

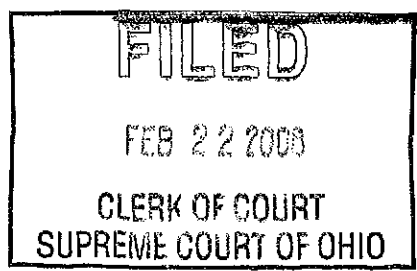
IN THE SUPREME COURT OF OHIO

State ex rel. Robert W. Parrott :
127 West Sixth Street :
Marysville, OH 43040, :

Case No. **08-0410**

and :
:

Union County Board of Commissioners :
233 West Sixth Street :
Marysville, Ohio 43040 :



Relators, :
:

v. :
:

Secretary of State Jennifer Brunner :
180 East Broad Street, 15th Floor :
Columbus, OH 43215-3726, :

Expedited Election Matter
Brought Pursuant to Rule X, Section 9
Rules of Practice of the Supreme Court

Respondent. :

PETITION FOR ELECTION WRIT OF PROHIBITION AND OTHER WRIT

Now come Relators Robert W. Parrott and the Union County Board of Commissioners, by and through counsel, and state as follows:

PARTIES

1. Relator Robert W. Parrott is a member of the Union County Board of Elections, and a taxpayer in Union County. Affidavit attached as Exhibit A, para. 1.
2. The Union County Board of County Commissioners brings this suit pursuant to Ohio Revised Code §305.12 in its capacity to sue and be sued, and plead and be

impleaded, in any court.

3. Respondent Jennifer Brunner serves as the Ohio Secretary of State.

JURISDICTION

4. Ohio Constitution, Article IV, Section 2(B)(1)(d) and the Rules of Practice of the Supreme Court of Ohio, Rule X, vest this Court with original jurisdiction to grant a writ of prohibition.

5. Ohio Revised Code §2503.40 vests this Court with original jurisdiction to grant an alternative, other writ when necessary to enforce the administration of justice. Cf.: *Smith v. Granville Twp. Bd. Of Trustees* (1996), 77 Ohio St.3d 1215; 671 N.E.2d 1277.

6. The Rules of Practice of the Supreme Court of Ohio, Rule X, Section 9 provides an expedited process for review of election matters, such as the matters involved herein.

FACTS COMMON TO ALL COUNTS

7. Ohio Revised Code §3506.02 grants three entities the authority to adopt voting equipment for use in elections: by the county board of elections; by the board of county commissioners of such county on the recommendation of the board of elections; or by the affirmative vote of a majority of the electors of such county voting upon the question of the adoption of such equipment in such county. The statute does not include the Ohio Secretary of State.

8. The Union County Board of County Commissioners, upon recommendation of the Board of Elections, selected as its voting equipment direct recording electronic

("DRE") voting machines. The Ohio Secretary of State had no authority to participate in this selection. Affidavit attached as Exhibit A, para. 2.

9. The Union County Commissioners purchased DRE voting equipment for use in accordance with the recommendation of the Board of Elections.

10. On January 2, 2008, the Ohio Secretary of State issued Directive 2008-01 to require all county boards of elections which use DRE voting machines, including the Union County Board of Elections, to also provide paper ballots to voters upon request as an alternative means to cast a ballot at the Primary Election to be held Tuesday, March 4, 2008. Exhibit B.

11. Directive 2008-01 requires that the boards count the ballots on election night using a Central Count Optical Scan system.

12. The effect of the Ohio Secretary of State Directive 2008-01 will require the Union County Board of Elections to implement a Central Count Optical Scan voting system as an alternative means to the DRE system selected by Union County.

13. The Ohio Secretary of State is without legal authority to implement a voting system in Union County different than that selected by the Union County Board of Elections and the Board of Commissioners. *Opinion of the Attorney General 2005-006*.

14. Directive 2008-01 requires the expenditure of county funds which were not appropriated to the Union County Board of Elections by the Union County Board of Commissioners.

15. The bi-partisan staff of the Union County Board of Elections has estimated the cost to offer a paper ballot system as an alternative to the DRE system at \$86,000.00, which funds have not been appropriated to the Board of Elections. Affidavit attached as Exhibit A, para. 7.

