

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>STATE OF OHIO, ex rel.</b>	:	
<b>DANA SKAGGS, et al.,</b>	:	
	:	<b>Case No. 2:08 cv 1077</b>
<b>Relators,</b>	:	
	:	<b>Judge Marbley</b>
<b>vs.</b>	:	
	:	<b>Magistrate Judge King</b>
<b>JENNIFER L. BRUNNER</b>	:	
<b>SECRETARY OF THE STATE OF</b>	:	
<b>OHIO, et al.,</b>	:	
	:	
<b>Respondents.</b>	:	

**RELATORS DANA SKAGGS AND KYLE FANNIN’S  
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Relators Dana Skaggs and Kyle Fannin (“Relators”) move for summary judgment on their request for a Writ of Mandamus<sup>1</sup> compelling: (1) Ohio Secretary of State Jennifer Brunner (“Secretary Brunner”) to correct her office’s erroneous instruction to the Franklin County Board of Elections (the “Board”), based on an erroneous interpretation of Section 3505.183(B)(1)(a) of the Ohio Revised Code, and compelling her to advise the county boards of elections that any Provisional Ballot Application cast in the November 4, 2008 election 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; and (2) compelling Secretary Brunner and the Board 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 Section 3505.183(B)(1)(a). A

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<sup>1</sup> A Writ of Mandamus is the prescribed form of remedy under the Ohio Constitution and case law to address Secretary Brunner’s refusal to comply with the statutory requirements for consideration of provisional votes. With the removal of the case, Relators seek such relief, irrespective of forum, to remedy Secretary Brunner’s unlawful direction to the Board.

memorandum setting forth the basis for this motion and a supplemental affidavit of Matthew Damschroder are attached.

Respectfully submitted,

/s/ John W. Zeiger

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## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

*“If . . . the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretation effort is at an end, and the statute must be applied accordingly”.*

[In re Guardianship of Lombardo,  
86 Ohio St. 3d 600 (1999).]

So too here. R.C. 3505.183(B)(1)(a) is clear, unequivocal and definite: a voter “must include her name and signature on the provisional ballot application ‘in order for the provisional ballot to be eligible to be counted. . . .’” Since the duty is “mandatory,” the voter must “strictly comply. . . .” State ex rel. Myles, et al. v. Brunner, 2008-Ohio-5097, ¶ 18 (2008). If she fails to do so, her provisional ballot is simply not eligible to be counted.

Relators seek the most basic of relief: Secretary Brunner’s compliance with the statutory requirements for the consideration of provisional ballots as set forth in the plain and unambiguous language of Section 3505.183. Where an Ohio state official refuses to comply with the statutory mandate prescribed by the General Assembly, the Sixth Circuit has made clear the judiciary’s role is to remedy this lack of compliance by “enforc[ing] the law [the General Assembly] enacted, not to write a different one that [respondents] think is superior.” Rittenhouse v. Eisen, 404 F.3d 395, 397 (6<sup>th</sup> Cir. 2005). That the instant action may impact a federal congressional race is of no relevance, as Congress made “conspicuously” clear in 42 U.S.C. § 15482(a)(4) that “the issue of whether a provisional ballot will be counted as a valid ballot” is left “to the States.” Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 577 (6<sup>th</sup> Cir. 2004). Hence, it is Ohio statutory law—specifically, R.C. 3505.183(B)(1)(a)--which is dispositive here.

As a preliminary matter, let's begin with what is not disputed. First, as the parties stipulated before this Court, there is no dispute as to any material fact.<sup>2</sup> Thus, Secretary Brunner has offered no evidence (nor is there any) that the defective provisional ballots (a) were the product of poll worker error; (b) were caused by any event or person other than the voter's failure to comply with the statutory requirements; or (c) that any excuse or explanation exists for the voter's non-compliance. Instead, she offers nothing but speculation and conjecture, both of which do not, under Rule 56, substitute for the evidence she fails to offer. See, e.g., Highland Capital, Inc. v. Franklin Nat'l Bank, 350 F.3d 558, 568 (6<sup>th</sup> Cir. 2003).

