SUPPORT OF
WRIT OF PROHIBITION AND OTHER WRIT

I. INTRODUCTION

Relators, Robert W. Parrott, a member of the Board of Elections of Union County, Ohio, and the Union County Board of County Commissioners, bring this action in prohibition or, in that alternative, as an alternative writ necessary to enforce the administration of justice pursuant to Ohio Revised Code §2503.40. Relators bring this action as an expedited elections matter in order to seek immediate guidance and relief from this Court resulting from an unlawful usurpation of their statutory authority by the Ohio Secretary of State Jennifer Brunner (Respondent).

By exercising her quasi-judicial authority to break tie votes, Respondent has abused her discretion and, in clear disregard of statutes and applicable legal provisions, ordered Relators to implement and pay for a paper ballot on demand system in Union County. The Union County Board of Elections will be forced to implement a voting system that its counsel has determined is unenforceable, without the funding necessary to implement the system in the secure manner which it deems necessary, and under threats of removal if they do not comply with the Respondent's demands. In short, the Union County Board of Elections faces a "Catch 22" that has serious ramifications for Relators and, more importantly, the voters of Union County.

The integrity and security of the primary election, which is just five (5) days away, is jeopardized by Respondent's last minute, ill-conceived order to implement a

second voting system. The integrity of the Relator's statutory authority has already been usurped and Relator Parrott's position on the Board of Elections threatened. Only this Court can address the significant issues raised by this matter. Relators respectfully urge this Court to issue a writ prohibiting the Respondent from enforcing, through any means, her paper ballot voting system mandate.

II. STATEMENT OF THE CASE

This is an original action brought as an expedited election matter to challenge the unlawful implementation of Directive 2008-01 ("Directive") issued by Respondent. Union County carefully studied, purchased and implemented a Direct Recording Electronic (DRE) voting equipment in its elections. The Directive seeks to force Union County to also provide a paper ballot, Central Count Optical Scan (CCOS) system as an alternative way for voters to cast a ballot in the March primary election.

After obtaining advice from legal counsel that the Directive was unlawful, the Union County Board of Elections voted 2-2 on a motion not to follow the Directive. The vote was certified to the Respondent, who exercising quasi-judicial authority, ordered the Board of Elections to comply with her order. In doing this, Respondent acted contrary to law, and decided that the Union County Board of Elections must implement two elections systems.

The Directive exceeds the Secretary of State's statutory authority by: 1) requiring the County to adopt and implement a separate voting system, a decision which is

reserved to the exclusive statutory authority of the counties; and 2) requiring Relators Board of County Commissioners to provide funding which was not previously appropriated or allocated for the Board of Elections to implement the system.

Accordingly, a Writ of Prohibition must issue to prevent Respondent from requiring the county to operate two systems, and thus to prevent the unauthorized expenditure of funds as required by the Respondent. In the alternative, Relators seek an alternative writ pursuant to Ohio Revised Code §2503.40 necessary to enforce the administration of justice.

III. STATEMENT OF FACTS

The facts related to this case are relatively straightforward. Union County purchased Direct Recording Electronic ("DRE") voting equipment and has used it without problems at the polling places on Election Day. (Affidavit of Robert Parrott, Appendix Exh. A.) On January 2, 2008, Respondent issued Directive 2008-01 to all boards of elections using DRE equipment, including the Union County BOE. The Directive ordered that county boards of elections "must provide an optical scan ballot to any voter making such a request at his or her polling place on Election Day" as an "alternative means to casting a ballot on a DRE machine." (Directive, Appendix Exh. B.)

The Directive also arbitrarily ordered the board to purchase and provide a minimum number of optical scan ballots at each precinct determined "by multiplying the number of ballots cast at each precinct at a like election by 10%." This 10% number

was chosen arbitrarily by Respondent and was "not based on any, given anything in statute." (Transcript of Testimony, Appendix Exh. N, pp. 201, 202.)

The Directive requires the Union County BOE to provide secure ballot containers and voter privacy booths and to tabulate the vote at the Board of Elections on election night as part of the unofficial canvas. No other guidance is provided for training poll workers. The Directive does not provide instructions for distributing ballots or educating voters on undervotes or overvotes. The Directive does not instruct how paper ballots should be secured, accounted for, verified, or transported to be counted. (Directive, Appendix Exh. B.)

Respondent, realizing that the Directive would create additional costs, also requires the boards of elections to document and itemize those costs, so that Respondent can "compile them and seek federal or other reimbursement of these costs as funds may become available." (Directive, Appendix Exh. B.)

Relator Robert Parrott is a member of the Union County Board of Elections. On January 8, 2008, Relator Parrott requested an opinion from the Union County Prosecuting Attorney as to the lawfulness of the Directive. (Opinion Request, Appendix Exh. C.) On that same day, the Prosecuting Attorney provided the Union County BOE with an opinion that the Directive exceeded the Respondent's authority by requiring the use of an additional voting system. The prosecutor opined that the Directive nullified the choice of the Relator Union County Board of County Commissioners to purchase

and use the DRE equipment in an election. (Prosecutor Opinion, Appendix Exh. D.)

