

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE STATE OF OHIO ex rel.	:
DANA SKAGGS, et al.,	:
	: Case No. 2:08-CV-1077
Plaintiff - Relator,	:
	:
v.	: Judge Marbley
	:
JENNIFER L. BRUNNER	:
SECRETARY OF THE STATE	:
OF OHIO, et al.,	:
	:
Defendant - Respondent.	:
	:

**MOTION OF DEFENDANT, JENNIFER BRUNNER,
OHIO SECRETARY OF STATE, FOR SUMMARY JUDGMENT**

Defendant Ohio Secretary of State Jennifer Brunner moves this Court, pursuant to Fed. R. Civ. P. 56(c), for an order granting summary judgment. No genuine issues of material fact exist and the Defendant is entitled to judgment as a matter of law. A memorandum in support of this motion is incorporated by reference.

Respectfully submitted,

**NANCY H. ROGERS
ATTORNEY GENERAL**

/s Richard N. Coglianesse
Richard N. Coglianesse (0066830) Trial Attorney
Damian W. Sikora (0075224)
Aaron D. Epstein (0063286)
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
aepstein@ag.state.oh.us
(614) 466-2872 – phone
(614) 728-7592 – fax

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Complaint in this case seeks to disenfranchise approximately 1,000 Franklin County voters who cast provisional ballots on November 4, 2008 *and who were in fact properly registered and eligible to vote*. Plaintiffs have not alleged that any of the provisional ballots in question were fraudulent, or cast by ineligible voters, or cast in the wrong precinct. As a matter of law, Plaintiffs are not entitled to the extraordinary relief they seek.

Plaintiffs would have this Court find a defect not with the ballots themselves, but rather with the completion of the Provisional Ballot Affirmation form used by the Franklin County Board of Elections (“Board”) that accompanied each provisional ballot (and constitutes the envelope in which each provisional ballot is stored until such time as the Board decides the vote should be counted). According to the allegations in the Complaint and the information presented at the Temporary Restraining Order Hearing on November 17, 2008, the alleged deficiencies in the Provisional Ballot Affirmation forms challenged by the plaintiffs fall into four categories:

- (1) Forms that contain the individual’s printed name, but no signature;
- (2) Forms that contain the individual’s signature, but no printed name;
- (3) The individual’s name and signature appear on the face of the form, but somewhere other than in the blanks designated on the form for name and signature; or
- (4) The form fails to indicate the type of voter identification document the individual presented to the poll worker before receiving a provisional ballot.

However, these “defects” in the affirmation forms are not valid reasons to reject the provisional ballots.

Ohio law is clear that neither a printed name nor a signature is a necessary prerequisite for a ballot to be counted. Indeed, Ohio law imposes an affirmative legal duty upon *poll workers*, not voters, to ensure that the Provisional Ballot Affirmation forms are fully and properly filled out. If information is missing from the form, it necessarily is the result of poll worker error, and federal law – specifically Directive 2008-103 – issued by this Court, forbids the rejection of an otherwise proper provisional ballot that is irregular due to error by the poll worker.

Even if the Plaintiffs offer a contrary interpretation of Ohio law, summary judgment must still be granted. The Secretary of State is, by statute, the chief elections official. RC 3501.04. She is under no clear legal duty to advise the Franklin County Board of Elections to reject any provisional ballots at issue. Rather, in the face of two competing reasonable interpretations of state election law, courts must defer to the conclusions of the Secretary. And in this case, the Secretary has reached the reasonable – if not unavoidable – legal conclusion that these provisional ballots should be counted. For all these reasons, and because there are no material facts in dispute, the Secretary respectfully asks the Court to grant summary judgment in her favor and deny the Plaintiffs’ request for a writ of mandamus.