Second, as the Court has observed, there is no dispute as to the constitutionality of the Ohio statutory provisions at issue. They are, thus, to be applied as written, subject to the application of basic principles of statutory construction.

Finally, in light of Secretary Brunner's concession during oral argument, there is no dispute that Section 3505.183(B)(1) of the Ohio Revised Code, which establishes the requirements for evaluation and counting of provisional ballots by county boards of election in Ohio, contains *mandatory* language that, under Ohio Supreme Court precedent, must be *strictly* applied.<sup>3</sup>

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<sup>2</sup> Although the parties stipulated that there are no issues of material fact, Secretary Brunner has sought a stipulation and otherwise expressed an intention to interject additional factual contentions before this Court with respect to poll worker training and procedures. Specifically, Secretary Brunner seeks to introduce a poll worker information chart prepared by her office that purportedly imposes additional obligations placed on poll workers beyond those set forth in the Revised Code. While it is obvious that Secretary Brunner is not permitted to amend or rewrite the Revised Code by issuing new materials shortly before the election, in any event, as reflected in the affidavit of Matthew Damschroder (Exhibit A), Secretary Brunner's chart was provided to poll workers hired by the Franklin County Board of Elections only *after* their poll worker training had been completed.

<sup>3</sup> This motion is limited to the specific legal issues identified by the Court during the oral argument proceedings on November 17, 2008. Nonetheless, Relators also renew their arguments previously made, both with respect to the merits of Relators' claim for mandamus relief, and with respect to the Court's lack of subject matter jurisdiction to hear this case. Apparently, Secretary Brunner has similar concerns inasmuch as she has challenged whether Relators have Article III standing to proceed in federal court. See, e.g., Coyne v. American Tobacco Co., 183 F.3d 488, 496-97 (6<sup>th</sup> Cir. 1999) (where plaintiffs lack standing in removed action, remand to state court is "mandatory").

Accordingly, the only issue presented is one of basic statutory construction involving the interplay between Section 3505.183(B)(1), which mandatorily prohibits boards of elections from counting provisional ballots unless the voter provides her name and signature, and Section 3505.181(B)(2), which provides that provisional voters “shall be permitted to cast a provisional ballot . . . upon execution of a written affirmation . . . before an election official. . . .” The issue arises in the context of four different types of incomplete provisional ballot applications received by the Franklin County Board of Elections: (1) those where the voter executed the affirmation statement required under Section 3505.181(B)(2) of the Revised Code, but did not provide his or her printed name; (2) those where the voter provided his or her printed name but did not execute the affirmation by signature; (3) those where the voter executed the application in the wrong place (i.e., not in the required affirmation); and (4) those where the voter failed to provide the necessary voter identification information and/or identification affirmation. The answer to each of these questions is found in the express language of Ohio’s election statutes.

As to the first three types, as reflected in both Section 3505.181 and Section 3505.183 of the Ohio Revised Code and as discussed below, the statutory duty to complete the necessary information is clearly on the voter. In contrast, under the fourth type, the statutory duty to complete the required identification information is clearly placed on the poll worker. See Ohio Rev. Code § 3505.181(B)(6). In light of this plain statutory language, Relators do not challenge the validity of Secretary Brunner’s directive to the Board to count those provisional ballots that do not include the necessary identification information because, pursuant to Section 3505.181(B)(6), the poll worker has an express duty to record such information. The same, mandatory language does not appear in Section 3505.181(B)(2), however. As a result, no similar

poll worker duty attaches, and the obligation to include the name and signature on the required affirmation rests solely on the voter.