On January 9, 2008, relying upon the opinion of the Prosecuting Attorney, Relator Parrott moved that the Union County BOE not implement the Directive. The motion was seconded by board member Max Robinson and proceeded to a vote. Ultimately, the two Republican members voted in favor of the motion and the two Democrat members voted against the motion. The board was unable to break the tie vote, and the matter was submitted to the Respondent for a decision. (Affidavit of Robert Parrott, Appendix Exh. A.)

After considering the evidence submitted by both sides, the Respondent exercised quasi-judicial authority and ordered the Union County BOE to follow the Directive. Respondent opined that she has the authority to issue the Directive and found, without any evidence, that compliance with the Directive would not require the board to adopt a new voting system. (Respondent's Vote, Appendix Exh. E.)

Finally, the Respondent stated that, "Failure of a Board of Elections member to follow Directive 2008-01 is tantamount to insubordination and could be considered a violation of his or her oath." (Respondent's Vote, Appendix Exh. E.)

Similar threats of removal for voting in a manner contrary to her Directive were made against other boards of elections. For example, when the Hardin County Board of Elections voted not to comply with Directive 2008-01, Respondent threatened to remove each of them from office unless they changed their vote. (Respondent's Letter,

Appendix Exh. F.) Following this threat, the Hardin County BOE reversed itself and voted 3-1 in favor of following the Directive. Despite this reversal, on February 22, 2008, Respondent refused to reappoint the dissenting member James Crates to the Hardin County Board of Elections. Despite eight years of unblemished service on the Hardin County BOE, Respondent found that Mr. Crates was "incompetent" simply because he dissented and failed to vote in favor of following the directive¹. (Respondent's Letter to Hardin County, Crates Letter, Appendix Exh. G).

In light of the Respondent's actions, the Union County BOE requested that the staff evaluate the equipment, personnel needs and costs to Union County in order to comply with the Directive. The staff did so, and on a bi-partisan basis, determined that the cost to properly implement the Directive would be approximately \$68,000.00 \$68,000.00. Later estimates of cost showed the original estimate to be low, more recent estimates show the overall cost could exceed \$86,000.00. (Cost Estimates, Appendix Exh. H.) Union County BOE staff concluded and the BOE itself unanimously voted, that certain procedural safeguards had to be in place in order to implement the Directive in a proper and secure manner.

On February 4, 2008, Relator Board of Union County Commissioners, having already selected and purchased DRE voting equipment for use in Union County at a

¹ Since the motion carried 3-1, Mr. Crates's dissenting vote was of no legal importance. The Respondent's sole stated reasons for refusing to reappoint Mr. Crates was because he voted against her Directive.

cost of over \$550,000, and having appropriated money to use that equipment, resolved to appropriate to the Board of Elections only those funds necessary to conduct elections using the DRE voting system. The Board found that an additional expenditure of funds would be an "inappropriate, wasteful and unnecessary expenditure of Union County taxpayer money." (Board Resolution, Appendix Exh. I.)

Relator Board also directed the Union County Prosecutor to implement a lawsuit in their name against the Secretary of State to determine the lawfulness of the Directive and the County's duty to comply. That lawsuit was subsequently removed to the Franklin County Court of Common Pleas and later dismissed on procedural grounds on February 22, 2008. The Franklin County Court concluded that the Board of County Commissioners had no standing to bring the challenge, but that only the Board of Elections could do so. (Decision, Appendix Exh. M.)

The Board of Elections has since implemented an emergency plan to remain within allocated funds and do the best it can to comply with the Directive using cardboard, bags, tape and duct tape. (Affidavit of Robert Parrott, Appendix Exh. A.)

Perhaps in an attempt to fill in the some of the missing and ambiguous provisions in the Directive, Respondent has recently taken several steps to clarify the requirements of the Directive. On February 19, 2008, Respondent issued posters to the affected boards of elections to place in all precincts notifying voters of the availability of paper ballots. The posters contain no additional instructions to voters. (Respondent's

Letter, Appendix Exh. J.) On February 4, 2008, Respondent issued a Directive requiring voter instruction and a notice to be provided with the paper ballots. (Directive 2008-21, Appendix Exh. K.) February 26, 2008, Respondent issued Advisory 2008-04 instructing boards of elections that they could refuse to provide a paper ballot once a voter started the process to vote on a machine. (Respondent's Advisory, Appendix Exh. L.)

III. LAW AND ANALYSIS

A. Standard Of Review

To obtain a writ of prohibition, a relator must show: (1) that the entity against whom the writ is sought is exercising or about to exercise judicial power; (2) that the exercise of power is unauthorized by law; and (3) that denying the writ will result in an injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Cleveland Electric Illuminating Co v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312.