16. The Ohio Secretary of State is without legal authority to direct the expenditure of county funds without an appropriation by the Union County Board of Commissioners, in their discretion. Cf.: *State ex rel. Price v. Huwe* (1921), 103 Ohio St. 546; 134 N.E. 456.

17. The "Help America Vote Act" (HAVA), requires each state to adopt a uniform and nondiscriminatory election system, 42 U.S.C. §15404. Directive 2008-01 violates HAVA because it fails to establish an election system with the ability to notify a voter of an under-vote or over-vote, or to provide appropriate voter education on paper ballots.

18. On January 9, 2008, the Union County Board of Elections tied in a vote on whether to offer paper ballots in addition to the DRE voting machines previously selected by the Union County Board of Elections. Affidavit attached Exhibit A, para. 3.

19. On February 4, 2008, the Union County Board of Elections found, in their discretion, that, "given the time involved, there is no practical way to effectively train poll workers and not doing so could result in unnecessary confusion, loss of confidence in the election system" among other findings. Exhibit C; see also Affidavit attached as Exhibit A, para. 4.

20. By letter February 5, 2008, less than 30 days prior to the election, the Ohio

Secretary of State considered the positions of each side, and exercising her quasi-judicial authority, purported to “break the tie vote”, in favor of her own prior action, and directed the Union County Board of Elections to follow her Directive 2008-01. Exhibit D. *State ex rel. Brady v. Blackwell* (2006), 112 Ohio St.3d 1; 2006 Ohio 5752; 857 N.E.2d 1181.

21. The Secretary of State’s decision noted that, “your board has not submitted the tie vote in accordance with the procedures outlined in the Ohio Election Official Manual....” Exhibit D.

22. The Secretary of State’s decision indicated that any member of the Union County Board of Elections, including relator Robert W. Parrott, who did not follow her Directive would be insubordinate and in violation of his or her oath. Exhibit D.

23. On February 6, 2008, the Union County Court of Common Pleas issued a Temporary Restraining Order against implementation of Directive 2008-01, pursuant to an action filed by the Union County Board of Commissioners.

24. On February 11, 2008, after transfer of venue, the Franklin County Court of Common Pleas dissolved the injunction issued by the Union County Court of Common Pleas.

25. By decision February 19, 2008, the Franklin County Court of Common Pleas held that the Union County Board of Commissioners lack standing to assert the claims against implementation of Directive 2008-01 before the court. Exhibit E.

26. Without referring to the Ohio Secretary of State's role to "break the tie vote", the Franklin County Court of Common Pleas found tautologically that the Union County Board of Elections "has voted to comply with the Directive and not to challenge the authority of the Secretary." Id.

27. Finally, the Franklin County Court of Common Pleas held that, in the absence of the Union County Board of Elections joined as a party, the Court lacks jurisdiction to decide the Commissioners' claims, and that this jurisdictional defect cannot be remedied. Id.

28. Under the Franklin County Court of Common Pleas decision, for any motion by the Union County Board of Elections to sue the Ohio Secretary of State, the Ohio Secretary of State would have to cast the tie-breaking vote, a vain act. Affidavit attached as Exhibit A, para. 5. The law does not require a party to do a vain act. *Nemazee v. Mt. Sinai Medical Center* (1990), 56 Ohio St.3d 109, 564 N.E.2d 477.

29. The matter is "capable of repetition yet evading review," and provides an established exception to mootness. See: *In re Protest* (1990), 49 Ohio St.3d 102, 551 N.E.2d 150; *In re. Huffer* (1989), 47 Ohio St.3d 12, 546 N.E.2d 130; *St. ex rel. Plain Dealer v. Barnes* (1988), 38 Ohio St.3d 165, 527 N.E.2d 807. "This court has long recognized the fundamental tenet of judicial review in Ohio that courts should decide cases on the merits". *State ex rel. Montgomery v. R & D Chem. Co.* (1995), 72 Ohio St.3d 202, 204; 648 N.E.2d 821, 823.