Nonetheless, Secretary Brunner asks the Court to simply ignore those words specifically chosen by the General Assembly and instead judicially re-write Section 3505.181(B)(2) to impose an express duty on the *poll worker* to ensure that the provisional voter completes the affirmation properly. The end result is clear: The poll workers become an absolute guarantor for voter error, and the mandatory language of Section 3505.183(B)(1), which *prohibits* the Board from counting ballots that do not contain the voter's name and signature, is completely eviscerated. This approach allows Secretary Brunner to ignore the directive of the General Assembly, as plainly stated in Section 3505.183(B)(1), and render the controlling provision of Ohio law for ensuring the very legality of a provisional ballot a nullity, in violation of every rule of statutory construction.

Fortunately, the law forbids this and the Sixth Circuit has specifically expressed its disdain for such tactics. This Court should do as well by applying the plain language chosen by the Ohio General Assembly and granting Relators' motion summary judgment on all claims.

## **II. LAW AND ARGUMENT**

### **A. Section 3505.183(B)(1) Is Mandatory, And Its Terms Must Be Strictly Applied.**

Section 3505.183 sets forth the requirements, applicable to county boards of elections, for determining whether a provisional ballot is valid and entitled to be counted. Section 3505.183(B)(1) provides:

To determine whether a provisional ballot is valid and entitled to be counted ... [t]he board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. ... [T]he following information *shall be included*

in the written affirmation in order for the provisional ballot to be eligible to be counted:

(a) The individual's name and signature;

\* \* \*

(2) In addition to the information required to be included in an affirmation under division (B)(1) of this section ...

\* \* \*

(3) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that all of the following apply, the provisional ballot envelope shall be opened, and the ballot shall be placed in a ballot box to be counted:

\* \* \*

(c) The individual provided 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 (emphasis added).]

On their face, these statutory terms: (1) impose a mandatory obligation on county boards of election to reject a provisional ballot application where the voter failed include both his or her written name and signature on the required affirmation; and (2) clearly indicate that it is the voter's obligation to provide this required information on the provisional ballot application.

These mandatory obligations, apparent from the face of the statute, must be strictly applied. It is a “settled rule” that “election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.” State ex. rel. Myles, et al. v. Brunner, 2008-Ohio-5097, ¶ 18 (2008) (emphasis added). Indeed, under Ohio law, a court “cannot accept substantial compliance” with the statutory terms unless the statute specifically provides for it. State ex rel. Citizens for Responsible Taxation v.

Scioto County Board of Elections, 65 Ohio St. 3d 167, 169 (1992). See also State ex rel. Evergreen Co. v. Board of Elections of Franklin County, 48 Ohio St. 2d 29, 31 (1976) (“It is a basic principle of law that ... election statutes are mandatory and must be strictly complied with.”).

Where, as here, the legislature uses terms such as “shall contain” or “shall include,” such terms are mandatory and, pursuant to the general rule, must be strictly applied:

R.C. 3509.03 specifies that although an absentee-ballot application need not be in any particular form, it “shall contain” certain items, including a “statement that the person requesting the ballots is a qualified elector.” R.C. 3509.03(G). “[T]he settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.” ... R.C. 3509.03 demands strict compliance insofar as absentee-ballot applications must contain the specified information.

[Myles, 2008-Ohio-5097, ¶ 18 (emphasis added).]

See also Esch, 61 Ohio St. 3d at 596 (election statute with “shall contain” language set forth mandatory requirements, to be strictly applied); Citizens for Responsible Taxation, 65 Ohio St. 3d at 168 (legislature’s use of, *inter alia*, “shall” in elections-related statute triggered strict compliance requirement).

Where an elections statute contains this mandatory language, not only is substantial compliance insufficient, but also the rule of strict construction precludes the need to resort to public policy considerations. Secretary Brunner is obligated to apply the statute’s “plain language,” and no deference whatsoever is due her interpretations, irrespective of whether such guidance is embodied in a directive, email, manual, etc. See, e.g., State ex rel. Stokes v. Brunner, 2008-Ohio-5392, ¶ 29 (Oct. 16, 2008) (“[W]e need not defer to the secretary of state’s

interpretation because it ... fails to apply the plain language” of the statute.); Myles, 2008-Ohio-5097, ¶ 26 (same).

