

IN THE SUPREME COURT OF OHIO

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

Relators,

vs.

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

Respondents.

08-2206

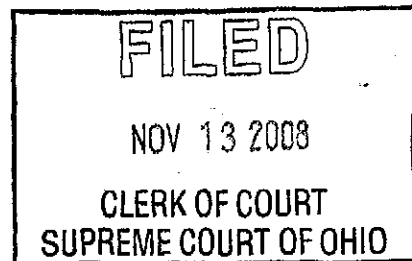
Case No. _____

ORIGINAL ACTION IN
MANDAMUS

COMPLAINT

John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900
zeiger@litohio.com

COUNSEL FOR RELATORS
DANA SKAGGS AND KYLE FANNIN



IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
DANA SKAGGS
676 Stewart Avenue
Columbus, Ohio 43206,

and

KYLE FANNIN
3070 St. John Ct., Apt. 6
Columbus, Ohio 43202,

Relators,

vs.

JENNIFER L. BRUNNER
SECRETARY OF THE STATE OF
OHIO,
180 East Broad Street
Columbus, Ohio 43215,

and

THE BOARD OF ELECTIONS OF
FRANKLIN COUNTY, OHIO
280 East Broad Street, Room 100
Columbus, Ohio 43215,

Respondents.

Case No. _____

ORIGINAL ACTION IN
MANDAMUS

COMPLAINT

1. This is an original action in mandamus seeking to compel Jennifer L. Brunner, Secretary of State of Ohio, and the Board of Elections of Franklin County, Ohio to meet their clear legal duty under Ohio statutes in determining the eligibility of provisional ballots cast in the November 4, 2008 election. No federal law claims are asserted; rather, Relators seek a writ requiring respondents to comply with the state law

statutory requirements of R.C. 3505.181, 3505.182, 3505.183 and 3505.18 in determining the eligibility of such provisional ballots to be counted. Relators require this Court's intervention because Respondent Brunner has issued erroneous, after-the-election interpretations of these statutes, reversing and countermanding her own pre-election directions that the disputed provisional ballots are not eligible to be counted. Relators are therefore entitled to a writ of mandamus correcting the misdirected instructions of the Secretary of State regarding the eligibility of the contested provisional ballots to be counted. State ex rel. Colvin v. Brunner, 2008 - Ohio - 5041, ¶ 20 (2008). Moreover, based on the erroneous, after-the-election change in interpretation of the Secretary of State, the members of the Respondent Board of Elections will tie when they vote on whether to count these challenged provisional ballots. R.C. 3501.11(X) provides that, upon a tie vote of the members of the Board of Elections, Respondent Brunner herself is authorized to "summarily decide the question" and her "decision shall be final." As such, Relators lack an adequate remedy in the ordinary course of the law to correct the misdirected interpretation of the Secretary of State even though they have a clear legal right to the relief they seek. A writ of mandamus should issue. State ex rel. Stokes v. Brunner, 2008-Ohio-5097 (2008).

JURISDICTION

2. This Court has jurisdiction of this original action in mandamus pursuant to Article IV, Section 2 of the Constitution of the State of Ohio and Chapter 2731 of the Ohio Revised Code.

PARTIES

4. Relator Dana Skaggs is a citizen of the State of Ohio and a Franklin County elector. Relator Skaggs voted in Franklin County, Ohio in the November 4, 2008 election and brings this action to assure that his vote is not diluted as a result of the misdirected instructions of the Secretary of State to count provisional ballots that are not lawful or valid under Ohio law.

5. Relator Kyle Fannin is a citizen of the State of Ohio and a Franklin County elector. Relator Fannin requested an absentee ballot for the November 4 election, but he never received it. He therefore voted a provisional ballot in the November 4, 2008 election. Relator Fannin brings this action to assure that his vote is not diluted as a result of the misdirected instructions of the Secretary of State to count provisional ballots that are not lawful or valid under Ohio law.

6. Respondent Jennifer L. Brunner is the duly elected and acting Secretary of State of Ohio.

7. Respondent Board of Elections of Franklin County, Ohio is the duly established and acting election authority for Franklin County, Ohio pursuant to R.C. 3501.06.

