

IN THE SUPREME COURT OF OHIO

STATE EX REL. SUMMIT COUNTY
REPUBLICAN PARTY EXECUTIVE
COMMITTEE,

Relator,

v.

JENNIFER BRUNNER,
OHIO SECRETARY OF STATE

Respondent.

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: Case Number 2008-0478
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: Original Action in Mandamus
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BRIEF OF RESPONDENT SECRETARY OF STATE JENNIFER BRUNNER

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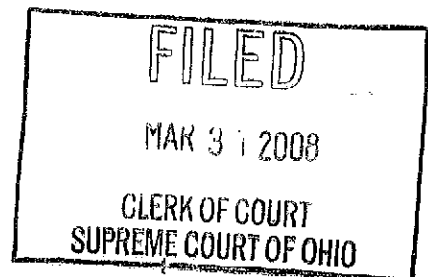


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INTRODUCTION

Although rare, nonpartisan or bipartisan governmental entities sometimes experience overzealous and overpowering partisan influences putting those institutions in sore need of change in personnel or internal leadership. Such was the case in the Summit County Board of Elections in early 2008 when the four-year term of incumbent Board Member Alex Arshinkoff drew to a close. Secretary of State Jennifer Brunner in her deposition (which was filed with this court by both the relator and the respondent) recounted her observations of a wounded board of elections at which partisan backbiting, employee intimidation and fear had taken its toll on employee morale and hindered the ability of the board to effectively and efficiently conduct its operations.

In 2006, Ohio's citizens elected respondent, Secretary Brunner, to serve as the state's chief election official after a campaign in which she pledged to act fearlessly in the interests of free, fair, open and honest elections. Secretary Brunner acted in pursuit of that goal in refusing to appoint both Arshinkoff and Brian K. Daley, a nominee whose reputation as evidenced by the record promised to differ little from the problematic behavior of his predecessor, to the four-year term beginning on March 1, 2008.

The relator in this case duplicitously invites the court to accept as fact its imagined, unproved and unfounded conjectures concerning the Secretary's motivations in refusing to appoint Daley to be her representative to a four-year term as a member of the Summit County Board of Elections. When the controlling law is applied to the facts as demonstrated by the evidence, as opposed to the wishful "facts" presented by the relator, a single legal conclusion is warranted: Secretary of State Brunner acted well within her statutory authority in refusing to appoint Daley to the board.

The General Assembly has provided the Secretary with the authority to refuse to appoint individuals whom the Secretary has reason to believe are not competent to serve. Moreover, as demonstrated hereafter, this Court has repeatedly recognized that the Secretary of State is statutorily vested with discretion to determine whether a nominee is competent to serve as a member of a county board of elections and that the Court should be hesitant to interfere with the exercise of that discretion. In short, both statutory text and court precedent establish that the Secretary may refuse to appoint a nominee whom she determines to be incompetent to serve as a member of a county board of elections.

This litigation centers on the Secretary's decision to reject Brian K. Daley's nomination and her appointment of Donald Varian who currently serves on the board. In evaluating the nomination of Brian K. Daley to a four-year term, the Secretary considered not only reports of board employees and other members of the community, but her own personal observations for necessary improvement while visiting the board. Those observations convinced her that the Summit County Board of Elections needed a board member who would foster a revived spirit of reconciliation rather than continued partisan division. As the evidence before the Court demonstrates, the Secretary plainly had reason to believe that Mr. Daley was not an individual who would fill this need and was therefore not competent to serve as a member of the Summit County Board of Elections.

The Secretary instead appointed another longstanding Summit County Republican, Donald Varian, to the board, thereby ensuring a bipartisan board consisting of two Republicans and two Democrats, in full satisfaction of the requirements established in Chapter 35 of the Revised Code. Moreover, that appointment occurred at a time that enabled a fully-constituted board to select its chairman, its director and its deputy director within in the five-day period

established by statute for biennial board of elections reorganization to occur, and without uncertainty or manipulation concerning the identity of the members of the board entitled to vote on that reorganization. In short, were she not to have appointed a competent board member by March 1, 2008, one day prior to the period for board reorganization, a board member she previously determined to be not competent, Mr. Ashinkoff, would have, by virtue of the operation of the state's holdover statute, R.C. 3.01, been entitled to participate in board reorganization. It should be noted that the Summit County Republican Party acquiesced to her finding regarding Mr. Arshinkoff's inappropriateness for continued board service, by choosing to submit a second appointment in Mr. Daley's nomination.

Relator has filed this action in mandamus seeking to compel the appointment of Daley and to "undo" the appointment of Varian and all the actions taken by the board since his appointment. Additionally, Relator argues that it was denied the opportunity to make a third recommendation before the Secretary appointed Varian—an opportunity not provided by statute—and that it was also entitled to an opportunity to refute the negative information forwarded to the Secretary in opposition to Daley's appointment before she rejected Daley's nomination.

As a threshold matter, R.C. 3501.07 does not confer upon Relator both the right to make a second nomination *and* to file an action in mandamus. By recommending Mr. Daley as a second nominee, Relator elected one of the only two statutory remedies available to it upon rejection of Alex Arshinkoff's nomination. This Court has held that when the Secretary refuses to appoint a second nominee a county executive committee does not return to square one with a new opportunity to again choose between filing mandamus and appointing yet another, third, nominee. The statute simply does not provide that opportunity. To the contrary, this Court has

acknowledged that it is only upon the rejection of a *first* nominee that a political party executive committee has a statutory right to elect between submitting a new nomination and filing a mandamus action to compel appointment of its nominee. Relator was therefore precluded from filing this action at the point that it submitted the name of Brian Daley to the Secretary for nomination to the board of elections.

Furthermore, because the statutory deadline for submitting nominations to the Secretary had passed by the time Relator forwarded its recommendation of Daley to Secretary Brunner, that nomination was improper and untimely, barring any right to a writ of mandamus.

While the above jurisdictional defects are fatal to Relator's petition, Relator's application for a writ of mandamus also fails on its merits. The express language of R.C. 3501.07 simply does not impose any legal duty upon the Secretary or confer any rights upon Relator that could form the basis of any of Relator's requested relief. Nor is Relator entitled to an alternative writ or any relief striking evidence from the record that might be unfavorable to Mr. Daley. Therefore, Relator's petition for mandamus should be dismissed in total.

Secretary Brunner acted well within the scope of a sound exercise of discretion and in accordance with law. She comes before this Court confident that it will decide the case at bar based on relevant facts and the controlling law—not the 44 pages of vitriolic polemic contained in the Relator's brief—and that the Court will accordingly deny the Relator's request for a writ of mandamus.

STATEMENT OF FACTS

Title 35 of the Revised Code governs the administration of elections in Ohio, including the relationship between the Secretary, the state's chief election official, and the eighty-eight county boards of elections. The General Assembly has established an elections administration

system in which the Secretary has broad authority to direct the local boards. The Secretary of State is the state's chief elections officer. R.C. 3501.04. The members of those local boards serve as her representatives. R.C. 3501.06. She has the authority to issue directives concerning election administration that carry the weight of law. R.C. 3501.05(A) and 3501.11(E). She has the authority to summarily dismiss members of the boards of elections for cause. R.C. 3501.16. And, as specifically relevant to this case, she has the statutory power to appoint all members of the local boards of elections, R.C. 3501.05(A).

R.C. 3501.07 in its entirety provides as follows:

At a meeting not held more than sixty nor less than fifteen days before the expiration date of the term of office of a member of the board of elections, or within fifteen days after a vacancy occurs in the board, the county executive committee of the major political party entitled to the appointment may make and file a recommendation with the secretary of state for the appointment of a qualified elector. The secretary of state shall appoint such elector, unless [s]he has reason to believe that the elector would not be a competent member of such board. In such cases the secretary of state shall so state in writing to the chairman of such county executive committee, with the reasons therefore, and such committee may either recommend another elector or may apply for a writ of mandamus to the supreme court to compel the secretary of state to appoint the elector so recommended. In such action the burden of proof to show the qualifications of the person so recommended shall be on the committee making the recommendation. If no such recommendation is made, the secretary of state shall make the appointment.

Accordingly, when the county executive committee of a political party recommends to the Secretary of State a nominee for appointment to the Board, R.C. 3501.07, by its express terms, provides that the Secretary of State may reject the nominee when she has "reason to believe that the elector would not be a competent member of such board."