Accordingly, the language of Section 3505.183(B)(1), is mandatory, and it expressly recognizes the voter's obligation to include both his or her name and signature on the provisional ballot application affirmation. In the absence of any of these mandatory items, the Board of Elections is required to reject the provisional ballot. This statutory language could not be clearer, and when strictly applied, it is dispositive of Relators' claims in this case.

**B. R.C. 3505.181(B)(2) Can Not Eviscerate The Provisions Of R.C. 3505.183(B)(1) That Unequivocally And Mandatorily Prohibit Respondents From Opening And Counting Provisional Ballot Applications Lacking Both The Name And Signature Of The Voter.**

**1. No Poll Worker Duty Arises Under The Plain Language Of R.C. 3505.181(B)(2).**

In oral argument, counsel for Secretary Brunner conceded the obvious: R.C. 3505.183(B)(1) makes it mandatory that a provisional voter provide both “[t]he individual’s name and address” “in order for the provisional ballot to be eligible to be counted. . . .” The Secretary nonetheless seeks to circumvent this flat prohibition against counting incomplete provisional ballots by arguing that R.C. 3505.181(B)(2) creates a duty on poll workers to confirm the completeness of the application before signing it themselves. The Secretary bases her claim on an otherwise unremarkable procedural provision:

An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows:

\* \* \*

(2) 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 that 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.

Of course, nothing in the plain language of this statute imposes a duty on a poll worker to verify or otherwise check to ensure that a provisional ballot voter has fulfilled his or her obligations in completing the provisional ballot application affirmation. Indeed, the express wording of the statute doesn't even require the poll worker to provide a verification. Yet Secretary Brunner's requested re-write would result in the following newly minted legislation:

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, who shall ensure that the voter correctly writes his or her name on and executes the affirmation in the appropriate place, ...

But that is not what the statute says. And, as the Sixth Circuit has recognized, the Court's duty is "to enforce the law . . . enacted, not to write a different one. . . ." Rittenhouse v. Eisen, 404 F.3d 395, 397 (6<sup>th</sup> Cir. 2005).

**2. This Court Can Not Construe R.C. 3505.181(B)(2) To Impose An Implied Duty On Ohio's Poll Workers That The Legislature Did Not Expressly Impose.**

The Secretary's request that the Court imply a duty on poll workers to check provisional ballot applications is precluded by Ohio's law on statutory construction. "Where under one possible construction [such as that the Secretary proposes] two statutes would appear to be irreconcilable, but under another possible construction they would not, the construction will be adopted which harmonizes the statutes and gives effect to each." Franklin Township v. Village of Marble Cliff, 4 Ohio App. 3d 213, 217 (10th Dist. 1982). Accord: Benjamin v. Ernst & Young, LLP, 2007 WL 2325812, \*4-5 (10th Dist. Aug. 16, 2007) (citing Franklin Township and

adopting construction of R.C. §3903.04 in a manner which “also allows R.C. Chapter 2743 to be fully effective”). This maxim of statutory interpretation is equally applicable to the construction of Ohio’s Election Laws. See Zweber v. Montgomery County Board of Elections, 2002 WL 857857, \*3 (2d Dist. April 25, 2002) (“A well-recognized principle of statutory construction requires us to construe two seemingly conflicting statutes, when possible, to give effect to both. ... In accordance with these principles, the trial court properly construed R.C. 3501.01(F) and R.C. 3517.01(A) in the only way that avoids an irreconcilable conflict and gives effect to both provisions as written.”).

Here, the result of the construction proposed by the Secretary would make R.C. 3505.181(B)(2) directly irreconcilable without the mandatory mandates of R.C. 3505.183(B)(1)(a). As such, the Court is bound to construe R.C. 3505.181 to avoid the irreconcilable conflict the Secretary proposes.