FACTUAL ALLEGATIONS

8. The unofficial returns of the November 4, 2008 election (the "Election") reflect that Republican Steve Stivers leads Democrat Mary Jo Kilroy by nearly 400 votes in the election for the 15th Congressional District seat; Democrat Nancy Garland leads Republican Jim McGregor by 783 votes in the 20th House District race; and, Democrat Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19th House District (the "Undecided Races"). The outcome of each of these three elections may be determined by the provisional ballots the Franklin County Board of Elections is now reviewing for eligibility to be counted, which process, as of the date of this complaint, is not yet complete. Affidavit of Matthew M. Damschroder ¶ 2 ("Affid. ¶ __").

9. Over 27,000 provisional ballots were cast in Franklin County in the Election. A voter may cast a provisional ballot if the voter's name does not appear in the poll list; the voter fails to provide required identification at the polling place on the day of the Election; the voter previously requested an absentee ballot; and for other reasons specified in R.C. 3505.181. Affid. ¶ 3.

10. If a voter seeks to cast a provisional ballot, the voter is provided a Provisional Ballot Application prepared by the Board of Elections and a ballot. A true and accurate original of the Provisional Ballot Application used by the Board of Elections in the Election is attached to the Damschroder Affidavit as Exhibit A. The Provisional Ballot Application specifically requires that the voter fill in her name and signature on the provisional voter affirmation required by R.C. 3505.183(B), and fill in the verifying identification information required by R.C. 3505.18 or, alternatively, sign the identification verification affirmation required by R.C. 3505.18(A)(4). The Provisional

Ballot Application is printed on an envelope into which the voter inserts her provisional ballot, which the voter then seals to assure the secrecy of her vote. Affid. ¶ 4.

11. The Board of Elections, upon receipt of the Provisional Ballot Application, is mandated to use the information required to be completed by the voter on the Application to determine the eligibility of the voter to cast a provisional ballot. The voter-provided information is cross-checked against the information of the Board of Elections, and of other county Boards of Elections, to determine the eligibility of the provisional ballot voter. Affid. ¶ 5.

12. Upon completion of the review of a Provisional Ballot Application, if the provisional ballot voter is determined by the Board of Elections to be eligible to vote, the envelope on which the Provisional Ballot Application is printed is opened and the ballot is removed. To assure the secrecy of the provisional voter's ballot choices, the Provisional Ballot Application envelope is then separated from the ballot it contains and the ballot is then commingled with all other provisional ballots cast in the Election. As a consequence, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of any particular provisional voter, rendering impossible any after-the-fact adjudication of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional voter. Thus, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from their Application envelopes. Affid. ¶ 6.

13. R.C. 3505.183(D) provides that all provisional ballots must be counted simultaneously:

No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election.

Thus, the Board of Elections cannot open and count any provisional ballot until the eligibility of each and every Provisional Ballot Application has been reviewed and resolved. Affid. ¶ 7.

14. Initial processing suggests that the majority of the Provisional Ballot Applications submitted in Franklin County on November 4, 2008 were submitted by voters who are eligible under Ohio statutes. As such, their Applications will be opened and their ballots will be counted if this initial processing is confirmed by formal action of the Board of Elections. Initial processing also suggests that a number of the Provisional Ballot Applications submitted in Franklin County on November 4, 2008 are fatally flawed because the voter who tendered the provisional ballot is either not properly registered to vote or voted in an incorrect precinct. If this initial processing is confirmed by formal action of the Board of Elections, these Applications will not be opened or counted. Affid. ¶ 8.

15. While the determination of eligibility of a high percentage of provisional ballot voters is clear, dispute has arisen regarding the eligibility under Ohio statutes of two separate categories of provisional ballots. The first involves Provisional Ballot Applications on which the provisional ballot voter failed to write in both her name and her signature on the required affirmation. The Provisional Ballot Application, a copy of which is attached to the Damschroder Affidavit as Exhibit A, clearly states that the provisional voter is *required* to provide both her name and her signature. The form highlights this requirement in capital letters, underscored, and in bold type: the

provisional ballot voter is directed to “CLEARLY PRINT NAME-(REQUIRED)” and provide the “VOTER’S SIGNATURE-(REQUIRED).” Nonetheless, approximately 3-4% of the Provisional Ballot Applications submitted in Franklin County lack either the name or signature or both that is specifically required by the Application. Affid. ¶¶ 9-10.