Each board consists of four members who are appointed to four year terms. R.C. 3501.06. On March 1st of every even numbered year, the Secretary must appoint two members

to each board in the State. *Id.* One appointment must come from the party who received the highest number of votes for Governor and the second member must be from the party that received the second highest number of votes for Governor. *Id.*

The Revised Code specifies the manner in which these appointments are to take place. First, the executive committee of the political party entitled to make the recommendation must meet no more than 60 days and no less than 15 days before the end of the expiring term of the previous member of the board of elections. R.C. 3501.07. Within that time period, the executive committee may make a recommendation for appointment of a qualified elector and file that recommendation with the Secretary of State. *Id.* The Secretary must appoint that elector “unless [s]he has reason to believe that the elector would not be a competent member of such board.” R.C. 3501.07. If the Secretary decides not to appoint the original elector, the county executive committee has a choice – either meet again and recommend another elector or file a mandamus action in this Court. If the executive committee decides to bring litigation, it bears the burden of proof concerning the qualifications of the elector recommended. *Id.*

Thus, Ohio’s statutory scheme establishes the manner in which a county executive committee must nominate an elector to a new term on the board of elections. First, the executive committee must meet at some point between 60 and 15 days before the expiration of the prior term in order to make a recommendation. Second, if that initial name is rejected because the Secretary has reason to believe the elector is not competent to serve on the board of elections, the executive committee at that point has a choice – either file a mandamus action in this Court *or* submit a new name to the Secretary of State.

In this case, the Summit County Republican Party Executive Committee initially met within the appropriate time frame and recommended that Alex Arshinkoff be appointed to the

Summit County Board of Elections. See Resolution of Summit County Republican Party Executive Committee (Jan. 29, 2008), attached as Exhibit A of Relator's Petition. Secretary Brunner rejected that appointment because various employees of the Summit County Board of Elections, as well as sitting common pleas judges in Summit County, had reported very specific incidents of harassment, intimidation, coercion, and threats from Mr. Arshinkoff during his prior term on the Summit County Board of Elections. Jennifer Brunner Aff., at ¶ 8, attached as Exhibit A of Respondent's Evidence Vol. IX. Among the complaints that the Secretary received about Mr. Arshinkoff was that he created a generally hostile working environment in which Republican employees were prohibited from even speaking with their Democratic counterparts. In addition, board employees were asked to engage in partisan recruiting and petitioning from the board offices during the work day. *Id.* The Secretary also reviewed three affidavits from Summit County Common Pleas Court judges who had testified that Mr. Arshinkoff attempted to interfere with their official duties and tried to intimidate them relative to the Judicial Corrections Board. *Id.* at ¶ 10. The Secretary herself had personally witnessed the heightened tension and overly partisan atmosphere at the Summit County Board of Elections. *Id.* at ¶ 9.

Since the Secretary rejected the appointment of Arshinkoff, the Summit County Republican Party Executive Committee had a choice -- it could either sue in mandamus challenging the rejection of Arshinkoff or it could nominate another elector. It chose to submit a second name when it recommended Brian Daley as a member of the Summit County Board of Elections. See Resolution of Summit County Republican Party Executive Committee (Feb. 26, 2008), attached as Exhibit C of Relator's Petition.

After the Secretary rejected his nomination Arshinkoff contacted Brian Daley and asked if he would be interested in being a member of the Summit County Board of Elections. Brian

Daley Dep. at 5, Respondent's Evidence Vol. II. That was the first time anyone had ever approached Daley to inquire about his interest in being a member of the board of elections. *Id.* Previous to that conversation, Daley had never expressed any interest whatsoever in serving on a board of elections. *Id.*

During this phone conversation, Arshinkoff mentioned that Daley would be paid \$17,000 per year and that duty of a board of elections members generally involved ensuring the integrity of the electoral process. *Id.* at 6. Thus, prior to the meeting of the Summit County Republican Party's Executive Committee meeting, the only thing that Daley understood about a position on the board of elections was that it would pay him \$17,000 per year and he would be responsible for insuring the integrity of the electoral process. *Id.* Daley eventually provided his resume to Arshinkoff.

Daley, who attended the Executive Committee meeting, was uncertain whether his resume was even provided to the committee members during their meeting. *Id.* at 8. Apparently, during this meeting, Arshinkoff informed the members of the committee that Daley was qualified for the position because he had some background in auditing and financial control. *Id.* No one else spoke about Daley or his background. *Id.* The Committee eventually recommended that Daley be appointed to the Board of Elections.¹

On February 26, 2008, the Summit County Republican Party Executive Committee made its recommendation that Brian Daley be appointed as a member of the Summit County Board of Elections. See Exhibit C of Relator's Petition. The Secretary of State's office received materials dated February 26, 2008, which consisted of: (1) a letter from the Executive Committee, (2) a

¹ In fact, the Executive Committee lacked a quorum when it recommended Brian Daley as a nominee to the Summit County Board of Elections. Scott Siegel Affidavit, Ex. A of Brunner Dep., Respondent's Evidence Vol. A.

resolution of the Executive Committee recommending Brian Daley, (3) a completed questionnaire that contained the answers to seven basic questions regarding Daley's background, (4) a form entitled "Recommendation for Full Term Appointment" containing Daley's contact information and the signatures of Daley and various officers of the Executive Committee, (5) an Ethics Policy Acknowledgement Form signed by Daley, and (6) a copy of Daley's resume. See Exhibit C of Relator's Petition. At that time, the Secretary of State's office did not receive any other information supporting Daley's nomination or competency to serve on the Summit County Board of Elections.

Brian Daley was well-known to James J. Hardy, the Secretary's regional liaison ("field representative") for Summit County. Daley's neighbors, William and Debra Vagas, supplied Hardy with information concerning Daley's demeanor and competence to serve on the Summit County Board of Elections. James Hardy Dep., at 8-9, Respondent's Evidence Vol. X. Hardy was not asked by either Secretary of State Brunner or by Deputy Assistant Secretary of State David Farrell to obtain this information. *Id.* at 7. Hardy received a letter from the Vagases concerning litigation that the City of Hudson had brought against them because they shared a waterline with Brian Daley and his wife. Although both the Daleys and the Vagases shared a waterline, the City of Hudson decided to bring litigation against only the Vagases. After the common pleas court ruled that Daley was also a necessary party to the litigation, the City of Hudson dismissed its complaint. Daley served on the Hudson City Council during this entire course of events.

Hardy also received emails concerning Daley from four different people. Hardy Dep., *supra*, at 11. He forwarded those emails to the Secretary's administrative assistant. *Id.* at 19.

Hardy also downloaded an editorial about Daley from the Akron Beacon Journal that he remembered previously seeing. *Id.* at 21.

Secretary Brunner followed the same process she followed with all nominees when she reviewed the Daley nomination. *Brunner Aff.* at ¶ 13, Ex. A of Respondent's Evidence Vol. IX. She had information in front of her showing that Daley had "bullied, intimidated, and threatened people in order to get his way, rather than engaging in reasoned or constructive problem solving." *Brunner Aff.*, *supra*, at ¶ 15. The Secretary also reviewed information showing that Daley refused to even "meet or cooperate with local school officials" in various funding matters. *Id.* at ¶ 16. Schools must work closely with boards of elections in order to place funding issues before the voters. *Id.* at ¶ 17. Thus, Daley's refusal to work with these school officials gave the Secretary cause for great concern. *Id.* In addition, Mr. Daley referred to members of the Hudson Economic Development Corporation, who were advocating council involvement with school issues, as "special interests" and "ankle biters." *Id.* at 16. Based upon this information, Secretary Brunner determined that she "had reason to believe that [Daley] was not competent, fit, or suitable to serve on a board of elections." *Id.* at ¶ 14.

The Secretary recognized that the Summit County Board of Elections already suffered from a partisan and difficult environment. *Id.* at ¶ 18. Members of boards of elections must be fair, objective, and cooperate with each other and their employees as well as with other agencies, organizations, and political subdivisions. *Id.* Based upon Mr. Daley's past behavior, it became clear that there was sufficient reason to believe he would not be competent to perform the duties of a member of a board of elections. Thus, on February 29, 2008, the Secretary rejected the appointment of Brian Daley to the Summit County Board of Elections. *Id.* at ¶ 19.