Second, R.C. 3505.181(B)(1) “may not be extended by implication beyond the clear impact” of the words it contains. United States v. Stewart, 311 U.S. 60. That is because it is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. Lake County v. Rollins, 130 U.S. 662, 670, 671.

Here, R.C. 3505.181(B)(2) does not impose any duty on a poll worker. Rather, it merely says a voter must cast a provisional ballot “before an election official” at the polling place. (Emphasis added.) The statute prescribes conduct by a voter; it does not mandate conduct of a poll worker. As such, R.C. 3505.181(B)(2) can not be extended by implication beyond the clear import of its word as the Secretary seeks.

Nor may one be inferred in an effort to override the express, mandatory language of Section 3505.183(B)(1). Courts may not delete words used or insert words not used in a statute. Columbia Gas Transmission Corp. v. Levin, 117 Ohio St. 3d 122, 125 (2008). It is simply not the province of a court to add words to a statute that the legislature omitted. Indeed, a proffered statutory construction must be rejected where such construction could have been conveyed by “very simple and concise language,” which the legislature did not employ. See State, ex rel. Darby v. Hadaway, 113 Ohio St. 658 (1925). That is, if it “would have been simple” for the legislature to use certain, clear language, and if the legislature chose not to, it must have “had some different meaning in mind.” State, ex rel. Pickrel v. Industrial Commission, 1988 WL 35809, \*2 (10<sup>th</sup> Dist. March 24, 1988).

It is equally well settled that where the legislature uses specific language in one statutory provision, its failure to use the same language in another provision must be deemed intentional.

As the Supreme Court has stated:

Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. ... “The short answer is that Congress did not write the statute that way.”

[Russello v. U.S., 464 U.S. 16, 23 (1983) (emphasis added).]

See also City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994) (“it is generally presumed that Congress acts intentionally and purposely’ when it ‘includes particular language in one section of a statute but omits it in another’”) (citation omitted).<sup>4</sup> Ohio courts have applied this same canon of construction. Thus, where the General Assembly uses clear

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<sup>4</sup> Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197-98 (6<sup>th</sup> Cir. 1983) (“[i]t is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent”).

language in one portion of a statute or act, but excludes it from another, “it must be assumed that [the exclusion] was so intended by the law-making body.” State v. Johnson, 97 N.E. 2d 54, 55 (2d Dist. 1950). See also O’Toole v. Denihan, 118 Ohio St. 3d 374, 383-84 (2008) (“[i]f the legislature had wanted agencies to immediately cross-report to law enforcement, it could have explicitly so stated, just as it did” in a related provision).

And it has been long the rule in Ohio that statutory provisions are to be construed so as “to give effect to every word and clause ...” State ex rel. Myers v. Board of Education of Rural School Dist. of Spencer TP., Lucas County, 95 Ohio St. 367, 372-73 (1917). Under this canon, “[n]o part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” Id.

Applied to Section 3505.181(B)(2), these canons of construction compel the conclusion that poll workers do not have a mandatory obligation to ensure that provisional voters complete all of the necessary information on the provisional ballot application affirmation. First, and fundamentally, in the absence of express statutory language imposing a duty on poll workers to act as a guarantor for voter error in completing the provisional ballot affirmation, the Court may not “write” such a supplemental provision. Had the legislature chosen to impose such a mandatory duty on poll workers, it could have done so with “simple” and “concise” language. The fact that it did not do so must be deemed intentional.<sup>5</sup>

Moreover, when the Ohio legislature seeks to create mandatory obligations, it knows how to do so, as reflected in its use of terms such as “shall” and “require” in instructing county boards

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<sup>5</sup> In addition, Secretary Brunner’s proffered interpretation of Section 3505.181(B)(2) would effectively construe that provision as requiring the counting of all provisional ballots where the voter failed to write his name or execute the required affirmation in the proper place, because such failure is a result of poll worker error. Such a construction would, on its face, create an irreconcilable conflict with Section 3505.183(B)(1), which expressly directs the boards of elections to reject any such ballots—without any provision for poll worker error.