II. STATEMENT OF THE CASE

This case originally arose when Plaintiffs filed a petition for a Writ of Mandamus and Motion for a Temporary Restraining Order in the Ohio Supreme Court on November 13, 2008, naming Ohio Secretary of State Jennifer Brunner and the Franklin County Board of Elections as Relator-Defendants. On November 14, 2008 Secretary Brunner filed a Notice of Removal to the

Federal District Court for the Southern District of Ohio. The case was originally removed to Judge Frost's Court, but was transferred by Judge Frost to Judge Marbley. *See* Transfer Order Attached as Exhibit 1. The case was transferred in response to the Motion to Consolidate filed by Secretary Brunner.

Secretary Brunner filed a Motion to Consolidate the current case with the *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-CV896 (S.D. Ohio) ("*NEOCH*") case. In that case, pursuant to settlement negotiations, Secretary Brunner issued Directives 2008-101 and 2008-103, which were adopted by this Court in two separate orders. *See* Orders Attached as Exhibits 2 and 3. Directive 2008-101 outlined the process by which provisional ballots should be processed and counted, and Directive 2008-103 specifically addressed the issue of poll worker error in processing provisional ballots.

On November 15, this Court held a hearing on the Notice of Removal, reserving judgment until November 17, 2008. On November 17, 2008, this Court determined that the Plaintiffs were actually raising issues under Directives 2008-101 and 2008-103, which were adopted and annexed by the Court, as well as issues of Equal Protection. As a result, the Court held that removal was proper and immediately proceeded with oral arguments on the Motion for Temporary Restraining Order filed by Plaintiffs. After oral arguments, Plaintiffs decided to withdraw their Motion for Temporary Restraining Order. The Court is now prepared to decide the merits of the case in an expedited manner and Defendant submits this Motion for Summary Judgment accordingly.

III. STATEMENT OF THE FACTS

On November 4, 2008, more than 27,000 Franklin County voters cast provisional ballots. *Damschroder Aff.* ¶ 3. In her role as the state's chief elections official, Secretary Brunner has

promulgated a provisional ballot affirmation/identification envelope for use by voters who must cast a provisional ballot. Unfortunately, the Franklin County Board of Elections elected not to use the Secretary of State's prescribed Provisional Ballot Affirmation form (SOS Form 12-B). *See* Ex. 4 Affidavit of Patricia A. Wolfe at Ex. C. Instead, Franklin County crafted its own Provisional Ballot Affirmation form, one which differs from the Secretary's form in critical respects.

The Secretary's form contemplates that a poll worker must print the voter's name and then sign the form. There is no statement on the Secretary's form that the individual voter must both print his name and sign the form. Franklin County's provisional ballot affirmation form, however, reflects the premise that the requirement of completing the envelope rests with the voter – not the poll worker. Furthermore, the Franklin County provisional ballot affirmation form states that the individual voter is **required** to provide both his printed name and signature. The Board included this requirement on the form despite the fact that a similar mandate does not appear on the Secretary's prescribed form and is not a correct statement of law.¹ As a result of this difference, the fate of hundreds of provisional ballots in Franklin County are at issue in this case, which could potentially decide three extremely close races.

The Secretary of State has required poll workers to be trained with the Secretary of State's Poll Worker Manual and Poll Worker Quick Reference Guide. *Wolfe Aff.* at ¶¶ 8-9. Both the Poll Worker Manual and the Quick Reference Guide direct poll workers to ensure that the provisional ballot envelopes are completed. *Wolfe Aff.* at ¶¶ 10-11. The Franklin County Board of Elections also trains poll workers with the Precinct Election Officials Training Manual

¹ Franklin County has also required that the voter provide his or her birthday on the provisional ballot envelope. It would appear based upon the arguments made by the Plaintiffs in this case that Franklin County should reject any provisional ballot which does not contain a date of birth, despite the fact that Ohio law does not provide that as a reason to reject a provisional ballot. RC 3505.183(B).