Reorganization meetings at the boards of elections must take place between March 2 and March 6, 2008. R.C. 3501.09; Secretary of State Directive 2008-31 (Feb. 28, 2008). Because of the rapid approach of this statutory deadline and her statutory responsibility to appoint members of the boards of elections by March 1st pursuant to R.C. 3501.07, the Secretary was compelled to consider another elector to appointment to the Board of Elections. Secretary Brunner subsequently appointed Donald Varian. Secretary Brunner stated in her deposition that she learned of Mr. Varian from Wayne Jones, a Democratic member of the Summit County Board of Elections. Secretary Brunner delegated the responsibility to interview Mr. Varian to Deputy Assistant Secretary of State David Farrell, (Brunner Aff., supra, at 21), who recommended that Mr. Varian was a good candidate for the position. The Secretary then interviewed Mr. Varian, herself, and thereupon offered him the position in time to fulfill her statutory duty to make the appointment by March 1, 2008.

Mr. Varian is an attorney and member of the Summit County Republican Party Central Committee with a favorable reputation in the Summit County legal community. Brunner Aff., supra, at ¶ 22. He had previously served on the Summit County Republican Party Executive Committee and had completed an internship with the National Republican Committee. Varian Aff., Ex. C of Respondent's Evidence Vol. IX. In conducting the interview of Mr. Varian, Mr. Farrell asked Mr. Varian if he were interested in serving on the Summit County Board of Elections. David Farrell Aff., at ¶ 19, Ex. B of Respondent's Evidence Vol. IX. Farrell interviewed Varian following the same format using the questionnaire for prospective appointment that all other possible candidates needed to fill out. Farrell Aff., supra, at ¶ 20. Varian informed Farrell that he was a registered voter in Summit County, he was a Republican who had never been elected to public office or served as a campaign treasurer, did not have any

relatives employed by the Summit County Board of Elections, has been a practicing attorney for 36 years and an assistant prosecutor for 2 years. Varian also informed Farrell that Varian has been married for 36 years and has 4 grown children and 5 grandchildren. *Id.* at ¶ 21.

LAW AND ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction Over Relator’s Claims.

As a preliminary matter, the Court should dismiss Relator’s request for mandamus for lack of subject matter jurisdiction. In at least two ways, Relator has failed to meet the express requisities of R.C. 3501.07 for mandamus. First, the statute allows Relator to file an action in mandamus at only one time—after its first nominee is rejected by the Secretary of State. R.C. 3501.07 does not allow a mandamus action after Relator has already chosen to recommend a second nominee, as Relator has done here. Second, Relator failed to recommend Brian Daley as its second nominee within the statutory time limit. Relator has thus failed to bring a proper action in mandamus over which this Court can exercise jurisdiction.

A. R.C. 3501.07 does not authorize Relator to name a second nominee and also thereafter file an action in mandamus.

When a county executive committee submits a nominee for appointment to the Board of Elections that is rejected by the Secretary of State, the executive committee may elect one of two remedies, as provided by the express language of R.C. 3501.07. If the Secretary of State “has reason to believe that the elector would not be a competent member of such board” and decides to reject the executive committee’s nominee, the committee “may *either* recommend another elector *or* may apply for a writ of mandamus to the supreme court to compel the Secretary of state to appoint the elector so recommended.” R.C. 3501.07 (emphasis added). As explained previously by this Court, “R.C. 3501.07 affords an executive committee only two alternatives when the Secretary of State rejects the nominee within the specified period.” *State ex rel. Pike*

Cty. Republican Executive Comm. v. Brown (1989), 43 Ohio St.3d 184, 185, 540 N.E.2d 245. If the committee's first choice is not appointed, "the committee may *either* make another recommendation *or* it may file for a writ of mandamus. R.C. 3501.07 does not allow the committee to make a second recommendation *in addition* to filing for a writ of mandamus." *Id.* (emphasis in original).

The *Pike County* case, *supra*, demonstrates how R.C. 3501.07 operates when both the first and second nominees of an executive committee are rejected by the Secretary of State. After the first nominee of the Pike County Republican Executive Committee was rejected, the executive committee filed an action in mandamus that was denied by the Court. *Id.*, at syllabus, citing 37 Ohio St.3d 710, 532 N.E.2d 136 (dismissal order issued without opinion). The executive committee then submitted a second nominee. *Id.* When that nominee was also rejected by the Secretary of State, the executive committee filed suit in mandamus again to compel the appointment of the second nominee. *Id.* The Court also denied the committee's second suit for mandamus, ruling that once the committee elected to file an action in mandamus following the rejection of the first nomination, the committee was not authorized to return to the recommendation stage. *Id.* at 185. "R.C. 3501.07 does not allow the committee to make a second recommendation *in addition* to filing for a writ of mandamus." *Id.*

In this instance, the Summit County Republican Executive Committee had two options, as provided by R.C. 3501.07, after Secretary of State Brunner rejected its first nomination. It had the option of recommending another elector or of applying for a writ of mandamus to compel the appointment of Mr. Arshinkoff. The Committee chose to nominate Brian Daley on February 26, 2008. After Secretary Brunner rejected Mr. Daley, the Committee filed this mandamus action in an attempt to compel his appointment. However, as demonstrated by the

Pike County case and the express language of R.C. 35017.07, upon rejection of the first nominee, Arshinkoff, the Committee had an option to either recommend another elector *or to* file a mandamus action. By choosing one, the committee necessarily foregoes the other option. Without a limitation like this, a county party executive committee could hamstring the operation of a board of elections, including its reorganization for the next two-year period, by repeatedly nominating individuals lacking competence. R.C. 3501.07 does not give the executive committee another bite at the apple after its second nominee has been rejected.

Respondent acknowledges that the facts in the case at bar somewhat differ from the facts in *Pike County* in that, here, the Relator chose to nominate Brian Daley as its second recommendation rather than to file an action in mandamus to challenge the non-appointment of Alex Arshinkoff. However, this constitutes a distinction without a difference in terms of the legal analysis underlying the *Pike County* case. That case clearly stands for the legal principle that mandamus is available to a party executive committee only after its first nominee is rejected. In the case at bar, the executive committee closed the door on filing a subsequent challenge in mandamus by choosing to instead submit a second nomination to the Secretary.

B. Relator failed to recommend Brian Daley within the statutory time limit in R.C. 3501.07.

Relator failed to comply with the provision in R.C. 3501.07 requiring the Executive Committee to recommend an elector fifteen days before the expiration date of a board member's term. In order to make a full-term appointment to the Board of Elections, the statute requires the Executive Committee to hold a meeting and make and file its recommendation "not more than sixty nor less than fifteen days before the expiration date of the term of office of a member of the

board of elections.” R.C. 3501.07.² See also Secretary of State Directive 2007-34 (Dec. 11, 2007) (citing R.C. 3501.07 and clarifying that the executive committee must meet “no earlier than December 31, 2007 and no later than February 14, 2008” to recommend an appointment for terms beginning March 1, 2008). The statute also provides that, “If no such recommendation is made” by the Executive Committee, “the secretary of state shall make the appointment.” R.C. 3501.07.

In *State ex rel. Dewort v. Hummel* (1946), 146 Ohio St. 653, 67 N.E.2d 540, this Court ruled that an executive committee could not compel or prevent the Secretary of State’s appointment of a board member when the executive committee failed to recommend a nominee within the time limits of R.C. 3501.07. That is because the failure to recommend a competent nominee within that time triggers the Secretary of State’s duty to appoint another elector. Although the facts in *Dewort* involve an appointee who was selected too early – i.e. prior to the 60 days immediately preceding the expiration of the term – the Court’s ruling in *Dewort* shows that an executive committee has no cognizable claim against the Secretary of State once the statutory deadline passes because, at that point, the statute confers full authority on the Secretary of State to appoint an elector. The record makes it clear that the Secretary provided the relator with a specified deadline *prior to* the March 1 statutory appointment deadline to nominate another candidate for appointment, giving it every opportunity to provide her with a candidate acceptable to both the Executive Committee and to her. In other words, the Secretary, in deference to the Executive Committee of the Summit County Republican Party, was willing to

² The provision in R.C. 3501.07 allowing the Executive Committee to make a recommendation “within fifteen days after a vacancy occurs in the board” does not apply to this action because it refers to mid-term vacancies, not full-term appointments.

accept and appoint a second nominee, had the Committee provided the name of a competent individual, even though she was under no legal duty under the statutory scheme to do so.