The remedy of prohibition is particularly appropriate where, as here, time is a controlling consideration in determining whether a relator has an adequate remedy at law. See *State, ex rel. Riley Construc. Co. v. East Liverpool City School Dist. Bd. of Educ.* (1967), 10 Ohio St. 2d 25, 27; *State, ex rel. Schaffer v. Board of County Comm'rs of Montgomery County* (1967), 11 Ohio App. 2d 132, 134.

This Court has often held in election cases that "given the closeness of the election date * * *, relators lack an adequate remedy in the ordinary course of law"

because alternate remedies are not sufficiently speedy. *State ex rel Brown v. Butler Cty Bd of Elections*, 109 Ohio St.3d 63, 2006-Ohio-1292, 846 N.E.2d 8, P 22. See, generally, *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections* (1995), 72 Ohio St.3d 289, 291-292, 649 N.E.2d 1205; *State ex rel. Smart v. McKinley* (1980), 64 Ohio St.2d 5, 6, 18 O.O.3d 128, 412 N.E.2d 393.

In the alternative, Relators seek a writ pursuant to Ohio Revised Code §2503.40, which vests this Court with original jurisdiction to grant an alternative, other writ when necessary to enforce the administration of justice. *Smith v. Granville Twp. Bd. Of Trustees* (1996), 77 Ohio St.3d 1215; 671 N.E.2d 1277.

B. Argument

Proposition of Law 1. The Secretary of State is Without Authority to Issue or Enforce a Directive that Exceeds Her Statutory Authority and Usurps the Exclusive Authority Reserved to Counties to Select Voting Systems Pursuant to Ohio Revised Code §3506.02.

Directive 2008-01 exceeds the Respondent's statutory authority for two basic reasons. First, Respondent has no legal authority to order a county to adopt a voting system. Second, the Ohio Revised Code specifically reserves the option to provide paper ballots on demand to the Counties alone. This case, and the extent of Relator's authority, turns on a critical distinction between two terms: "polling place supply" and "voting system". The authority to issue Directives related to polling place supplies is vested in Respondent. Authority to choose a voting system, specifically a ballot on demand system, is reserved to the counties.

Respondent, in her tie breaking decision and now, argues that the Directive merely orders the counties to provide a "polling place supply," as permitted by Ohio Revised Code §3501.30(B). Respondent's argument that the impact of the Directive is limited to polling place supplies is misplaced. The Directive impacts a long and interrelated series of responsibilities that are more accurately described as a "voting system", and not a mere "polling place supply". If complying with the Directive were as easy as setting out a stack of paper ballots, then the ballots might be a mere supply.

It is either disingenuous or extremely ill conceived for Respondent to argue that the Directive simply requires that a polling place supply --paper ballots-- be purchased and made available. Clearly basic principles of operating a valid, efficient and secure election require much more. At least the Union County BOE thought so when it unanimously voted, among other things, to: train poll workers; implement systems for assuring that voters who requested paper ballots got the right one; take steps to account for all voted and unvoted ballots; secure the ballots at the precincts, in transit and at the board of elections; create systems for counting and accounting for paper ballots, and to purchase boxes for ballots and ballot stubs. In short, to implement a complete Central Count Optical Scan voting system.

In fact, Respondent's own witness undermines Respondent's repeated cry that the Directive only requires a polling place supply by testifying during the Franklin County proceedings that the Directive requires a second voting system. (Transcript of

Testimony, Appendix Exh. N, pp. 208, 209.) Directive 2008-01 does more than “simply” require counties to have paper ballots available. The Directive obligates the boards of elections, at the counties’ expense, to set up a separate voting system to run parallel with the DRE voting system previously selected by the Union County Board of Commissioners at the recommendation of the Board of Elections, and in the discretion of the County.

Perhaps because they are more involved, more expensive, and more significant to the voting process, “voting systems”, as opposed to supplies, are treated differently in the law. Ohio Revised Code §3506.02 sets forth three express statutory means for the adoption of voting systems, or voting machines, marking devices, and automatic tabulating equipment: (1) by the board of elections; or (2) by the board of county commissioners on the recommendation of the board of elections; or (3) by vote of the electors. Ohio Revised Code. Nothing in Ohio Revised Code §3506.02 or elsewhere in the Revised Code authorizes the Secretary of State to adopt a voting system or tabulating equipment for a County.

Relator Board of County Commissioners already purchased approximately \$500,000.00 worth of iVotronic DRE voting equipment. This voting equipment has been selected “for use” in the March 4, 2008 Primary Election. Respondent, through her Directive, attempts to override the Relator’s decision by directing the general use of optical scan and DRE voting equipment on Election Day, at the voter’s direction.

