



Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

**I. INTRODUCTION**

On November 13, 2008, Plaintiff/Relators filed for a writ of mandamus in the Ohio Supreme Court against Jennifer Brunner, the Ohio Secretary of State and the Franklin County Board of Elections (“FCBOE”). The crux of the Plaintiff’s sought the following relief:

- 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.

Due to the fact that a temporary restraining order was requested, upon receipt of the Petition that was hand delivered to the statutory counsel for the FCBOE, a notice of appearance was filed with the Ohio Supreme Court. The next morning, counsel for Secretary Brunner filed a notice of removal, despite the fact FCBOE would not consent to the removal of this lawsuit to federal court. Secretary Brunner then filed a motion to realign the parties to defeat this obvious

defect. Additionally, this Court agreed with Secretary Brunner that FCBOE is a nominal party whose consent is not required.<sup>1</sup> Said motion was granted by this Court on November 17, 2008.

This motion for partial summary judgment deals solely with the issue of where the voter fails to sign their name to the provisional application. Judgment on this issue should be rendered in favor of the Relators and the realigned party FCBOE because the voter's signature is necessary to protect the integrity of the process and allow the FCBOE and its counsel to comply with its statutory duties. As a result of hearings in this matter, the parties are to file motions for summary judgment.

## **II. FACTS**

On October 24, 2008, in response to a supplement complaint filed in the related case of *NEOCH v. Brunner, et al*, United States District Court for the Southern District of Ohio Case No. C2-06-896, this Court directed the Ohio Secretary of State to issue Directive 2008-101, which directed the County Boards of Elections on how to process provisional ballots cast in the November 2008 General Election.<sup>2</sup> The Directive stated:

### 1. Ballots Eligible to be Counted

Where ALL of the following apply, board staff responsible for processing provisional ballots must recommend to the board that a provisional ballot shall count, and a board of elections shall count the provisional ballot:

- a) The individual named on the affirmation is properly registered to vote;
- b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;
- c) The individual provided the following:

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<sup>1</sup> FCBOE objected to the motion to realign and deem it a nominal party. One of the rationales for this is that FCBOE has an duty to investigate cases of election fraud, and the outcome of this case could impact on those duties.

<sup>2</sup> The NEOCH plaintiffs have filed notices to intervene in this action. However, given the Court of Appeals opinion in the original case, the standing issues questioned by the Appellate Court remain. It appears that limited standing conferred on the NEOCH plaintiffs as a result of the 2006 consent order have transformed that case into a mystical talisman to justify removal of any election case to Federal Court.

- (1) His or her name and **signature** as the person who cast the provisional ballot;
  - (2) A statement that he or she, as the person who cast the provisional ballot, is a registered voter in the jurisdiction in which he or she cast the provisional ballot; and
  - (3) A statement that he or she, as the person who cast the provisional ballot, is eligible to vote in the particular election in which he or she cast the provisional ballot;
- or
- (4) His or her name recorded in a written affirmation statement entered either by the individual or at the individual's direction recorded by an election official;
- or
- (s) A completed affirmation under R.C. 3505.183(B)(4) . . .

(Emphasis added). On October 27, 2008, the SOS issued, in response to a concern by the Court, Directive 2008-103, which stated:

Therefore, pursuant to the court order, I hereby instruct the boards of elections that provisional ballots may not be rejected for reasons that are attributable to poll worker error including a poll worker's failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R.C. 3505.181.

As a result of the these two directives and in response to several inquires by representatives of the Kilroy for Congress campaign, on November 13, 2008 at 5:45 p.m., Mr. Shinn, an employee of Secretary Brunner informed the FCBOE that if a person fails to provide a signature, the vote may be counted. (See Exhibit A, email from Brian Shinn to Michael Stinziano and Matthew Damschroder). On November 14, 2008, the FCBOE met in special session to vote on issues related to provisional ballots. William Anthony, one of the Board members, made a motion to accept those provisional ballots that failed to contain the signature of the voter. That motion resulted in a tie vote. That matter is to be decided by the SOS in accordance with R.C. §3501.11(X).

Simultaneously occurring, was the above captioned action, in which the Court ordered the parties to file motions for summary judgment by November 18, 2008 at 5:00 p.m. This

motion for partial summary judgment is being requested to compel Secretary Brunner to correct her directive to instruct the county boards of elections not to count provisional ballots that do not contain the signature of the voter. As there are no genuine issues of material fact and construing all the facts in favor of the Secretary Brunner, reasonable minds can come to but one conclusion—that FCBOE is entitled to judgment on this issue as a matter of law<sup>3</sup>.

### **III. LAW AND ARGUMENT**

#### **A. Summary Judgment Standard.**

Summary judgment should be granted where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In this case, all parties have agreed that there is no genuine issue of material fact. As to the limited issue addressed within the FCBOE’s partial motion for summary judgment, the FCBOE is entitled to judgment as a matter of law.

#### **B. The voter’s signature must be required on the provisional ballot in order to protect the integrity of the statutory process and to allow the FCBOE and its counsel to comply with their respective statutory duties.**

This Court must uphold the statutory requirement that provisional ballots must include the voter’s signature. Such a ruling would protect the integrity of the statutory process and to allow the FCBOE and its counsel to comply with their respective statutory duties. The express language of Ohio Revised Code Section 3505.183 requires that the provisional ballot include the individual voter’s signature. In addition, the signature requirement is vital to the prosecution of voter fraud, prevents vote dilution, and protects the integrity of the election.