The Relator in *Dewort* filed a writ of prohibition attempting to prevent the Secretary of State's appointment of an elector who was recommended too early by the executive committee. The Court ruled that the nominee "is not the choice of the [] executive committee because that committee has not met or convened during the sixty days immediately preceding the filing of relator's petition." *Id.* at 653. Relator's petition was filed on February 26, 1946, which means that the statutory deadline for recommending a nominee had passed. However, despite the premature and invalid nomination, the Secretary nevertheless appointed the nominee--an appointment that the Court upheld. Because the executive committee "had made no recommendation within the time limits set forth in [R.C. 3501.07], the Secretary of State was empowered to make an appointment" of any qualified elector of the county who was a member of the appointing party. *Id.* at 656. Therefore, the Court refused to issue a writ of prohibition that would disturb the Secretary's exercise of discretion. *Id.*

In this case, the Summit County Republican Party Executive Committee met on February 26, 2008, and on that date selected Brian Daley as its nominee for appointment to the Board of Elections. See Resolution of Summit County Republican Party Executive Committee (Feb. 26, 2008), attached as Exhibit C of Relator's Petition. That meeting took place well after February 14, 2008 – the fifteenth day before the March 1, 2008 expiration of the term. By operation of the statute, the Executive Committee's failure to name Mr. Daley within the time limit meant that Secretary Brunner was free to exercise her discretion in appointing another elector. Relator's failure to nominate a competent individual before February 14, 2008, is fatal to Relator's petition in mandamus. Because the Secretary of State has no legal duty to appoint a nominee that has

been untimely recommended, Relator's petition fails on the merits. See *infra*, Part II.A.2 (discussion of mandamus requirements). However, even before reaching that determination, since Relator brings an action in mandamus that is not authorized by the express language of R.C. 3501.07, Relator does not properly invoke this Court's original jurisdiction. Therefore, the Court should decline from hearing this matter and dismiss for lack of subject matter jurisdiction.

II. Relator Is Not Entitled to a Writ of Mandamus.

Even if the Court were to exercise jurisdiction over this matter, the Court should deny Relator's petition because Relator has not shown that it is entitled to the requested writ of mandamus. Relator has the burden of establishing: (1) a clear legal duty on the part of Secretary of State Brunner to appoint Mr. Daley, (2) a corresponding clear legal right of the Relator to the appointment of Brian Daley, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 175, 2007 Ohio 5838, 876 N.E.2d 1231, ¶ 13; *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006 Ohio 5439, 857 N.E.2d 88, ¶ 18. This Court has made it clear that mandamus is not to be issued in doubtful cases. *State ex rel. Shafer v. Ohio Turnpike Commission* (1953), 159 Ohio St. 581, 113 N.E.2d 14. Because mandamus is an extraordinary remedy, "it is to be issued with great caution and discretion" and only when Relator has proven its burden of entitlement to the writ. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St. 2d 165, 166, 364 N.E.2d 1; *State ex rel. Preschool Development, Ltd. v. Springboro*, 99 Ohio St. 3d 347, 2003 Ohio 3999, 792 N.E.2d 721, ¶ 12 (relator in mandamus has the burden of proving entitlement to the writ).

As to the first requirement, Relator cannot show that the Secretary of State has a clear legal duty to appoint Brian Daley to the Summit County Board of Elections. To the contrary, both the express language of R.C. 3501.07 and case law from this Court demonstrate that

Secretary Brunner followed the mandates of the statute and properly acted within her discretionary authority. Second, Relator can point to no statutory or constitutional right that forms the basis of any of the relief requested by Relator. Finally, in the absence of any injury to any purported right belonging to Relator, this Court cannot issue a remedy in mandamus.

A. Secretary of State Brunner has no clear legal duty to appoint the Executive Committee's nominee Brian Daley to the Summit County Board of Elections.

In extraordinary actions challenging the decisions of the Secretary of State, relief will not issue unless Relator can show that the Secretary “engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions.” *Whitman v. Hamilton County Board of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, 778 N.E.2d 32, ¶ 11; *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 583, 651 N.E.2d 995. As a general rule, in the absence of an abuse of discretion, “mandamus cannot compel a public body or official to act in a certain way on a discretionary matter.” *State ex rel. Veterans Serv. Office v. Pickaway Cty. Bd. of Cty. Comm’rs.* (1991), 61 Ohio St.3d 461, 463, 575 N.E.2d 206. Unless Relator can show that the Secretary of State acted in a way that constitutes an abuse of discretion – that is, “unreasonable, arbitrary, or unconscionable” – the extraordinary writ of mandamus cannot be used to control the exercise of the Secretary’s discretion. *State ex rel. Dublin v. Delaware Cty. Bd. of Comms’rs.* (1991), 62 Ohio St.3d 55, 60, 577 N.E.2d 1088. An abuse of discretion “must be more than an error of law or an error of judgment.” *State ex rel. Democratic Executive Comm. of Lucas Cty. v. Brown* (1974), 39 Ohio St.2d 157, 161, 314 N.E.2d 376. An abuse of discretion warrants judicial intervention only when an officer exercises discretion “to an end or purpose not justified by, and clearly against, reason and evidence.” *Id.* In other words, “it must clearly appear that such officer has so far departed from the line of his duty under the law that it can be said he has in fact so far abused such discretion that he has neglected or refused to

exercise any discretion.” Id. at 161-162, citing *State ex rel. Armstrong v. Davey* (1935), 130 Ohio St. 160, 163.

When applying this standard of review, Secretary Brunner’s refusal to appoint Brian Daley to the Summit County Board of Elections constitutes a proper exercise of her discretion in accordance with R.C. 3501.07. The language of the statute itself confers broad discretionary authority on the Secretary of State to reject appointments if there is reason to believe that a recommended nominee would not be competent to serve on the board of elections. As held by this Court in *State ex rel. Democratic Committee of Lucas County v. Brown* (1974), 39 Ohio St.2d 157, that grant of discretionary authority means that the Secretary can determine whether a nominee would inspire confidence in the fairness and integrity of the elections system. As the chief elections officer, the Secretary’s interpretation of R.C. 3501.07 should be given deference over the alternative, narrow interpretation of the statute offered by Relator.

1. Secretary of State Brunner properly exercised her discretion within the General Assembly’s broad grant of authority in R.C. 3501.07.

As a preliminary matter, the express language of R.C. 3501.07 does not require the appointment of Brian Daley. The statute merely states that when a county executive committee recommends to the Secretary of State an elector for appointment to a board of elections, the Secretary shall appoint such elector, “unless [s]he has reason to believe that the elector would not be a competent member of such board.” R.C. 3501.07 (emphasis added). While the statute itself does not further define “competence,” the Ohio Supreme Court has affirmed that “R.C. 3501.07 grants the Secretary of State broad discretion in determining whether recommended appointees are competent to be members of boards of elections.” *Democratic Executive Comm. of Lucas Cty.*, 39 Ohio St.2d at 160. Accordingly, when determining whether an elector recommended by the county executive committees is competent to serve on a board of elections, the Secretary can

take into account not only the nominee's knowledge of election law and the mechanics of its administration, but also "his basic ability to get along with those with whom he must work and to inspire public confidence in the election system." *Democratic Executive Comm. of Lucas Cty.*, 39 Ohio St.2d at 162.

In the case of *State ex rel. Democratic Committee of Lucas County v. Brown* (1974), 39 Ohio St.2d 157, this Court considered a similar challenge to a previous Secretary of State's decision to reject a nominee recommended by the Lucas County Democratic Executive Committee. In a letter setting forth his reasons for not appointing the nominee, Secretary of State Ted Brown stated as follows:

The competence of a board member depends not only on his knowledge of the election law and the mechanics of its administration; it also includes his basic ability to get along with those with whom he must work and to inspire public confidence in the election system. It is my belief that personality conflicts cannot be allowed to be a disruptive influence in a board of elections. The ability to constructively cooperate is a necessity if the board is to properly perform the duties assigned to it by law. A board member must represent the interests of *all* of the people he serves, not just those of his own political persuasion.

Id. at 162 (emphasis in original). Following these principles, Secretary Brown rejected the committee's nominee for reappointment because the nominee "injected abrasive partisan bickering into the conduct of board business," "produced turmoil and tension," "undermined staff morale," acted without tact and courtesy towards board staff, and "damaged the harmony which once characterized the Lucas County Board of Elections." *Id.* While the Court acknowledged that these reasons "reflect to a great extent the Secretary's personal views as to the requirements of a competent member of the board of elections, *that determination is within the discretion granted the Secretary of State.*" *Id.* at 163 (emphasis added).