Respondent simply lacks this authority. Discretion over such matters is statutorily vested in counties for one simple reason: counties must pay for them. Ohio Revised Code §3501.17 provides that the counties must pay for the necessary and proper expenses of the boards of elections. "Necessary" expenses are those which satisfy a board of elections' statutory duty. *Stauffer v. Miller*, (1992) 79 Ohio App. 3d 100, 105. Commensurately, expenses for matters that are not grounded in statutory authority are not "necessary" expenses of a board of elections.

Where, as here, a board of elections has no appropriation for a certain activity, the board of elections may not proceed in hopes of being reimbursed at some point. It is axiomatic that political subdivisions cannot incur expenses beyond the fiscal appropriations available. Nor can a board of commissioners or the any other authority order a board of elections to exceed its budgetary appropriation. *State ex. rel Ruggles v. Howser*, 1988 Ohio App. LEXIS 1678 (12th Dist. 1988.) This is especially true where, as here, the statutory authority to support the expenditure is lacking. Yet Respondent unlawfully attempts to do just that.

Attorney General Opinion 2005-006 and the authorities cited therein directly answer the fundamental question posed in this case: Respondent does not have the authority to mandate a specific system. The following paragraph provides a compelling summary of the issue:

The county boards of election are bodies separate from the Secretary of State, with their own statutory powers and duties, including responsibilities that

require the exercise of discretion. See 2003 Op. Att'y Gen. No. 2003-036 at 2-298 (where board of elections is statutorily authorized to perform an act and is given no clear direction on how to perform it, the board has discretion to perform it in any reasonable manner that is consistent with statute); 2002 Op. Att'y Gen. No. 2002-025 at 2-169 (certain matters "are left to the discretion of the board of elections"). The Secretary of State is not empowered to make decisions on behalf of boards of elections in matters in which the responsibility for exercising discretion and making decisions is bestowed by statute upon the boards of elections. *Id* at 22, 23 emphasis added, citations omitted.

Union County already properly adopted, paid for, and implemented a voting system for use on Election Day. The Directive purports to require use of a different system and machine that the County does not currently use on Election Day and has not funded. As set forth in Attorney General Opinion 2005-006, this exceeds the Respondent's authority.

Proposition of Law 2. The Secretary of State is Without Authority to Enforce a Directive that Exceeds Her Statutory Authority and Usurps the County's Discretion to Select A Ballot on Demand System Under Ohio Revised Code §3505.11(B)(1).

Not only is authority over voting systems in general reserved to the counties, but the type of system mandated by the Directive is specifically and exclusively reserved to the discretion of the boards of elections by statute. The Directive requires that a paper ballot be provided upon request, or demand, of a voter. Respondent has not, and cannot, claim that the Directive does not call for ballots on demand.² A ballot on

² Patricia Wolfe, on behalf of the Respondent, explained that if a polling place ran out of ballots, they would need to print additional ballots on demand. (Transcript of Testimony, Appendix Exh. N, pp. 203.)

demand system is specifically referenced in the Revised Code and reserved to the counties: “A board of elections may choose to provide ballots on demand.” Ohio Revised Code §3505.11(B)(1), emphasis added.

The Ohio General Assembly expressly and clearly granted the decision-making authority and discretion to offer “ballots on demand” to the boards of elections, not to the Respondent. Nor can Respondent’s general “polling place supply” argument overcome the plain statutory provisions related to a ballot on demand system. Ohio Revised Code §3501.30(B) is a general provision relating to a broad category of “polling place supplies” and the basis for the Respondent’s purported authority. Revised Code §3505.11, on the other hand, specifically relates to “ballots on demand” and reserves that process to the authority and discretion of the counties.

It is a fundamental tenet of statutory construction that where a general statute and a specific statute regulate similar matters, the specific statute prevails. See e.g. *State ex rel. Dublin Sec. v. Ohio Div. of Sec.*, 68 Ohio St. 3d 426, 1994-Ohio-340. Ohio Revised Code § 1.51 provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails

Applying the Directive as the Respondent urges renders meaningless Ohio Revised Code §3505.11’s direction that “a board of elections may choose to provide ballots on demand.” The Ohio rules of statutory construction allow no such result.

Finally, the Respondent may argue that the Directive's impact is insignificant because counties already must handle paper provisional or absentee ballots in the same manner. Of course, creating a "minimal impact" has never been a recognized justification for exceeding statutory authority. Not only is the argument irrelevant, but it is misplaced. Providing paper ballots on demand is very different from providing a provisional ballot. Most significantly, there is statutory authority regulating provisional ballots. Ohio Revised Code §§3505.181 through 3505.183 spell out legislative authorization and procedures for provisional ballots. These statutes only provide authority for the Respondent to issue Directives consistent with those legislative enactments. The statutory foundation for other paper ballots (Ohio Revised Code §3505.11) specifically reserves discretion to the counties to implement those processes.