30. Relators are without an adequate remedy at law, given the Franklin County Court of Common Pleas' determinations. Affidavit attached as Exhibit A, para. 6.

31. Realtors are without an adequate remedy at law, given that given the closeness of the election date because alternate remedies are not sufficiently speedy. *State ex rel. Brown v. Butler County Bd. of Elections*, 109 Ohio St. 3d 63, 2006 Ohio 1292, 846 N.E.2d 8, 2006 Ohio LEXIS 660 (2006).

32. Relators are entitled to a writ, in that (1) the secretary of state has exercised quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Brady v. Blackwell* (2006), 112 Ohio St.3d 1; 2006 Ohio 5752; 857 N.E.2d 1181.

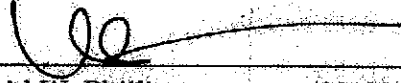
PRAYER FOR RELIEF

WHEREFORE, Relators request that this Court grant a peremptory writ of prohibition or peremptory other writ, such that this matter can be considered on the merits without rushing determination prior to the March 4, 2008 Primary Election;

An alternative writ of prohibition or alternative other writ, finding the Secretary of State without authority to implement a separate voting system in Union County, by requiring the use of paper ballots and a Central Count Optical Scan system;

And such other relief as is appropriate.

Respectfully submitted,



David W. Phillips (0019966)

Union County Prosecuting Attorney

Melissa A. Chase (0042508)

Assistant Prosecuting Attorney

221 West Fifth Street, Suite 333

Marysville, OH 43040

(937) 645-4190, Telephone

(937) 645-4191, Facsimile

dphillips@co.union.oh.us

Counsel for Relators

Co-Counsel for Relators:

Luther L. Liggett, Jr. (0004683)

Maria J. Armstrong (0038973)

Bricker & Eckler LLP

100 South Third Street

Columbus, Ohio 43215-4291

(614) 227-2399, Telephone

(614) 227-2390, Facsimile

lliggett@bricker.com

marmstrong@bricker.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition was hand-delivered,

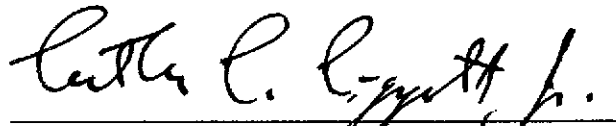
this 22nd day of February, 2008 upon the following:

Jennifer Brunner
Ohio Secretary of State
180 East Broad Street, 15th Floor
Columbus, OH 43215-3726

Richard N. Coglianese
Assistant Attorney General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215

Respondent

Counsel for Respondent


Luther L. Liggett, Jr. (0004683)

IN THE SUPREME COURT OF OHIO

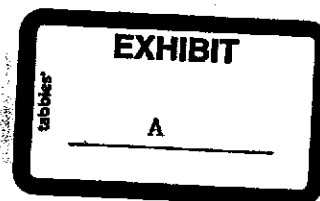
State ex rel. Robert W. Parrott, et al., :
Relators, :
v. :
Jennifer Brunner :
Respondent. :

STATE OF OHIO :
: ss.
County of Franklin :

Affidavit of Robert W. Parrott

I, Robert W. Parrott, being duly sworn and cautioned, state as follows:

1. I am a member of the Union County Board of Elections, and a taxpayer in Union County.
2. The Union County Board of County Commissioners, upon recommendation of the Board of Elections, selected as its voting equipment direct recording electronic ("DRE") voting machines. The Ohio Secretary of State had no authority to participate in this selection.
3. On January 9, 2008, the Union County Board of Elections tied in a vote on a motion that Union County not offer paper ballots in addition to the DRE voting machines previously selected by the Union County Board of Elections.
4. Given the time involved, there is no practical way to obtain the necessary equipment or ballots, train poll workers, and conduct required voter education on the Central County system. Not doing so could result in unnecessary confusion, loss of confidence in the election system, prior to the next election.
5. On this issue, regardless of merits or legal authority, individual members of the Union County Board of Elections will vote along party lines, effectively preventing any legal action by the Board against the Ohio Secretary of State.
6. Given the trial court's findings that the County Commissioners have no standing, and given the Board of Elections' party line votes, the Union County Board of Commissioners is without a remedy at law to prevent the unauthorized actions of the Ohio Secretary of State.