Relator seeks to limit the definition of competence to an elector's "aptitude, skill, strength, or knowledge," Relator's Brief at 17-18. However, that narrow interpretation of R.C.

3501.07 is not supported by the language of the text or by the case law. By way of illustrating the broad scope of the Secretary's discretionary authority under R.C. 3501.07, the Supreme Court of Ohio has compared that statute to R.C. 3501.16, which controls the removal of election board members. See generally *State ex rel. Hough v. Brown* (1977), 50 Ohio St.2d 329. While R.C. 3501.07 confers broad discretion upon the Secretary of State to refuse the **appointment** of a board member, R.C. 3501.16 does not grant the Secretary of State broad discretion in **removing** board members. *Id.* at 332. In contrast to R.C. 3501.07, which places no statutory limits on the Secretary's discretion to appoint or reject a nominee recommended by the Executive Committee, R.C. 3501.16 limits the Secretary's ability to remove members of the boards of elections to cases in which "good and sufficient cause" for removal exists. See *Hough*, *supra*, at 332, citing R.C. 3501.16. The differences in these statutory provisions demonstrate that the General Assembly intended to grant broad discretionary powers to the Secretary under 3501.07 to reject nominees to new board of elections terms. If the Legislature wanted to limit the Secretary's authority, it would have done so expressly, as it did in R.C. 3501.16.

Furthermore, because the Secretary of State is the State's chief elections officer, R.C. 3501.04, this Court has found on numerous occasions that when an elections statute is subject to two different, but equally reasonable interpretations, courts have a duty to defer to the Secretary of State's interpretation. *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 141, 2007-Ohio-5795; *Whitman*, 2002-Ohio-5923, at ¶ 22; *Herman*, 72 Ohio St.3d at 586. In fact, in these situations, the interpretation of the Secretary of State "is entitled to **more weight**" than competing interpretations, including the interpretation offered by Relator. *Herman*, *supra*, at 586 (emphasis added).

For reasons similar to the ones upheld in *State ex rel. Democratic Executive Comm. of Lucas County*, supra, Secretary of State Brunner determined that she had reason to believe that Brian Daley would not be competent to serve on the Summit County Board of Elections. See generally Brunner Aff., Exhibit A of Respondent's Evidence Vol. IX; Letter of Jennifer Brunner to Alex Arshinkoff (Feb. 29, 2008), attached as Exhibit D of Relator's Petition. Following the same process for all nominees, Secretary Brunner reviewed the materials submitted by Mr. Daley and the Executive Committee and considered testimony and correspondence from the Summit County community and various third parties. Brunner Aff., supra, at ¶ 13. The evidence before Secretary Brunner included editorials and testimony regarding Mr. Daley's past conduct and demeanor as a member and president of the Hudson City Council. *Id.* at ¶ 15. One editorial describes Mr. Daley as a "bully" and an "arch ideologue in a city better served by practical problem solvers." Brunner Letter, supra, at p.3; Akron Beacon Journal editorial (Oct. 29, 2007), attached as Exhibit 9 of Brunner Deposition, Relator's Evidence Vol. IV. The editorial expressed concerns that Mr. Daley's approach to leadership "in style and substance, is not suited to the political realities of Hudson" and "clashes sharply with the nonpartisan tradition of governing." *Id.*

Secretary Brunner also considered a written communication from Michael Moran, who served on city council with Mr. Daley. That communication indicated that Mr. Daley has bullied, intimidated, and threatened people in order to get his way, rather than engaging in reasoned problem solving. Brunner Aff., supra, at ¶ 15; Email communication from Michael Moran to James Hardy, attached as Exhibit 9 of Brunner Dep., Respondent's Evidence Vol. IV. While serving on Hudson City Council, Mr. Daley opposed a local school funding issue, as he is entitled to do. However, Mr. Daley went one step further by demanding that city officials refuse

to meet or cooperate with local school officials. Brunner Aff., supra, at ¶ 16. Rather than working on reaching a solution with other city officials, Mr. Daley resorted to calling the Chamber of Commerce and Hudson Economic Development Cooperation “special interests” and “ankle biters.” Id. Schools routinely place issues on election ballots, and the board of elections must work with schools official to place issues those issues before the voters. Given Mr. Daley’s refusal to work with Hudson City Council officials, Secretary Brunner had serious concerns that he would engage in similar conduct if appointed to the Board of Elections. Id. at ¶ 17. Because of the already partisan and hostile environment at the Summit County Board of Elections, Secretary Brunner had reason to believe that Mr. Daley would not be suitable for a position at the Board of Elections that requires fairness, objectivity, and cooperation with fellow board members and employees, regardless of their political positions or beliefs. Id. at ¶¶ 17-18.

Secretary Brunner also reviewed numerous editorials and newspaper articles reflecting community-wide concern that Mr. Daley improperly used his position on city council and taxpayer money to escalate a water line dispute with his neighbors, William and Debra Vagas. See generally Exhibit 9 of Brunner Dep., Respondent’s Evidence Vol. IV. The dispute involves a shared water line discovered by the parties on their adjacent properties in 2004 in violation of a city ordinance. *Hudson resident suspicious of city’s lawsuit in neighbor dispute*, THE CLEVELAND PLAIN DEALER (Oct. 24, 2007), attached as Exhibit 9 of Brunner Dep., Respondent’s Evidence Vol. IV. Although the Vagases offered to put a valve on their property so that the city could turn their water off without disturbing the Daleys, the city filed suit only against the Vagases. Id. While the water line was also on Mr. Daley’s property, the city did not include Mr. Daley as a defendant in the lawsuit until the Summit County Common Pleas Court issued an order. Id.; see also Judgment Entry (Sept. 26, 2007), *City of Hudson v. Vagas*, Summit County

Common Pleas Court No. 2006-1-7340, attached as Exhibit 1 of Respondent's Evidence Vol. VII. The City of Hudson spent \$8,000 to litigate this case against the Vagases. *Id.* As reflected in these editorials and articles, the community at large knew of this dispute and expressed its concerns over the appearance of Daley's undue influence on the city's legal proceedings: "[T]he appearance that Daley has used his position on council to escalate a tiff with a neighbor and is using taxpayers' money to push it in court is alarming." THE CLEVELAND PLAIN DEALER editorial (Oct. 29, 2007), Exhibit 9 of Brunner Dep., Respondent's Evidence Vol. IV.

In considering the evidence and testimony before her of Mr. Daley's demeanor and actions as a public official, Secretary Brunner had reason to believe that Mr. Daley would not be a competent member of the Summit County Board of Elections. For reasons similar to the ones previously upheld by this Court as within the Secretary's discretion, see *Democratic Executive Comm. of Lucas County*, 39 Ohio St.2d 157, the Secretary determined that the appointment of Mr. Daley would create an unproductive environment at the Board of Elections and would undermine the public's confidence in the administration of fair, non-partisan elections. See Brunner Letter, at 3, attached as Exhibit D of Relator's Petition.

Throughout its Brief, Relator relies on the case of *State ex rel. Cuyhoga Cty. Democratic Party Executive Comm. v. Taft* (1993), 67 Ohio St.3d 1, 615 N.E.2d 615, for the proposition that Secretary Brunner has a legal duty to appoint Mr. Daley to the Board of Elections. See, e.g., Relator's Brief, at 15-16. In that case, the Court granted a writ of mandamus compelling the appointment of a nominee that then-Secretary of State Taft rejected based on suspected violations of campaign finance law and errors and omissions in the nominee's campaign finance reports. *Id.* at 3. However, in his dissent, Chief Justice Moyer found the majority's opinion troubling because it "sweeps aside precedent of this court establishing the broad discretion of the

Secretary of State under R.C. 3501.07” and “sends the wrong message with respect to the qualifications required of persons serving as members of a county board of elections.” *Id.* at 2-3 (Moyer, C.J., dissenting). Pointing specifically to the Court’s decision in *Lucas Cty.*, Chief Justice Moyer stated that he “fail[ed] to comprehend why the Secretary of State has discretion to reject an appointee on the basis of a potential personality conflict... as we have previously held [in *Lucas Cty.*], ... but does not have the discretion to reject an appointment on the basis that the appointee has violated campaign finance laws. There can hardly be a clearer case of this court’s substitution of its judgment for that of the Secretary of State.” *Id.* at 3.