In addition, provisional ballots are not counted on election night, nor at the precincts. The Directive requires election night counting. Provisional ballots are secured in specially-designed envelopes that assure the integrity and secrecy of the ballot. The Directive provides no guidance on this matter. The Union County BOE determined that if it was forced to provide paper ballots it must also provide security for paper ballots; in its discretion, the board voted on a system to provide that security.

Proposition of Law 3. The Secretary of State's Authority to Issue Directives Cannot Supersede or Contradict the Law.

The authority to issue directives pursuant to Ohio Revised Code §3501.05(B) and (M) does not equate to an unbridled grant of authority to subvert the local control

granted by statute. To grant Respondent this kind of authority would be to render county board of elections into useless rubberstamps for the whims of a particular secretary of state. Neither the Ohio Constitution nor the Legislature have granted nor intended to grant Respondent that kind of authority. Respondent maintains that because she is entitled to issue Directives—they are legally enforceable. That logic is not only erroneous, but dangerous.

Directives that Respondent may issue must comply with all of the provisions of Title 35. While Ohio Revised Code § 3501.04 names Respondent as the chief elections officer of the state, that statute also states that Respondent only has “such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV [35] of the Revised Code.

The county boards of election are bodies separate from the Respondent, with their own statutory powers and duties, including responsibilities that require the exercise of discretion. For example, in 2003 Op. Att’y Gen. No. 2003-036 at 2-298, the Attorney General properly ruled that where a board of elections is statutorily authorized to perform an act and is given no clear direction on how to perform it, the board has discretion to perform that act in any reasonable manner that is consistent with statute. Here, boards of elections are given discretion to provide paper ballots. Nothing in the statute, or in the Directive for that matter, regulates how that process should be performed. As such, boards of elections have discretion how that duty is

carried out and the Respondent may not usurp that authority.

Respondent is not empowered to make decisions on behalf of boards of elections in matters in which the responsibility for exercising discretion and making decisions is bestowed by statute upon the boards of elections.

Boards of election were established on a county basis so that they could tailor their decisions and actions to the needs of individual counties. See *State ex rel. City of North Olmsted v. Cuyahoga County Bd. of Elections* (2001), 93 Ohio St. 3d 529, 533, 757 N.E.2d 314 (boards of elections are the local authorities that are best equipped to gauge compliance with election laws).

Respondent attempts to usurp the Relators' statutory authority over voting systems, to impede Relator's statutory discretion to provide ballots on demand, and interfere with Relator's discretion to carry out its statutory duties. Respondent's attempts to do so exceed her authority and cannot be permitted. Relators' compliance is only required with 'lawful orders finding their support in some section or sections'. *State ex. rel. White v. Franklin County Bd. of Elections* (1992), 65 Ohio St.3d 5, 6-7, 598 N.E.2d 1152. The Directive is not such an order. The Respondent cannot, by casting a tie-breaking vote in clear disregard of Ohio law, act as a one person legislature and grant herself that authority.

Proposition of Law 4. Prohibition is Appropriate to Challenge a Secretary of State's Vote to Break a Tie By A County Board Of Elections.

Respondent's Answer to the instant Complaint raises a number of defenses that

seek dismissal of the Complaint without a ruling on the merits. No doubt, Respondent will vehemently object to the instant action on a number of procedural grounds in her Memorandum as well. As is set forth in more detail below, Respondent's arguments are without merit and Relators urge this Court to consider the merits of this case and provide the relief they seek.

To say the least, this case presents a unique and egregious set of circumstances. Respondent has taken and continues to take a series of actions that exceed her authority and usurp the Relators' statutory authority and discretion. Worse still, Respondent seeks to enforce an unlawful Directive by threatening to remove Board Members who chose to exercise their own discretion to reach a conclusion that is inconsistent with hers. Surely, that type of activity is appropriately curtailed through a writ of prohibition or an alternative writ pursuant to Ohio Revised Code §2503.40 as needed for the administration of justice. Relators respectfully urge this Court to do just that: issue such a writ to secure the duties and discretions reserved to the counties and prohibit the Respondent from taking any action to enforce the Directive.

The elements of a proper writ of prohibition action are well established in law: (1) that the entity against whom the writ is sought is exercising or about to exercise judicial or quasi-judicial power; (2) that the exercise of that power is unauthorized by law; and (3) that denying the writ will result in an injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Cleveland Electric Illuminating Co*

v. Cuyahoga Cty. Court of Common Pleas, 97 Ohio St.3d 69, 2002-Ohio-5312. Each of those elements is met in the instant case.

Relators have satisfied the first requirement for securing a writ of prohibition because Respondent acted with quasi-judicial authority in several instances related to this matter. The Secretary's action of voting to "break a tie" of the Union County BOE and against the motion not to follow her Directive was quasi-judicial in nature and properly subject to a prohibition action.