16. R.C. 3505.183 specifically provides that both the “name and signature” of a provisional voter must be included in the written affirmation submitted by the elector “in order for the provisional ballot to be eligible to be counted.” The wording of R.C. 3505.183(B)(1)(a) could not clearer:

... the following information *shall be included* in the written affirmation [on the Provisional Ballot Application] *in order for the provisional ballot to be eligible to be counted*:

(a) The individual’s name and signature;

* * *

[Emphasis added.]

R.C. 3505.183(B)(2) makes clear that the information specified in this provision is “*required* to be included in an affirmation under (B)(1) of this section. . . .” [Emphasis added.]

17. On March 31, 2008, Brian Shinn, Assistant General Counsel, Secretary of State of Ohio, responded to a series of questions from the Board of Elections regarding procedures for counting provisional ballots. In response to a question regarding a voter’s failure to fill in both her name and signature on her provisional ballot affirmation, Mr. Shinn, as Assistant General Counsel for the Secretary of State, followed the language of R.C. 3505.183 and directed that an affirmation in a provisional ballot application that

failed to include both the voter's name and signature was invalid under Ohio law and was not eligible to be counted. Mr. Shinn wrote in his e-mail of March 31, 2008:

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

[Emphasis in original.]

Affid. ¶ 11.

18. Mr. Shinn's March 31, 2008 direction that a voter's failure to provide both her "Name AND signature" in her provisional ballot affirmation invalidated the provisional ballot was consistent with both the express language of the statute as well as the Secretary of State's pre-election interpretation of R.C. 3505.183(B)(1)(a). In Directive 2008-101 ("SOS Directive 2008-101"), the Secretary of State instructed that the failure of a provisional ballot voter to provide both her name and her signature on the provisional ballot affirmation rendered it invalid under law and precluded a Board of Election from treating the provisional ballot as eligible to be counted. Rather, the Secretary of State held that a provisional ballot with such an incomplete affirmation "shall neither [be] open[ed] nor count[ed]":

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

* * *

c) The individual did not provide the following:

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

* * *

[Bold emphasis in original;
bold italics emphasis added.]

SOS Directive 2008-101 is attached as Exhibit C to the Damschroder Affidavit and may be accessed at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-101.pdf>.

19. The Prosecuting Attorney's Office of Franklin County, Ohio has likewise advised the Board of Elections that R.C. 3505.183(B)(1)(a) requires that the provisional voter must provide both her name and her signature on the provisional ballot affirmation statement for the ballot to be eligible to be opened and counted. Affid. ¶ 13.

20. The Board of Elections was prepared to follow the pre-Election instructions of the Secretary of State and disqualify as fatally flawed all provisional ballots that did not comply with Mr. Shinn's instruction that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ." However, on Monday, November 10, after the Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve Stivers by nearly 400 votes for the 15th Congressional District seat, Bob DeRose, a lawyer for the Kilroy Committee, sent an e-mail to the Board of Elections challenging the determination of the Secretary of State that R.C. 3505.181(B)(1)(a) requires that the affirmation in the Provisional Ballot Application, to be eligible to be counted, must contain both the name and the signature of the provisional ballot voter. Mr. DeRose went so far as to assert that a provisional ballot must be

counted even if it lacks both the printed name and the signature of the provisional ballot voter. Affid. ¶¶ 14-15.