Of all the cases cited by Relator, the *Cuyahoga County* case, *supra*, is the only one where the Court granted a writ of mandamus to compel the appointment of a nominee already rejected by the Secretary of State. There is a reason why this relief is rarely granted. As Chief Justice Moyer pointed out in his dissent, the substitution of the Court’s judgment for that of the Secretary’s is contrary to well-settled precedent establishing the Secretary’s broad discretionary powers of appointment under R.C. 3501.07 and contradicts the entire elections administration framework established in Chapter 35 of the Revised Code.

In accordance with the *Lucas County* case, this Court should find that the Secretary Brunner properly exercised her discretion to reject Mr. Daley for appointment to the Board of Elections. Contrary to Relator’s allegations, the Secretary’s rejection of Mr. Daley was not arbitrary or capricious. Secretary Brunner had reason to believe that Mr. Daley would not be able to execute the duties of a Board of Elections member in a fair, honest, and impartial way, or cooperate with Board staff and employees in the best interest of the voting public. These concerns strike at the heart of a Board member’s duties, and thus were properly considered by the Secretary in her rejection of Mr. Daley.

2. Secretary of State Brunner complied with her statutory duties in R.C. 3501.07 by appointing Donald Varian.

Relator's Brief and Petition for mandamus both contain various allegations that Secretary Brunner violated R.C. 3501.07 by appointing Donald Varian to the Board of Elections after rejecting both Alex Arshinkoff and Brian Daley. See, e.g., Relator's Petition, ¶¶ 34-41; Relator's Brief at 6, 13, 24ff. However, this entire line of reasoning lacks merit for several reasons.

First, after the rejection of Arshinkoff, Relator failed to make a recommendation within the statutory time limit in R.C. 3501.07. As set forth above in this Brief and as recognized by this Court, once the statutory deadline has passed, the Secretary of State may exercise her discretion in appointing an elector. See Part I.B of this Brief. In this case, the Summit County Republican Party Executive Committee did not meet or recommend Mr. Daley until February 26, 2008.³ The Executive Committee thus failed to make a recommendation by February 14, 2008, the fifteenth day before the March 1, 2008 expiration of the term. By operation of the statute, the Executive Committee's failure to name Mr. Daley within the time limit meant that Secretary Brunner was free to exercise her discretion in appointing Donald Varian. Because the Executive Committee failed to make a recommendation within the time limits set forth in R.C. 3501.07, Secretary of State Brunner was empowered to make an appointment of any qualified elector of the county who was a member of the appointing party. See *State ex rel. Dewort v. Hummel*, 146 Ohio St. at 656. The express language of R.C. 3501.07 simply does not require Secretary Brunner to wait for Relator to make another recommendation once the deadline has passed.

³ The Secretary provided the Relator with a specified deadline *prior* to the March 1 statutory appointment deadline to nominate another candidate for appointment, giving it every opportunity to provide her with a candidate acceptable to both the executive committee and to her.

Furthermore, Secretary Brunner was required to proceed with the appointment of Donald Varian because of the statutory deadline in R.C. 3501.09 requiring the Boards of Elections to conduct their “reorganization” meetings between March 2 and March 6, 2008 – no more than five days after the appointments are made by the Secretary of State on March 1. See R.C. 3501.06, 3501.09. See also Secretary of State Directive 2008-31 (Feb. 28, 2008) (“Boards of Elections are required to ‘reorganize’ between March 2, 2008 and March 6, 2008, in the manner provided in R.C. 3501.09.”). At that meeting, the boards are required to, among other things, appoint a director and deputy director. *Id.* Given this statutory deadline for the reorganization meeting, there is simply no merit to Relator’s argument that it is entitled to recommend other electors *ad infinitum* before the Secretary appointed Varian. See Relator’s Petition, ¶ 44. Taken together, the mandatory statutory deadlines in R.C. 3501.07 and R.C. 3501.09 prevent an executive committee from delaying the appointment process and/or taking advantage of that delay, as Relator here attempts to accomplish in its arguments. An executive committee cannot use stall tactics to subvert the Secretary of State’s appointing authority. If an executive committee fails to make a timely recommendation of a competent individual (and Secretary Brunner gave Relator every opportunity to do that—twice), the Secretary must continue with the appointment process so that a board of elections can timely fulfill their statutory obligations on reorganization with members who are entitled by law to make such decisions for their future operation for the next two years.

Finally, the appointment of Donald Varian meets the express criteria set forth in R.C. 3501.06 and R.C. 3501.07. R.C. 3501.06 requires that, “All vacancies filled for unexpired terms and all appointments to new terms shall be made from the political party to which the vacating or outgoing member belonged.” Mr. Varian is a qualified elector of Summit County and a current

member of the Central Committee of the Summit County Republican Party. Brunner Aff. ¶ 22, Ex. A of Respondent's Evidence Vol. IX. In fact, Mr. Varian has been a member of the Republican Party his entire adult life and has donated tens of thousands of dollars to the local and state Republican Party. Donald Varian Aff., Ex. C of Respondent's Evidence Vol. IX. Mr. Varian also has over two decades of experience in running and assisting national, state, and local campaigns for Republican candidates. *Id.*, ¶¶ 2, 5, 7, 8. As an attorney, Mr. Varian has acquired a favorable reputation among the Summit County legal community. Brunner Aff., *supra*, at ¶ 22. Relator offers no facts or allegations that Mr. Varian is not a member of the Republican Party or is not otherwise competent to serve on the Board of Elections.

Rather, the sole grounds for Relator's opposition to Mr. Varian's appointment is because Mr. Varian was not recommended by the executive committee, and because Mr. Varian's admirers include members of both the Republican and Democratic parties. As to the first reason for opposing Mr. Varian's appointment, the executive committee was no longer entitled to make any more recommendations to the Secretary of State once the statutory deadline passed. As to the second reason, Mr. Varian's favorable standing in the community across party lines merely emphasizes his competence to serve on the board of elections and actions of the Secretary *consistent with* her desire to heal a fractious atmosphere at a board of elections in one of the more populous counties of the state. For these reasons, Relator simply has no legal basis to challenge the appointment of Donald Varian.

3. R.C. 3501.07 imposes no evidentiary standard limiting the Secretary of State's consideration of application materials.

Throughout its Brief, Relator raises a number of arguments regarding the evidentiary standard or content of materials submitted for the Secretary's review before her decision to reject the appointment of Mr. Daley. See, e.g., Relator's Brief, at 28ff. First, Relator insists that the

Secretary of State's decision to reject Mr. Daley is somehow tainted by considering evidentiary materials that were "unsigned," "unauthenticated," "anonymous," or "unverified." There is simply no requirement in R.C. 3501.07 that materials considered by the Secretary of State before appointing or rejecting a nominee need to comport with the Rules of Evidence or any other evidentiary standard imposed by Relator. To the extent that newspaper articles or editorials constitute hearsay, those materials convey the community's perception of potential appointees and thus fall within the scope of factors that the Secretary may consider. If a nominee's conduct has created the appearance in the community of partisan bullying or misuse of power, that perception certainly undermines the public's confidence that the same nominee can perform the duties of the Board of Elections in a non-partisan and even-handed fashion.

The only authority cited by Relator for the proposition that the Secretary of State was required to abide by some evidentiary standard is Revised Code sections 1.47 and 1.49, and the case of *Mishr v. Poland Bd. of Zoning Appeals* (1996), 76 Ohio St.3d 238. See Relator's Brief, at 29. However, those authorities are completely inapposite to this case. The statutory provisions simply provide that in matters of statutory construction, one must assume that the General Assembly intended constitutional compliance and a just and reasonable result (R.C. 1.47), and that when a statute is ambiguous, a court may consider matters such as legislative history (R.C. 1.49). *Mishr* states the rule of statutory construction that "a statute should not be interpreted to yield an absurd result." 76 Ohio St.3d at 240. Here, statutory construction is not warranted in the absence of any ambiguity or any words regarding an evidentiary standard. See, e.g., *State v. Teamer* (1998), 82 Ohio St. 3d 490, 491, 696 N.E.2d 1049 (A court "must give effect to the words of a statute and may not modify an unambiguous statute by deleting words

used or inserting words not used.”). Here, Relator goes beyond asking the Court to construe or interpret a statute – it is asking the Court to insert words into the statute that do not exist.