7. The bi-partisan staff of the Union County Board of Elections has estimated the cost to offer a paper ballot system as an alternative to the DRE system at \$86,000.00, which funds have not been appropriated to the Board of Elections.
8. The attached Exhibits B through E are true and accurate copies.

FURTHER, AFFIANT SAYETH NAUGHT.


Robert W. Parrott

Sworn to and signed in my presence this 23rd day of February, 2008.


Notary Public
My commission expires on _____



R. Jeannie Rivins, Notary Public
Union County, State of Ohio
My Commission Expires 8/10/2012



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 East Broad Street, 15th floor
Columbus, Ohio 43215-3726 USA
Tel.: 1-614-466-2655
Fax: 1-614-644-0649
www.sos.state.oh.us

DIRECTIVE 2008-01

January 2, 2008

To: All County Boards of Elections

Re: Optical Scan Ballots for Voters in Counties using DREs

Due to the concerns raised by the EVEREST report, and to avoid any loss of confidence by voters that their ballot has been accurately cast or recorded, I hereby direct all counties using direct recording electronic voting machines (DRE) to provide an optical scan ballot to any voter who requests it as an alternative method to casting a ballot on a DRE voting machine. This is similar to the procedures already in place for counties using a DRE for persons appearing at their office to cast an absent voter ballot (i.e. "Voting an Absent Voter's Ballot" in Directive 2007-06, specifically at page 8).

Therefore, effective January 3, 2008, all counties using DREs must provide an optical scan ballot to any voter making such a request at his or her polling place on Election Day.

Determining Minimum Number of Optical Scan Ballots

Boards shall determine the minimum number of optical scan ballots to provide for each precinct by multiplying the number of ballots cast in each precinct at a like election by 10%. This will provide the minimum number of optical scan ballots a board using DREs as their primary voting system must provide for each precinct.

Secure Ballot Containers

Boards shall provide a secure ballot container for the voter to place his or her optical scan ballot into after marking the ballot.

Voter Privacy

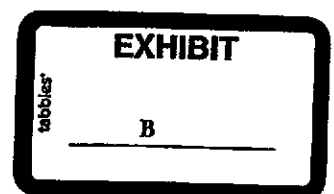
Boards shall provide a private area for a voter to mark his or her optical scan ballot. Privacy booths used by persons voting provisional ballots may be utilized for this purpose.

Tabulation

The optical scan ballots cast in a precinct are to be centrally counted at the Board on election night as part of the unofficial canvass.

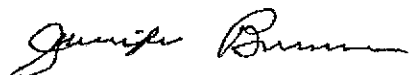
Documenting Additional Costs in Complying with this Directive

Please document and itemize the additional costs incurred as a result of complying with this directive to allow the Secretary of State to compile them and seek federal or other reimbursement of these costs as funds may become available. A further directive and accompanying reporting form will be provided to you after the March 4, 2008 primary election to allow you to report these documented and itemized costs.



If you have any questions concerning this directive, please contact the election attorney assigned to your county.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Brunner".

Jennifer Brunner

RESOLUTION NO. 60-08

WHEREAS THE UNION COUNTY BOARD OF COMMISSIONERS MET IN REGULAR SESSION ON THE 4TH DAY OF FEBRUARY IN OPEN SESSION, AND ADOPTED THE FOLLOWING RESOLUTION:

1. WHEREAS, the Board of County Commissioners has selected and purchased Ivotronic Direct recording electronic voting equipment manufactured and supported by ES&S, Inc., upon the recommendation of the Union County Board of Elections of a cost of \$550,716.36, including \$111,321.66 appropriated from the County General Fund, and it is unlawful for the Secretary of State to unilaterally override a lawful majority decision of a board of elections concerning the selection of election equipment, and;
2. WHEREAS, allowing the Secretary of State to override a lawful local board of election decision would result in one political party having the power to dictate the conduct of elections and threaten the fairness and integrity of the electoral system, and;
3. WHEREAS, the selection of the DRE voting equipment has proved to be an appropriate choice for Union County, Ohio, and;
4. WHEREAS, the County Board of Elections has conducted seven elections on the DRE equipment and found it to be 100% accurate, including during hand recounts in the last 5 elections, and;
5. WHEREAS, the DRE system selected by the County has proven to be reliable, secure and cost-effective.