21. Mr. DeRose sent electronic copies of his e-mail of November 10, 2008 to a number of people, including Mr. Shinn, Assistant General Counsel, Ohio Secretary of State. Mr. DeRose's e-mail was sent at 10:29 a.m. At 6:04 p.m. the same day, Mr. Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a)" Rather, in response to the DeRose request, Mr. Shinn directed that the Board of Elections deem eligible those Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." Mr. Shinn went so far as to indicate that if a voter's signature is found anywhere on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e.; it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." Affid. ¶ 16. Secretary of State Brunner concurred with Mr. Shinn's after-the-election change in interpretation of the provisions of R.C. 3505.183(B)(1)(a), and adopted it as her own, on Wednesday, November 12, 2008. Affid. ¶ 17.

22. As a result of the Secretary of State's reversal of the instruction that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . . ," the members of the Board of Elections will tie when they vote on whether it should reject and not count

Provisional Ballot Applications that fail to include both the voter's "Name AND signature" on the affirmation as required by R.C. 3505.183(B)(1)(a). Affid. ¶ 18.

23. The tie vote by the members of the Board of Elections will result in the Secretary of State determining the eligibility of the Provisional Ballot Applications that do not bear both the "Name AND signature" of the voter on the required affirmation. Given the number of such disputed provisional ballots, the determination of the eligibility of these Applications could prove decisive in one or more of the three Undecided Races. Affid. ¶ 18.

24. When members of the Board of Elections vote on the eligibility of the Applications that fail to set forth both the "Name AND signature" of the voter, the Board will also confront a decision as to the eligibility of a second category of Provisional Ballot Applications that are facially deficient under Ohio statute.

25. R.C. 3505.181 requires that a provisional voter provide specific identification verification at the poll or, alternatively, at the Board of Elections within ten (10) days after the Election. R.C. 3505.18 sets forth the items of identification that are acceptable. These include such simple measures as the voter writing in her Ohio driver's license number or the last four digits of her social security number on the Provisional Ballot Application. See "Step 2: Voter Identification" as set forth on the Franklin County Provisional Ballot Application that is attached to the Damschroder Affidavit as Exhibit A. These statutorily imposed identification verification requirements are necessary to assure that the person who tenders the Provisional Ballot Application is, in fact, the person named on the Provisional Ballot Application. Affid. ¶¶ 21-22.

26. Nonetheless, in approximately 10% of the Provisional Ballot Applications under review in Franklin County, the provisional voters failed to provide the required Voter Identification information or, alternatively, complete the Identification Affirmation sections of the Provisional Ballot Application (“Step 2”) even though the Application clearly states, “To be completed by the Voter.” Affid. ¶ 23. Having failed to provide the provisional voter identification verification information required by R.C. 3505.181, these Provisional Ballot Applications are facially deficient, invalid under law, and are not eligible to be counted.

27. The members of the Board of Elections will tie when they vote on whether to treat the Provisional Ballot Applications that fail to provide the voter identification verification information or affirmation required by R.C. 3505.181 as fatally flawed and therefore ineligible to be counted. The Secretary of State will break the tie vote on this issue, on information and belief and based on her after-the-election relaxation and liberalization of the otherwise mandatory requirements of Ohio’s voting statutes, by ruling that the Applications on which the voter failed to provide the voter identification verification information or affirmation required by R.C. 3505.181 are nonetheless valid and eligible to be counted.

28. There will not be time for judicial review after the Secretary of State makes her decision if the Provisional Ballot Applications are opened on or before November 19 as currently scheduled. Once a Provisional Ballot Application is opened and the ballot it contains is separated from the Application, it will be impossible to determine whether the ballot was eligible to be counted under Ohio statutes or not. Affid. ¶ 24. Simply stated, once the provisional ballots are opened, it will be impossible to

correct the error if this Court were subsequently to decide that the votes associated with these facially deficient Applications are in fact ineligible to be counted.

CAUSE OF ACTION

29. Relators incorporate by reference paragraphs 1-28 as if rewritten herein.

30. The Relators have a clear legal right to require that the Secretary of State comply with Ohio law.

31. Respondents have a clear legal duty to act consistent with Ohio's election statutes in administering the November 4, 2008 election and in determining whether the provisional ballots cast on November 4 comply with Ohio law and are eligible to be counted.