Finally, there is no merit to Relator’s unfounded allegations that the Secretary of State and her staff engaged in “nefarious” and “deceptive” conduct in the gathering of evidentiary materials concerning Mr. Daley. See, e.g., Relator’s Brief, at 26. Relator makes much ado about purported “discrepancies” in what Secretary Brunner told a reporter at the Akron Beacon Journal and what she testified at her own deposition. *Id.*⁴ There is simply no discrepancy, except as created by Relator. The reporter states that Secretary Brunner “told [her] that Varian’s name had been suggested by her elections director [David Farrell]”. *Stephanie Warsmith Aff.* ¶ 6, Relator’s Evidence Vol. III, at 876. And indeed, Secretary Brunner testified that after David Farrell conducted a telephone interview with Mr. Varian, Mr. Farrell recommended Mr. Varian to Secretary Brunner on February 29th, the day before the statutory deadline to make an appointment. *Brunner Dep., Respondent’s Evidence Vol. III*, at 45.

Relator also makes much of the allegation that Mr. Varian’s name came to Secretary Brunner’s attention through a Democrat. Relator’s Brief, at 25-26. Secretary Brunner stated in her deposition that she learned of Mr. Varian from Wayne Jones, a Democratic member of the Summit County Board of Elections. To this, Relator takes great exception. The Secretary submits that it was not unrealistic for this to occur because of: 1) the limited time left to her after the relator twice failed to send nominees whom the Secretary could find were competent to perform the duties of a board of elections member in Summit County; 2) the then existing extremely partisan atmosphere at the board fueled by unreasonable actions taken by Mr. Arshinkoff and as anticipated by evidence submitted regarding Mr. Daley; 3) and the need to

⁴ Note that Relator’s counsel had every opportunity to question Secretary Brunner about this perceived discrepancy in the Secretary’s lengthy deposition, but he apparently chose not to do so.

foster bipartisan cooperation for the betterment of election administration in Summit County. Brunner Aff. ¶¶ 5, 8-9, Ex. A, Respondent's Evidence Vol. IX. Despite what unofficial partisan "rules of engagement" may be deemed by Relator to exist in Summit County, it was not unreasonable to consult with another member of the Summit County Board of Elections in seeking a competent member of the board who would be able to work to repair the fractious, partisan problems at this board.

The line of argument offered by Relator is a red herring that attempts to draw attention away from the lack of statutory authority and case law supporting Relator's arguments. Both the express language of R.C. 3501.07 and this Court's interpretation of the statute demonstrate that the Secretary acted within her broad grant of authority, and in fact, with reasonableness, in rejecting Mr. Daley's appointment and appointing Mr. Varian. Because Relator cannot meet its burden of showing any legal duty of the Secretary to the contrary, Relator's request for relief in mandamus should be summarily dismissed.

B. Relator has no clear right to the relief requested.

Relator has not met its burden of showing that the Secretary of State has a clear legal duty to appoint Brian Daley. Additionally, Relator cannot meet its burden of showing a clear legal right to any of the relief requested in its petition for mandamus.

1. Relator has no clear legal right to Brian Daley's appointment to the Summit County Board Elections.

As set forth at length above, the Secretary of State has no clear legal duty pursuant to R.C. 3501.07 to appoint Brian Daley to the Summit County Board of Elections. Within her broad grant of discretionary authority, Secretary Brunner determined that she had reason to believe that Mr. Daley would not be a competent member of the Board of Elections. Therefore, Realtor has no corresponding legal right to the appointment of Daley.

2. R.C. 3501.07 does not confer upon Relator the right to recommend another nominee or to be notified by the Secretary of State before rejection of Relator’s nominee.

Relator also had no right to be notified or contacted by the Secretary of State before she rejected Brian Daley for the Board of Elections. The plain language of R.C. 3501.07 simply does not afford such a right to Relator. To the contrary, the statute only allows for the Executive Committee to make its recommendation within the statutory time period, and that the Secretary of State shall appoint that nominee unless she has “reason to believe that the elector would not be a competent member of such board.” R.C. 3501.07. As set forth in Parts I.B and II.A.2 of this Brief, once that statutory deadline passed, the Executive Committee was not entitled to recommend another nominee.

Furthermore, there is no statutory provision requiring a hearing or any opportunity to confront negative testimony before the Secretary rejects a nominee. This Court decided over three decades ago that “R.C. 3501.07 grants the respondent Secretary of State broad discretion in determining whether recommended appointees are competent to be members of boards of elections.” *Lucas County*, 39 Ohio St.2d at 160. The Court furthermore stated that, “[t]he statute requires *only* that [the Secretary] submit his reasons for believing that the candidate would not be competent, in writing, to the county executive committee recommending him.” *Id.* (emphasis added). While the statute expressly requires written reasons for rejecting a nominee, the rights of an executive committee go no further. The Secretary of State is obligated only to follow the plain requirements of R.C. 3501.07—which Secretary Brunner did in this case. Relator is therefore not afforded any right to a hearing or any other opportunity to prevent the rejection of a recommended nominee.

3. Relator fails to establish the deprivation of any due process right.

In an attempt to establish the existence of a clear legal right as the basis for a writ of mandamus, Relator has attempted to argue that the failure to appoint Mr. Daley constitutes a violation of due process. Relator generally suggests that its “due process” rights have been violated, without specifying whether its substantive or procedural due process rights have allegedly been violated. Nevertheless, Relator is not entitled to relief under substantive or procedural due process. Furthermore, to the extent that Relator is trying to assert Daley’s rights, those claims should be disregarded because Relator lacks standing to do so on his behalf and because Daley has no property interest in being appointed as a member of the Summit County Board of Elections..

First, Relator has failed to establish the violation of any substantive due process right. Substantive due process involves the abridgement of a fundamental liberty interest – i.e., the right to marry, *Loving v. Virginia* (1967), 388 U.S. 1; to have children, *Skinner v. Oklahoma ex rel. Williamson* (1942), 316 U.S. 535; to direct the education and upbringing of one's children, *Meyer v. Nebraska* (1923), 262 U.S. 390 and *Pierce v. Society of Sisters* (1925), 268 U.S. 510; to marital privacy, *Griswold v. Connecticut* (1965), 381 U.S. 479; to use contraception, *ibid*; *Eisenstadt v. Baird* (1972), 405 U.S. 438; to bodily integrity, *Rochin v. California* (1952), 342 U.S. 165 (1952); and to have an abortion, *Planned Parenthood v. Casey* (1992), 505 U.S. 833. Courts have consistently held that “there is no fundamental right to government employment.” *Sanders v. District of Columbia* (D.C. Cir. 2007), 522 F. Supp. 2d 83, quoting *United Bldg. & Constr. Trades Council v. Camden* (1984), 465 U.S. 208, 219.

Relator does not have a fundamental liberty interest in the appointment of its recommended nominee for the Board of Elections. Nor is there such a fundamental liberty

interest in being afforded an opportunity to submit testimony regarding the competency of Relator's recommendation to the Secretary of State. As indicated above, these notions have never been considered by the Supreme Court, much less determined to be fundamental liberty interests. Likewise, Mr. Daley has no fundamental right to appointment to the Board of Elections or a similar opportunity to submit testimony regarding his competency. In fact, there is no such fundamental right to government employment. Therefore, Relator's claim does not fall under substantive due process.

To the extent that Relator is alleging the violation of its procedural due process rights, that argument fails as well. A claim for violation of procedural due process first requires the (1) deprivation, (2) of a property or liberty interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Once it is determined that the due process clause applies, only then is a person entitled to notice of the proceedings against him and an opportunity to defend himself/herself in the form of a hearing. *Loudermill*, 470 U.S. at 541.

In the case before this Court, there is no property or liberty interest that implicates the due process clause. As stated by the United States Supreme Court, property interests are not created by the Constitution – “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Loudermill*, 470 U.S. at 539, quoting *Board of Regents v. Roth* (1972), 408 U.S. 564, 577. In other words, one must look to a state statute in order to determine if a property right is implicated. The Supreme Court also established that although a state legislature may not constitutionally authorize the deprivation of a property interest without appropriate procedural safeguards once such a right is conferred, the legislature can elect not to confer a property interest in public employment.

Loudermill, 470 U.S. at 541, quoting *Arnett v. Kennedy* (1974), 416 U.S. 134, 167 (Powell, J., concurring in part and concurring in result in part).