Relators have satisfied the first requirement for securing a writ of prohibition because Respondent acted with quasi-judicial authority in several instances related to this matter. The Secretary's action of voting against the motion not to follow her Directive thereby breaking the tie of the Union County BOE was quasi-judicial in nature and properly subject to a prohibition action.

Ohio Courts have previously recognized that a writ of prohibition or other extraordinary writ is appropriately granted in cases involving a tie breaking vote by the Ohio Secretary of State. For example, in *State ex rel. Ruehlman v. Luken* (1992), 65 Ohio St. 3d 1, 4-5, 598 N.E.2d 1149, this Court said:

We have held that the Secretary of State's decisions, otherwise final, may be reviewed for "fraud, corruption, abuse of discretion or a clear disregard of statutes or court determinations." *State ex rel. Ferguson v. Brown* (1962), 173 Ohio St. 317, 320, 19 O.O.2d 227, 229, 181 N.E.2d 890, 893, overruled on other grounds *State ex rel. Saffold v. Timmins* (1970), 22 Ohio St.2d 63, 51 O.O.2d 95, 258 N.E.2d 112.

Similarly, in *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 583, 651

N.E.2d 995 this Court again examined a secretary of state's authority to break a tie vote at a board of elections. This Court concluded that a decision to break a tie, "like a decision of a board of elections, is subject to review in extraordinary actions to determine whether the Secretary of State engaged in fraud, corruption, abuse of discretion, or clear disregard of statutes or applicable legal provisions." *Klopfleisch*, at 583, citing *State ex rel. The Limited, Inc. v. Franklin Cty. Bd. of Elections* (1993), 66 Ohio St.3d 524, 526, 613 N.E.2d 634, 635; *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 598 N.E.2d 1149; *State ex rel. White*, supra at 5.

In *State ex rel. Brady v. Blackwell*, 112 Ohio St. 3d 1, 2006-Ohio-5752, 857 N.E.2d 1181, this Court examined a case where the court of appeals allowed a Relator to amend a complaint to include a prohibition claim in order to challenge the secretary of state's authority to break a tie by the board of elections. The Eighth District Court of Appeals held that although "the decision by the Secretary of State is not subject to appeal, it, like a decision from the board of elections, is subject to review in extraordinary actions to determine whether the Secretary of State engaged in fraud, corruption, abuse of discretion, or clear disregard of statutes or applicable legal provisions." *State ex rel. Brady v. Blackwell*, 2006 Ohio 5906, 2006 Ohio App. LEXIS 5863 (Ohio Ct. App., Cuyahoga County Nov. 6, 2006), citations omitted.

The court of appeals in *Brady* granted the writ of prohibition. This Court reversed, but did so based upon procedural grounds that are not at issue here. The

lower court's determination that a prohibition action was a proper vehicle to challenge the secretary of state's tie vote was tacitly approved by this Court. Accordingly, the decision by Respondent to interject her "tie-breaking" vote with the effect of requiring the adoption of a second voting system was a quasi-judicial act. The fact that Relator did not hold a formal hearing is of no import. Respondent considered evidence submitted by both sides of the issue and then rendered her decision to break the tie. That type of deliberative review of evidence and determination of the issues is appropriately considered to be quasi-judicial in nature. Moreover, the tie-breaking votes examined by this Court in the cases cited above did not involve such a hearing.

When Respondent acted to break the tie of the Union County BOE, she engaged in a quasi-judicial act, subjecting herself to a writ of prohibition upon satisfaction of the other two prongs of the test.

As to the second prong of the prohibition standard, Respondent's exercise of her power in this manner is unauthorized by law. As outlined above, voting to usurp Relators' authority and discretion constitutes an exercise of authority that is unauthorized by law. Respondent's clear disregard of statutes or applicable legal provisions is outlined in the sections above and need not be reiterated here.

Finally, denying the writ will result in an injury for which no other adequate remedy exists in the ordinary course of law. This Court has often found that "given the closeness of the election date in this expedited election case, relators lack an adequate

remedy in the ordinary course of law.” *State ex rel. Brown, supra at*, 66. See, also *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections* (1995), 72 Ohio St.3d 289, 291-292, 649 N.E.2d 1205; *State ex rel. Smart v. McKinley* (1980), 64 Ohio St.2d 5, 6, 18 O.O.3d 128, 412 N.E.2d 393. Relators assert the Secretary abused her discretion or clearly disregarded applicable law by ordering the implementation of another voting system. “An abuse of discretion implies an unreasonable, arbitrary, or unconscionable attitude.” *State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections* (1997), 80 Ohio St.3d 302, 305, 1997 Ohio 315, 686 N.E.2d 238.