32. The Secretary of State's interpretation of R.C. 3505.183(B)(1)(a) as allowing a provisional ballot to be eligible to be counted even if it does not include both the "individual's name and signature" in the statutorily required affirmation is erroneous and contrary to the express requirements of Ohio law.

33. Similarly, the Secretary of State's interpretation of R.C. 3505.181 as permitting a provisional ballot to be eligible to be counted even though the provisional voter fails to provide the required identification verification information mandated in R.C. 3505.18 is erroneous and contrary to the express requirements of Ohio law.

34. Ohio's election laws specifically impose the duty of correctly completing the statutorily mandated provisional voter affirmation and the statutorily required identification verification information on the provisional voter. The statutes do not impose a duty upon Ohio's poll workers to complete these items on behalf of provisional voters or to check that provisional voters have filled out their Provisional Ballot

Application correctly or completely. Under Ohio's election statutes, the duty to complete these items of information fully and correctly rests on the provisional voter, and only the provisional voter.

35. Inasmuch as the Secretary of State will impose her erroneous interpretations of these statutorily mandated requirements and inasmuch as the Board of Elections will follow the erroneous interpretations of the Secretary of State on these two issues or, alternatively, the Secretary of State will impose her erroneous interpretations pursuant to her authority under R.C. 3501.11(X) to break ties among the members of the Board of Elections, Relators lack an adequate remedy in the ordinary course of the law to protect their rights as electors and prevent an illegal diminution of their votes.

ANCILLARY RELIEF REQUESTED

36. Relators incorporate by reference paragraphs 1-35 as if rewritten herein.

37. Unless restrained or enjoined by an ancillary temporary restraining order or other injunction, the Respondents will erroneously and illegally determine that the contested provisional ballots are eligible to be counted as the Secretary of State has directed; they will open each of the contested Provisional Ballot Application envelopes and separate the ballot contained therein from its Application; and they will commingle the contested provisional ballots with those that do not have these infirmities and are therefore legally eligible to be counted. In doing so, Respondents will make it impossible to determine which votes are eligible to be counted under Ohio law and which are not.

Affid. ¶ 24.

38. This Court must enter an ancillary injunction to protect its jurisdiction to adjudicate the Relator's request for relief. Without ancillary injunctive relief pending this

Court's merit review of Relator's claims, Relators will be denied their rights as citizens and electors of Ohio and will be irreparably injured.

39. Relators lack an adequate remedy at law and require ancillary injunctive relief pending adjudication of the merits of their claims.

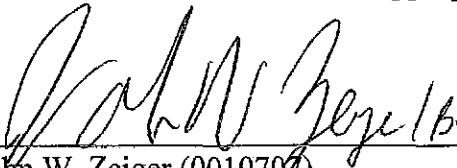
PRAYER

Relators therefore pray that the Court:

- A. Issue a writ of mandamus compelling Respondent Secretary of State to correct her erroneous interpretation of R.C. 3505.183(B)(1)(a) and compelling her to advise the county Board of Elections that any provisional ballot must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted.
- B. Issue a writ of mandamus compelling Respondent Secretary of State to correct her erroneous interpretation of R.C. 3505.181 and compelling her to advise the county Boards of Election that any provisional voter must provide the identification verification information mandated by R.C. 3505.181 on the Provisional Ballot Application or, alternatively, complete the identification affirmation provided in R.C. 3505.18(A)(4), and if the voter fails to do so, her provisional ballot is not eligible to be counted.
- C. Issue a writ of mandamus compelling Respondents to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter affirmation required by R.C. 3505.183(B)(1)(a)

and/or the voter fails to provide on the Application the identification verification information required by R.C. 3505.18 or, alternatively, fails to complete the identification affirmation provided in R.C. 3505.18(A)(4).

- D. Issue a temporary restraining order or other interim ancillary injunctive relief enjoining and restraining the Board of Elections from opening and commingling any provisional ballots until this Court can adjudicate the Relators' request for a writ of mandamus.
- E. Issue such further and other relief as the Court deems appropriate.



John W. Zeiger / *By Christopher Hogan*

John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900
zeiger@litoio.com

Counsel for Relators