of election as to their duties under Section 3505.183(B)(1). In fact, the legislature expressly utilized such mandatory language in identifying poll worker duties in other portions of Section 3505.181. In Section 3505.181(B)(6), for example, the legislature expressly imposed certain obligations on poll workers as they relate to voter identification requirements, which are distinct from the affirmation required of the voter in Section 3505.181(B)(2). In doing so, the legislature used the same mandatory language found in Section 3505.183(B)(1):

If, at the time that an individual casts a provisional ballot, the individual provides identification in the form of a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address, or provides the last four digits of the individual's social security number, or executes an affirmation that the elector does not have any of those forms of identification or the last four digits of the individual's social security number because the individual does not have a social security number, or declines to execute such an affirmation, 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 and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section.

[Section 3505.181(B)(6) (emphasis added).]

This express language, contained in another part of Section 3505.181, clearly reveals that when the legislature seeks to impose mandatory duties on poll workers, with respect to provisional ballots, it knows how to do so. It did not use such language in Section

3505.181(B)(2). And, thus, the legislature did not intend to impose a duty on poll workers to make sure that voters correctly complete the provisional ballot affirmation required thereunder.<sup>6</sup>

**3. Even If A Duty Could Be Implied Under R.C. 3505.181 That A Poll Worker Is To Review A Provisional Voter’s Application, The Special Provisions Of R.C. 3505.183(B) Control Over The More General Provisions Of R.C. 3505.181.**

Here, both R.C. 3505.183(B)(1)(1) and 3505.181(B)(1) were adopted as part of the same legislation. [2006 H.B. 3.] The General Assembly established “procedures” for casting provisional ballots in R.C. 3505.181 and established the rules for counting—and rejecting—provisional ballots in R.C. 3505.183. When it comes to determining eligibility for a provisional ballot to be *counted*, R.C. 3505.183 is applicable—and 3505.181’s procedures for casting a provisional ballot is not. In short, R.C. 3505.181 is a special statute that contains specific mandatory requirements that the General Assembly imposes on the eligibility of any provisional ballot to be counted, while R.C. 3505.181 imposes no such specific mandatory provisions. As such, R.C. 3505.183 is the more specific and controlling statute.

Thus, even if a duty could be implied on poll workers under R.C. 3505.181 to assure the completion of every provisional ballot, defective provisional ballots missing the voter’s name *and* signature still would not be eligible to be counted. As in Andrianos v. Community Traction Co., 155 Ohio St. 47, syllabus ¶1 (1951), the specific provision mandating the eligibility of provisional ballots to be counted “is controlling over a [more] general statutory provision” such as R.C. 3505.181 that “might otherwise be applicable.” See also Exemption of Real Property From Taxation v. County of Franklin, 167 Ohio St. 256, 261 (1958) (“a special statutory

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<sup>6</sup> These same basic principles of statutory construction also defeat any argument by Secretary Brunner that the “substantial compliance” language contained in Section 3505.182, which relates only to the form of the provisional ballot application, should also apply to Section 3505.183(B)(1). Clearly, under the canons of construction discussed above, the substantial compliance language in one statute cannot be read into Section 3505.183(B)(1), which contains *mandatory* language, as expressly recognized by the Ohio Supreme Court. Had the legislature intended to include a substantial compliance element in Section 3505.183(B)(1), it knew how to do so.

provision which relates to the specific subject matter involved in litigation [here R.C. 3505.183] is controlling over a general statutory provision [here R.C. 3505.181] which might otherwise be applicable”).

**III. CONCLUSION**

For all of the reasons set forth herein, Relators’ Motion for Summary Judgment should be granted.

Respectfully submitted,

/s/ John W. Zeiger

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel of record by means of the Court's CM/ECF system on this 18<sup>th</sup> day of November, 2008.

/s/ John W. Zeiger

John W. Zeiger (0010707)

859-001: 189215