(“Franklin County Poll Worker Manual”). Stipulation. Among other things, the Franklin County Poll Worker Manual outlines the duties of the poll workers with respect to elections. Regarding provisional balloting, the Franklin County Poll Worker Manual explicitly states “All required information MUST be completed for the Provisional Ballot to count.” The Franklin County Poll Worker Manual goes on to explain to the poll worker what information is required including: printed name of the voter, current address of the voter, date of birth of the voter, and signature of the voter. This manual is provided to each poll worker for use on election day. Thus, although the Franklin County Provisional Ballot Affirmation form purports to place responsibility upon the voter to provide all necessary information, Franklin County correctly trains its poll workers that it is their duty to ensure the forms are correctly filled out.

This tension gave rise to an email exchange between Brian Shinn, Assistant General Counsel & Elections Counsel of the Secretary of State’s Office, and Patrick Piccininni of the Franklin County Prosecutor’s Office in his role as counsel for the Franklin County Board of Elections, where debate ensued over how to count specific provisional ballots. Damschroder Aff. at Exs. B and D. As elections counsel for the Secretary of State has already informed the Franklin County Board of Elections:

While Franklin County’s form has the voter complete his or her name in column one, your poll workers are trained to review the provisional ballot affirmation before completing the poll worker portion. Your poll worker should have noticed that the voter did not put his or her name in column one and instructed the voter to do so. The voter actually signed the provisional ballot affirmation, so the voter was cooperating and wanting his or her ballot to be counted. That is why I conclude that the omission of a name is poll worker error.

Damschroder Aff. at Ex. D, p. 2, email from Brian Shinn to Patrick Piccininni, et al., dated November 12, 2008. It was on this basis that Plaintiffs have identified four types of problems

with provisional ballot envelopes: [1] where there is a printed name but no signature in the affirmation; [2] where there is no printed name but a signature in the affirmation; [3] where there is a printed name and a signature on the affirmation but they are not located in the place designated on the form for name and signature; and [4] where there is no proof on the affirmation form that valid identification was provided by the voter. Nevertheless, the Franklin County Board of Elections has subsequently voted on how to process such provisional ballot envelopes and has tied 2-2 on each of these four issues. Therefore, as a matter of law, pursuant to R.C. R.C. 3501.11(X), the position papers will be drafted by the four board members and submitted to the Secretary of State for her tie breaking decision. As a result, Plaintiffs have brought this petition for writ of mandamus to compel the Secretary of State to rule a specific way on this tie breaking decision. Specifically, the Plaintiffs seek a writ of mandamus to order the Secretary to reject any provisional ballots that fall into the four aforementioned categories.

Despite the fact that some hard working poll workers made errors, the Plaintiffs in this case wish to disenfranchise possibly thousands of individuals who were properly registered to vote, voted in the proper precinct, and presented the appropriate identification.

IV. LAW AND ARGUMENT

A. Standard of Review

“A moving party is entitled to a grant of its motion for summary judgment ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Univ. of Pittsburgh v. Townsend*, 542 F.3d 513, 522 (6th Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). It has long been held that the moving party bears the initial burden of showing that there is an absence of a genuine issue of material

fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Townsend*, 542 F.3d at 522. The burden then shifts to the nonmoving party to “come forward with some probative evidence to support its claim.” *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (citing *Celotex*, 477 U.S. at 324). The Court must construe the evidence in the light most favorable to the nonmoving party. *Townsend*, 542 F.3d at 522 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)).

In order to be entitled to a writ of mandamus, Plaintiffs must establish [1] a clear legal right to the relief requested, [2] a corresponding clear legal duty on the part of Secretary Brunner to perform the requested action, and [3] the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 3. If no duty exists in law, the Court cannot create a legal duty enforceable in mandamus. *Id.*; *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St. 3d 172, 182, 2007-Ohio-5838, ¶ 46.

B. The Ohio Revised Code Imposes an Affirmative Duty Upon Local Election Officials to Ensure that Affirmation Forms are Fully Filled Out

The Revised Code imposes a number of affirmative duties upon the volunteers who staff the polling locations as poll workers. For example, if a poll worker discovers that an individual is at the wrong precinct, election officials must (1) direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote; (2) explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct; and (3) provide the telephone number of the board of elections in case the individual has additional questions. R.C. 3505.181(C)(1). Likewise, when a voter cannot cast a regular ballot but is eligible to vote provisionally, the poll worker has an affirmative duty to notify the individual that he or she can cast a provisional ballot. R.C. 3505.181(B)(1).