This very Court has already visited the issue of whether R.C. 3501.07 violates the due process clause by vesting sole and arbitrary discretion in the Secretary of State in appointing board members without providing procedural guarantees of due process. *State ex rel. Democratic Executive Committee v. Brown* (1974), 39 Ohio St.2d 157, 158. This Court's answer was no – “no statutory right to appointment exists under R.C. 3501.07 prior to approval by the Secretary of State.” *Id.* at 159. The Court explained that there was “no stigma or disability attaching to the exercise of statutory discretion by the Secretary of State in failing to appoint the recommended electors which would foreclose their seeking any other elective or appointive position.” *Id.* As previously recognized by this Court, R.C. 3501.07 fails to establish a property right. Therefore, in the absence of a vested property right, Relator is not entitled to any of the procedural protections afforded by the due process clause.

Furthermore, there has simply been no *deprivation* of any purported right of the Summit County Republican Party Executive Committee. The only statutory right that could possibly form the basis of a due process complaint is the Executive Committee's right to nominate an elector within the statutory time limit in R.C. 3501.07. The Executive Committee did exercise that right by nominating Mr. Arshinkoff, and that right has not been deprived. R.C. 3501.07 does not confer the right to make a nomination *after* the expiration of the statutory deadline – as Relator did with Mr. Daley if the court treats the Daley appointment as the original appointment. R.C. 3501.07 also does not confer a statutory right or guarantee that the Executive Committee's nominee will be appointed. Moreover, the statute does not create a right for the Secretary of

State to notify the Relator before the nominee is rejected. As such, the procedural right to due process is not implicated.

As previously mentioned, Relator lacks standing to assert the due process rights – or any rights – of Brian K. Daley. Nevertheless, in the event the Court considers such an argument, it must fail on its merits because Mr. Daley also lacks a property interest. Neither R.C. 3501.07 nor any other state statute establishes a property right to be seated on the Board of Elections. Moreover, no state statute imparts a right to confront negative testimony from witnesses or a name-clearing hearing before appointment or rejection to the Board of Elections. Because the Secretary must make 176 appointments by March 1 on every even-numbered year based upon recommendations that must only be received no less than 14 days prior to that date, the statute does not seem to contemplate any type of hearing if the Secretary were to deny the recommendation. Because Relator cannot point to any deprivation of any statutorily-created property interest, Relator cannot rely on any due process rights as the basis for this mandamus action.

C. Realtor is not entitled to any remedy in the absence of an injury to any clear legal right.

Relator has failed to prove the first two prerequisites for mandamus – the existence of any clear legal duty of the Secretary of State or Relator’s clear legal right to the relief requested. In the absence of any injury to any clear legal right, it necessarily follows that Relator is not entitled to any remedy. As explained previously, the only statutory right that could possibly form the basis of Relator’s petition is Relator’s right to nominate an elector within the statutory time limit in R.C. 3501.07. Relator did exercise that right by nominating Mr. Arshinkoff, and Relator does not allege any injury to that right. However, R.C. 3501.07 does not confer the right to make a nomination *after* the expiration of the statutory deadline, as Relator contends it did

with Mr. Daley. Nor does R.C. 3501.07 confer a statutory right or guarantee that the Executive Committee's nominee will be appointed. Moreover, the statute does not create a right for the Secretary of State to notify the Relator before the nominee is rejected. Because Relator cannot establish any legal right that supports its petition for relief, Relator is not entitled to any remedy in mandamus.

III. Relator Is Not Entitled To Any Relief Restricting the Scope of the Evidentiary Record Before This Court.

Relator requests this Court to “disregard” evidence filed by Respondent regarding the testimony of City of Hudson Mayor William Currin and the Summit County Common Pleas Court pleadings from the case of *City of Hudson v. William E. Vagas* (“Vagas pleadings”). Relator’s Brief, at 12, 15, 30. Relator primarily bases this request on the argument that these materials were not considered by the Secretary of State at the time of Mr. Daley’s application, but were collected for the purposes of this litigation. *Id.* For the sake of consistency, if Relator takes this position, then its own evidence post-dating the Secretary’s decision should also be stricken from the evidentiary record. That would include the purported affidavits dated March 3, 2008 and attached as Exhibits G to N of Relator’s Petition.

Furthermore, this Court already denied Respondent’s motion *in limine* asking the Court to limit the issues, discovery, and evidence in this litigation to the Secretary of State’s reasonable belief that Mr. Daley was not competent to serve as a member of the Summit County Board of Elections, as opposed to his actual competence. See Slip Opinion, 2008-Ohio-1035 (March 10, 2008). The Court determined that, “the parties should be able to introduce all potentially relevant evidence at this early stage of the case.” *Id.* at ¶ 12. Mayor Currin’s comments about Mr. Daley and the Vagas dispute were matters of public knowledge and known by the Secretary of State at the time of considering Mr. Daley’s nomination. Furthermore, they subsequently

served to strengthen the Secretary's reason to believe that Mr. Daley is not competent to serve on the Board of Elections. Therefore, this evidence is properly admitted under this Court's March 10th decision.

Relator also opposes the admission of the Vagas pleadings, Respondent's Evidence Vol. VII, on the grounds that they are not "authenticated or verified under oath." Relator's Brief, at 13. However, as with any other publicly-available court pleadings, the Court may take judicial notice of the Vagas pleadings.

IV. Relator Is Not Entitled To An Alternative Writ.

This Court has already rejected Relator's earlier motion for an emergency writ to prevent the appointment of Donald Varian before the Board of Election's March 5, 2008 reorganization meeting. See Slip Opinion, 2008-Ohio-904. However, because the meeting has already occurred, Relator now recasts its effort to invalidate the Secretary of State's appointment of Donald Varian as a request for an alternative writ, pursuant to R.C. 2503.40. Relator seeks an order "that all 3-1 Summit County [Board of Elections] decisions in which Donald Varian voted with the majority be declared null and void." Relator's Brief, at 37. However, Relator is not entitled to this writ because it is a disguised request for declaratory judgment.

This Court has long recognized that if the allegations in a complaint for extraordinary writ indicate that the real object sought is a declaratory judgment, the complaint must be dismissed. *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006-Ohio-4334 ¶ 19; *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 634, 1999-Ohio-130; *State ex rel. Youngstown v. Mahoning County Board of Elections*, 72 Ohio St. 3d 69, 70, 1995-Ohio-184; *State ex rel. Pressley v. Indus. Comm'n.* (1967), 11 Ohio St. 2d 141, 150. Regardless of the manner in which Relator has couched its petition and prayer for relief, Relator is actually seeking a declaratory

judgment that the Secretary of State exceeded her authority by appointing Donald Varian to the Summit County Board of Elections.

In *Evans*, supra, this Court refused to grant a writ of mandamus against then-Secretary Blackwell's decision to transmit an initiated statute to the Ohio General Assembly before all protests were completed in the common pleas courts. The Court recognized that what Evans really sought was a declaratory judgment that the Secretary's actions violated Ohio law and a prohibitory injunction against the clerks in the General Assembly from keeping the initiated statute on their rolls. *Evans*, 2006 Ohio 4334 at ¶¶ 17-19. Similar to *Evans*, Relator has attempted to disguise a prayer for declaratory relief as an extraordinary writ. In reality, Relator wants this Court to issue a declaratory judgment that the Secretary of State abused her statutory power under R.C. 3501.07 and to invalidate her appointment of Donald Varian to the Summit County Board of Elections. Relator's request for an alternative writ should be dismissed because it asks for relief that does not lie within this Court's original jurisdiction.

In the alternative, Relator's claim for an alternative writ lacks merit because Secretary Brunner's appointment of Donald Varian was not only lawful but mandated by R.C. 3501.07. See *infra*, Part II.A.2.

CONCLUSION

As set forth above, Relator Summit County Republican Party Executive Committee has failed to bring a proper action in mandamus pursuant to R.C. 3501.07. Accordingly, the Court should dismiss Relator's petition for lack of subject matter jurisdiction. In the alternative, the Court should deny Relator's petition because Relator has not shown any legal duty of the Secretary of State or any clear legal right of the Relator that forms the basis for any relief in

mandamus. Therefore, Relator's petition should be denied for failure to meet the required elements of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of Respondent Secretary of State Brunner* was served on March 31, 2008, by U.S. Mail, postage prepaid and email, upon the following:

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