Respondent may argue alternatively that Relators, or at least some Relators, have an adequate remedy at law because Relator Board could have appealed the decision issued by the Franklin County Court of Common Pleas. Of course, that does not address Relator Parrott’s concerns, nor does an appeal of that action constitute an adequate remedy at law. In addition to the issues cited above related to the imminent nature of the election, the Common Pleas Court action dismissed the case on procedural grounds. An appeal would have resulted in a reversal and remand for a decision on the merits. Such a procedure could not have resulted in any meaningful relief before the primary election.

Respondent might also argue that Ohio Revised Code § 3501.17 provides an adequate remedy at law in that it allows the Board of Elections to bring suit against the Board of County Commissioners to address a funding dispute. Again, in addition to

being an inadequate remedy because of the immediacy of the matter, R.C. 3501.17 cannot provide complete relief. That process focuses on funding and does not include, or presumably permit, a direct challenge to the validity of the Directive or a mechanism for reclaiming the statutory and discretionary authority that has been usurped by Respondent.

Potential litigation by the Union County BOE against the Respondent is no remedy. The Board of Elections has tied 2 – 2 on the question of whether bring an action against the Respondent to determine the validity of the Directive. It seems that Respondent cannot, ethically, vote to break that tie; nor is Respondent likely to vote to sue herself. Thus this potential vehicle, in addition to the timing concerns, this action would provide no adequate remedy. The law does not require a party to do a vain act. *Nemazee v. Mt. Sinai Medical Center* (1990), 56 Ohio St.3d 109, 564 N.E.2d 477.

In short, there is no adequate remedy at law available except the instant action.

Proposition of Law 5. Issues Related to A Directive that Affects All Elections Without Limitation Or Expiration Are Not Moot.

Respondent lists as a defense in her Answer that this issue is moot. However, “the burden of demonstrating mootness ‘is a heavy one.’” *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1247, quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This case, like many elections cases, falls squarely within the “capable of repetition yet evading review” exception to the mootness doctrine. See *Norman v. Reed*, 502 U.S. 279 (1992), *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Election cases often fall within this exception to the mootness doctrine because of the inherently brief duration of any election. There is a long line of authority applying the “capable of repetition yet evading review” exception in election cases. *See, e.g., Norman v. Reed*, 502 U.S. 279, 287-288 (action challenging objections to placement of new party on the ballot was not moot even though the election was over. The issue was one that was “capable of repetition yet evading review” because the parties could “generate a similar, future controversy subject to identical time constraints” if the constitutional issues were not resolved); *Suster v. Marshall*, 149 F.3d 523, 527(6th Cir. 1998) (action challenging judicial canons governing expenditure of funds in judicial campaigns was not rendered moot by occurrence of general election, as the controversy was one that was “capable of repetition yet evading review”) *Ferency v. Austin*, 666 F.2d 1023, 1025 (6th Cir. 1981) (case was not moot even though national political convention which was focus of the litigation had taken place. The controversy over conflicts between state law and national party rules concerning delegate selection was one that was “capable of repetition yet evading review”); *Rosen v. Brown*, 970 F.2d 169, 173 (6th Cir. 1992) (action brought by independent candidate seeking injunction compelling the state of Ohio to place designation “Independent” below the candidate’s name on the general election ballot was not moot because the candidate intended to run as an independent in future Ohio elections. The candidate was informed just three months prior to the election that the requested designation would not be placed under his name on the ballot).

This Court has held that an elections case is not moot where “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.” *Rosen v. Brown*, 970 F.2d 169, 173 (6th Cir. 1992) (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978)). Both circumstances are present at bar – Respondent, by issuing a directive of the magnitude of 2008-1 at the time she did so, has ensured that this case is not moot under the “capable of repetition yet evading review” exception. Relators do not have time to fully litigate the matter before the 2008 primary election, and there is a reasonable expectation that Relators, will be subject to the same Directive again.

As the 6th Circuit Court of Appeals put it in *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998):

The instant action was not filed until August, 1996, three months prior to the general election. Although the parties may have won their respective seats in that election, all have indicated that they intend to seek re-election. Given the short duration between the filing of this action and the general election, there is a “reasonable expectation” that these same litigants, in addition to any other potential candidates in a subsequent election, “would be subjected to the same [constitutional] action again.”

Id; see also *Renne v. Geary*, 501 U.S. 312, 319-20, 111 S.Ct.2331, 2338, 115 L.Ed.2d 288 (1991).

In the case at bar, Respondent issued Directive 2008-1 on January 2, 2008, a mere two months and two days before the March 4, 2008 Primary Election. Relators filed the

Petition for a Writ of Prohibition and Other Writ on February 22, 2008. Taking only the example of *Suster* into account, Relators have been provided little more than two-thirds the amount of time deemed appropriate to meet the standard for the “capable of repetition yet avoiding review” exception.