When it comes to provisional balloting, the duties of local election officials are extensive, and all lead to the same conclusion: the omission of a printed name or signature from the Affirmation Form reflects a breach of duty by the local election official. For example, R.C. 3505.181(B)(2) states:

The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual *before an election official* at the polling place stating that the individual is both of the following:

- (a) A registered voter in the jurisdiction in which the individual desires to vote;
- (b) Eligible to vote in that election.

R.C. 3505.181(B)(2) makes the election official a mandatory witness to the execution, that is, the completion, of the Provisional Ballot Affirmation form. It necessarily follows that if the voter submitted an Affirmation form that was missing information – a signature or a printed name -- the election official failed to do what he or she was required to do.

This conclusion is borne out by other sections of the Revised Code. For example, when an individual does not sign the Affirmation form, the election official has an affirmative duty to “record” (i.e. print) the individual’s name on the Affirmation form and the fact that the individual refused to sign. R.C. 3505.181(B)(6). Here we have unsigned Affirmation forms that contain printed names but no indication that the individual declined to sign the Affirmation.² The Affirmation form is missing information that the election official was required to provide, not the voter.

As noted above, the Secretary’s prescribed provisional envelope form does not require a voter to print his name. Furthermore Franklin County, as well as the other counties in the State,

² Although the Plaintiffs spoke in terms of a religious objection for declining to sign the affirmation form, there is no limitation in Ohio law on reasons for failing to sign the Affirmation form.

was instructed to have their poll workers examine Provisional Ballot Affirmation forms after the voter returned the Affirmation form to the poll worker. Damschroder Aff. at Exs. B and D; Wolfe Aff. at ¶ 10. This has been the consistent advice of the Secretary of State since 2006. Wolfe Aff. at ¶ 10; Exhibit 5 Affidavit of Jacqueline J. Rothschuh at ¶ 8. Therefore, the lack of a printed name can only be attributed to poll worker error.

The provisional ballot Affirmation forms have blanks to indicate which form of Voter ID was used. The responsibility for checking the boxes relating to Voter Identification belongs to the election official. “The appropriate local election official shall record the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation.” R.C. 3505.181(B)(6). If those boxes were left blank, the fault is clearly the election official’s, not the voter’s.

C. There is No Basis in Law for Rejecting These Ballots

On October 27, 2008, this Court issued an Order which expressly stated that a provisional ballot cast by an otherwise eligible voter could not be rejected for reasons attributable to poll worker error. *See* Exhibit 3. The Court specifically identified a poll worker’s failure to follow a duty prescribed by R.C. 3505.181 as an inadequate reason for rejecting a provisional ballot. The Court’s Order is consistent with the Secretary’s Directive 2008-103, which clearly provides that a provisional ballot cannot be rejected because of poll worker error.

The October 27, 2008 Order followed, and explicitly adopted, an Order issued three days earlier by Judge Sargus. *See* Exhibit 2. Judge Sargus’ Order adopted the Secretary’s Directive 2008-101 as an order of this Court. Directive 2008-101 allows for a provisional ballot to be counted so long as the individual’s name is recorded in the written affirmation statement.

[Directive 2008-101, Page 7]. Given these Orders and Directives, and the Revised Code provisions already mentioned, the Court should find as a matter of law that the Secretary of State is under no affirmative legal duty to advise boards to reject these provisional ballots, rather the law requires that these provisional ballots must be opened and counted.