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<sup>3</sup> By submitting this motion for summary judgment, the FCBOE is not in any way waiving any prior objections to the jurisdiction assumed by this Court.

**1. The express language of Ohio Revised Code Section 3505.183 requires that the provisional ballot include the individual voter's signature.**

Ohio election law mandates that a provisional ballot shall not be counted if “[t]he *individual* did not provide all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.” Ohio Rev. Code § 3505.183(B)(4)(a)(iii) (emphasis added). Thus, as the plain language expresses, the individual voter is charged with the responsibility to provide all of the information required. The statute does not provide that “the provisional ballot shall not be counted if the *poll worker* did not obtain the information under division (B)(1) of this section . . . .” Any reading that replaces the responsibility on the poll worker, not the individual, is contrary to the express provision of Section 3505.183.

The information required to be provided in the written affirmation on the provisional ballot is “the individual’s name and signature.” Ohio Rev. Code § 3505.183(B)(1). Thus, when read in conjunction with the requirement in § 3505.183(B)(4)(a)(iii), the individual voter, not the poll worker, has the responsibility of providing the signature in the written affirmation on the provisional ballot. Therefore, consistent with these provisions of Ohio election law, this Court should hold that the signature of the voter be required in the written affirmation on the provisional ballot in order for the ballot to be legally counted.

**2. The signature requirement is vital to the prosecution of voter fraud, prevents vote dilution, and protects the integrity of the election.**

A board of elections is statutorily charged with the duty to “[i]nvestigate irregularities . . . or violations of Title XXXV of the Revised Code by election officers and other persons; . . . and report the facts to the prosecuting attorney or secretary of state.” Ohio Rev. Code § 3501.11(J). The Supreme Court has recently recognized the importance of an election board’s duty to ensure

that election laws are followed. *See, Crawford v. Marion County Election Bd.*, --- U.S. ----, 128 S. Ct. 1610 (2008). The *Crawford* Court held that, “There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.” 128 S. Ct. at 1619.

The importance of the FCBOE’s duty in administering and enforcing Ohio election laws cannot be understated. While it is important that participation in the election process is maximized, it is imperative that the rule of law is not compromised at the expense of this goal.

Enforcement of Ohio election law and prosecution of fraudulent voters is important not only because it is likely to deter future voters from committing fraud, but also prevents the lawfully-cast votes from being diluted by the injection of illegally-cast votes. The impact and existence of voter fraud cannot be disregarded. Numerous election fraud cases were referred by the FCBOE to, and investigated by, Franklin County Prosecutor Ron O’Brien<sup>4</sup> during the 2008 general election cycle. (Affidavit of Ron O’Brien, attached as Exhibit B, ¶ 2.) These cases included voting by non-residents, multiple voting, and “multiple registrations that were forged, fictitious or fraudulent.” (Id.)

Signatures by voters on the ballots are a powerful tool in prosecuting voting fraud cases. (See Ex. B, ¶¶ 6, 7.) The signature is essential on the provisional ballot in order to verify the voter’s identity. The signature on the provisional ballot is compared with “the known signature of a voter that is already on file at the Board, either on registration forms, absentee ballot requests, or the poll book for another precinct.” (Id. at ¶ 5.) In fact, in one of the cases referred

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<sup>4</sup> In addition to serving as statutory counsel to the FCBOE, Franklin County Prosecutor Ron O’Brien prosecutes voter fraud and other election law crimes that are primarily contained in Title 35 of the Ohio Revised Code. (Ex. B, ¶ 1.)

to the Franklin County Prosecutor by the FCBOE, an indictment was possible because of “expert opinion by a handwriting expert that the offender signed the fraudulent registration and absentee ballot forms.” (Id. at ¶ 7.) Thus, without the signature on the provisional ballot, a comparison cannot be made in order to ensure the legality of the cast ballot.

Additionally, voter documents must be signed under penalty of election falsification, and Ohio law requires a warning to that effect by the designated place for the voter to sign. (Ex. B, ¶ 6.) As Prosecutor O’Brien maintains in his affidavit: “Those laws are to deter election fraud, but more importantly are essential to the prosecution of a voter fraud case. Fraudulent provisional ballots will not be able to effectively be prosecuted if a signature of the purported voter does not exist.” (Id.)

In sum, the signature requirement is vital to the prosecution of voter fraud, prevents vote dilution, and protects the integrity of the election. This Court should hold accordingly.

#### **IV. CONCLUSION.**

For the foregoing reasons, it is requested that partial summary judgment be granted and that this Court issue an order that enjoins the Ohio Secretary of State from interpreting Directive 2008-101 as to allow a provisional ballot application that lacks the required signature by the voter to be deemed valid, opened, and counted. Further, it is requested that this Court issue a writ that requires the Secretary of State to instruct the county boards of elections that any provisional ballot application lacking the required voter signature is invalid and must not be counted.

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*Counsel for Respondent Franklin County Board of  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been served upon all counsel of record by means of the Court's electronic filing system this 18<sup>th</sup> day of November, 2008.

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