EXHIBIT

tabbles
C

6. WHEREAS, the Board of Commissioners has appropriated and will appropriate to the Board of Elections only those funds necessary for the conduct of elections on the DRE voting system adopted by the county, and;
7. WHEREAS, in Directive 2008-01, the Ohio Secretary of State has directed the Union County Board of Elections to use a central count optical scan (CCOS) system along with the DRE system selected by the County, and;
8. WHEREAS, the Union County Board of Elections has, on a bi-partisan basis, determined that meeting the directive will require the expenditure of at least \$68,187.50, and;
9. WHEREAS, the expenditure of these funds by the Commissioners would be an inappropriate, wasteful and unnecessary expenditure of Union County taxpayer money, and;
10. WHEREAS, the Board of Elections has deadlocked 2-2 whether to implement directive 2008-01, and;
11. WHEREAS, the Ohio Secretary of State has threatened removal of any Board of Elections member who fails to follow her directive, and;
12. WHEREAS, on March 4, 2008, Union County has a presidential primary election, and given the time involved there is no practical way to effectively train poll workers and not doing so could result in unnecessary confusion, loss of confidence in the election system, and;
13. WHEREAS, the official stance of the bipartisan association of all election officials from Ohio's 88 counties, the Ohio Association of Election Officials (OAEO,) at a recent public hearing organized by the Secretary of State's office stated "the

Ohio Revised Code is clear that the purchase and selection of equipment for each county resides within that county", and:

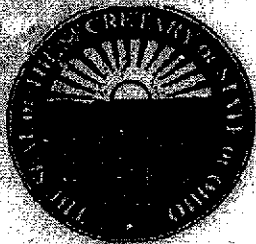
14. WHEREAS, the use of two voting systems in Union County will result in unnecessary expense, create an unequal voting system, and create uncertainty and lengthy delays counting votes cast by Union County voters;

UPON THE MOTION OF Gary Lee AND SECONDED BY Charles Hall IT IS THEREFORE RESOLVED THAT THE UNION COUNTY PROSECUTING ATTORNEY DAVID PHILLIPS BE AND HEREBY IS AUTHORIZED TO FILE A LAWSUIT AGAINST THE OHIO SECRETARY OF STATE JENIFFER BRUNNER ON BEHALF OF THE BOARD OF COMMISSIONERS TO DETERMINE THE LAWFULNESS OF DIRECTIVE 2008-01, AND THAT THE COMMISSIONERS HEREBY APPROPRIATE THE SUM OF \$1,000 FOR THE COSTS INCURRED THEREIN.

Gary Lee
Gary Lee, President

Charles A. Hall
Charles Hall

Tory McCarthy
Tory McCarthy



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 East Broad Street, 15th floor
Columbus, Ohio 43215-3726 USA
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www.sos.state.oh.us

February 5, 2008

Karla R. Herron, Director
Union County Board of Elections
940 London Avenue, Suite 1000
Union County Services Center
Marysville, Ohio 43040

RE: Tie vote on whether the board must follow Directive 2008-01

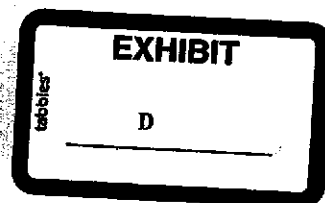
Dear Ms. Herron:

On January 2, 2008, the Secretary of State's office issued Directive 2008-01 requiring boards of elections to provide an optical scan paper ballot to any elector requesting such a ballot in lieu of casting a ballot using a DRE voting machine. On January 9, 2008, the Union County Board of Elections reached a tie vote on the question of whether the board must follow Directive 2008-01. Although your board has not submitted the tie vote in accordance with the procedures outlined in the Ohio Election Official Manual within the fourteen-day deadline mandated by R.C. 3501.11(X), I will break the tie vote. My analysis and decision are outlined below.