The plaintiffs cannot identify any authority for rejecting these provisional ballots or claiming the Secretary of State has a legal duty to do so. First, plaintiffs point to R.C. 3505.182, which states, in pertinent part, “[t]he form of the [provisional ballot] written affirmation shall be printed upon the face of the provisional ballot envelope and shall be **substantially** as follows,” and then proceeds to describe a model form that includes blanks for “name” and “signature.” The conceptual flaw in plaintiffs’ argument is that R.C. 3505.182, to the extent it imposes requirements, speaks to the appearance of the blank Affirmation form, not the mandatory content of a completed form. Stated differently, the legal flaw in plaintiffs’ argument is that, by its plain terms, R.C. 3505.182 requires only “substantial” compliance, not strict compliance. Substantial compliance with an election law is acceptable when, as here, the statute expressly says so. *State ex rel. Stokes v. Brunner*, ___ Ohio St.3d ___, 2008 Ohio 5392, at ¶33; *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008 Ohio 566, at ¶ 21. Therefore, R.C. 3505.182 not only fails to prove that printed name and signature are both indispensable, it actually undercuts the argument.

Second, plaintiffs rely upon R.C. 3505.183(B)(1)(a), which does in fact state that, in order to count a provisional ballot, “the individual’s name and signature” must be included in the affirmation. However, that section stands in apparent conflict with R.C. 3505.181(B)(2), which clearly indicates that all provisional ballots should be counted so long as the voters are registered in the jurisdiction and eligible to vote. In such circumstances, the Secretary of State, as the

statutory chief elections official in the State (R.C. 3501.04), is authorized to interpret the laws in the way best calculated to promote the franchise, and the courts must defer to her interpretation so long as it is reasonable. *State ex rel. Colvin v. Brunner*, 2008 Ohio 5041.

Finally, plaintiffs suggest that counting these votes, even though some lack signatures, would eliminate the crime of voter fraud under R.C. Chapter 3599. Nothing could be further from the truth. R.C. 3599.12(A)(1) makes it a crime to vote or attempt to vote in any election in a precinct in which that person is not a legally qualified elector. Other sections of R.C. 3599.12 make it a crime to attempt to vote twice or impersonate another voter. None of these provisions depends on the presence or absence of a signature.

So far in this Memorandum, the Secretary has not addressed one category of supposedly defective Affirmation Form: those that have the individual's name and signature written somewhere other than in the designated blanks. Here again, if an individual put the information in the wrong place on the Affirmation form, the poll worker should have discovered the "error" before accepting the ballot. But the objection to these ballots raises a more fundamental point: why should it matter where the information is written, so long as the information appears and is accurate? Plaintiffs cannot identify any statute that expressly commands the placement of name and signature in a particular space on the form. And even if they could, the Ohio Supreme Court has repeatedly affirmed the principle that courts "must avoid unduly technical interpretations [of election laws] that impede the public policy favoring free, competitive elections." *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22 (quoting *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3). Yet this is precisely what plaintiffs seek to achieve: a rigid, hyper-technical statutory construction that would achieve no valid end but would serve to disenfranchise hundreds of otherwise eligible voters.

IV. CONCLUSION

It cannot be emphasized enough that these are not provisional ballots from unregistered or unqualified voters. Plaintiffs concede that ineligible provisional ballots have already been culled. This case concerns only the provisional ballots of registered, eligible voters, whose votes will not be counted because of an alleged technical violation if plaintiffs prevail. These provisional ballots should be counted as a matter of law, and for this reason, defendant, the Ohio Secretary of State, respectfully asks the Court to grant summary judgment in her favor.

Respectfully submitted,

NANCY H. ROGERS
ATTORNEY GENERAL

/s Richard N. Coglianesse

Richard N. Coglianesse (0066830) Trial Attorney

Damian W. Sikora (0075224)

Aaron D. Epstein (0063286)

Assistant Attorneys General

Constitutional Offices

30 East Broad Street, 16th Floor

Columbus, Ohio 43215-3400

aepstein@ag.state.oh.us

(614) 466-2872 – phone

(614) 728-7592 – fax

Attorneys for Defendant Jennifer Brunner
Ohio Secretary of State

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 18th day of November, 2008.

/s Richard N. Coglianesse