As the Directive applies to all elections forward, the matter is “capable of repetition yet evading review,” and provides an established exception to mootness. See, *In re Huffer* (1989), 47 Ohio St.3d 12, 546 N.E.2d 130; *State ex rel. Plain Dealer v. Barnes* (1988), 38 Ohio St.3d 165, 527 N.E.2d 807. In fact, even after the primary election is over, this controversy is still capable of repetition. See, *In re Protest Filed with the Franklin County Board of Elections by Citizens for the Merit Selection of Judges Inc.* (1990), 49 Ohio St.3d 102, 551 N.E.2d 150 (holding that a matter of constitutional and statutory interpretation which affects how boards of elections review certain petition signatures was not moot even after the election was held.)

Union County, and all counties affected by this Directive, will continue to face challenges related to this Directive in the General Election in November and in every election thereafter. This is true even if Union County complies, in whole or in part, with the Directive in any given election. The fact that Union County may be able to cobble together some level of compliance with the Directive at the primary election does not mean that all of the issues raised by the Directive have been addressed and are now moot. Relators urge this Court overrule arguments regarding mootness and reach the

merits of this important case.

Proposition of Law 6. An Alternative Writ Under Ohio Revised Code 2503.40 is Appropriately Granted to Prohibit the Secretary of State From Enforcing A Directive That May Cause Hardship For the Boards of Elections Or Create Confusion Or Delay At the Polls On Election Day.

Elections cases, and particular expedited elections cases, often present unusual circumstances that do not always fit neatly within one of the traditional writ actions. For the reasons cited above, Relators urge this Court to conclude that a writ of prohibition is appropriate. In the alternative, Ohio Revised Code §2503.40 vests this Court with original jurisdiction to grant an alternative, other writ when necessary to enforce the administration of justice. A case that involves an imminent election, and this case in particular, seems to be ripe for the issuance of a writ that will further the administration of justice. See, for example, *Tatman v. Carley*, 103 Ohio St. 3d 1445, 2004 Ohio 4798, 814 N.E.2d 1226.

Ohio Revised Code § 2503.40 states, in part, that “the supreme court when in session, and on good cause shown, may issue writs of supersedeas in any case, and other writs not specially provided for and not prohibited by law, when necessary to enforce the administration of justice.” Although infrequently used, this statutory procedure provides this Court with a vehicle for crafting a remedy that will provide Relators necessary relief.

There are significant questions and ambiguities related to the implementation of Directive 2008-01, if it must be implemented. The fact that the Respondent issued a

letter, posters, an Advisory, and a Directive in an attempt to clarify application of the Directive is a strong indication of that confusion. (See Appendix Exhibits J, K, L and attachments.)

The Franklin County Court of Common Pleas proceeding included testimony from a Board of Election member from Pickaway County that supports the need to issue a writ. The witness, who was called by Respondent in support of her case, testified that the Board would be modifying existing equipment to transport paper ballots. Explaining that the Pickaway Board of Elections will be placing voted paper ballots in vinyl coin bags lined with contact paper so that no one can see through them, the witness admitted that this procedure "was not the best solution." (Appendix Exhibit N, pp. 166-70.)

The resulting opinion from the Court instructed the Union County Board of Elections to "make do." (Opinion, Appendix Exh. M.) Relators concluded that they did not want to "make do" but wanted to run a secure, efficient election. The existing DRE machines used in Union County accomplish that goal. If forced to provide paper ballots, Union County should at least be given the opportunity to develop and properly fund a system that will allow it to provide all Union County voters with a secure and efficient voting process, regardless of which type of ballot is used.

Relators respectfully request that this Court issue a writ of prohibition or, in the alternative, a writ under Ohio Revised Code §2503.40 that prohibits enforcement of the

CONCLUSION

For the foregoing reasons, Relators request that this Court grant a writ of prohibition or alternative other writ, finding the Secretary of State without authority to implement a separate voting system in Union County, and such other relief as is appropriate.

Respectfully submitted,



David W. Phillips (0019966)
Union County Prosecuting Attorney
Melissa A. Chase (0042508)
Assistant Prosecuting Attorney
221 West Fifth Street, Suite 333
Marysville, OH 43040
(937) 645-4190, Telephone
(937) 645-4191, Facsimile
dphillips@co.union.oh.us

Counsel for Relators

Luther L. Liggett, Jr. (0004683)
Maria J. Armstrong (0038973)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2399, Telephone
(614) 227-2390, Facsimile
lliggett@bricker.com
marmstrong@bricker.com

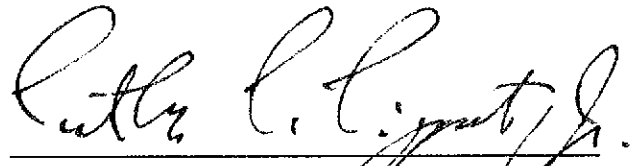
Co-Counsel for Relators

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Relators' Merit Brief was hand-delivered, this 28th day of February, 2008 upon the following:

Richard N. Coglianesse
Assistant Attorney General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215

Counsel for Respondent


Luther L. Liggett, Jr. (0004683)