Background

I issued Directive 2008-01 in response to security and performance concerns raised by the EVEREST Report regarding DRE voting machines and in anticipation of corresponding concerns by Ohio electors. Directive 2008-01 requires all Ohio county boards of elections using DRE voting machines: 1) to provide an optical scan ballot to any elector who requests an optical scan ballot in lieu of casting a ballot using a DRE voting machine; 2) to make available at each precinct optical scan ballots equal to at least 10% of the vote cast at a previous comparable election; 3) to provide secure ballot containers for the optical scan ballots; 4) to provide a private area in each precinct for voters to cast optical scan ballots; and 5) to tabulate all optical scan ballots centrally at the board of elections on election night.

On January 8, 2008, Board Member Robert W. Parrott unilaterally requested Union County Prosecutor David W. Phillips to advise the board whether the board must comply with Directive 2008-01. On January 8, 2008, Prosecutor Phillips issued a letter advising Mr. Parrott that Directive 2008-01 was not binding on the Union County Board of Elections.



Union County Board of Elections

Page 2 of 4

The Vote on whether the Board must follow Directive 2008-01

Although the board did not submit official minutes from the January 9, 2008 meeting in submitting the tie vote to me, Board Chair David R. Moots did provide unofficial minutes in conjunction with his position statement. It appears that Mr. Parrott made a motion to follow the advice of Prosecutor Phillips and not comply with Directive 2008-01. Apparently, the motion initially garnered no second. However, after a private conference between the Republican board members and you, the motion was renewed by Mr. Parrot and seconded by Board Member Max E. Robinson. Both Mr. Parrott and Mr. Robinson voted in favor of the motion, while Mr. Moots and Board Member Jack C. Foust voted against the motion.

My office received a position statement from Mr. Parrott on January 14, 2008, and a position statement and unofficial minutes from Mr. Moots on January 15, 2008. To date, the Union County Board of Elections has not provided my office with official minutes from the January 9, 2008 board meeting.

Discussion

The tie vote of the Union County Board of Elections concerns whether the board must follow Directive 2008-01. However, in order to break this tie vote, two determinative questions must be addressed: 1) whether the Secretary of State has the authority to issue Directive 2008-01, and 2) whether complying with Directive 2008-01 requires a board of elections to adopt an additional voting system?

The secretary of state has clear legal authority to issue Directive 2008-01.

The secretary of state is the chief election officer of the state and is granted the powers and duties with respect to administering elections provided in Title 35 of the Ohio Revised Code. R.C. 3501.04. Under R.C. 3501.05(B), (C), and (M), the secretary of state is authorized to issue instructions to boards of elections by directives and advisories as to the proper conduct of elections and to compel the observance of elections laws by elections officials. Similarly, the Ohio Revised Code requires boards of elections to provide instructions for the guidance of election officials and voters "not inconsistent with laws or the rules, directives, or advisories issued by the secretary of state" and to "[p]erform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state." R.C. 3501.11(E)&(P). Ohio courts have consistently recognized the authority of the secretary of state to direct the boards of elections in administering elections. See, e.g., *State ex rel. Donegan v. Cuyahoga Cty. Bd. of Elections* (2000), 136 Ohio App.3d 589, 596. The Supreme Court of Ohio has recognized that boards of elections must follow lawful directives of the secretary of state as long as the directives do not conflict with other provisions of Ohio law. See *State ex rel. White v. Franklin Cty. Bd. of Elections* (1992), 65 Ohio St.3d 5, 8. Additionally, the Supreme Court of Ohio has held that the secretary of state's interpretation of Ohio election law is entitled to more weight than interpretations by other Ohio officials. *State ex rel. Chance v. Mahoning Cty. Bd. of Elections* (1996), 75 Ohio St.3d 42, 44; *State ex rel. Herman v. Klopflisch* (1995), 72 Ohio St.3d 581, 586.

Union County Board of Elections

Page 3 of 4

Tie Vote on whether the Board must follow Directive 2008-01

In addition to the secretary of state's general authority to direct the boards of elections in administering elections as described above, R.C. 3501.30(B) specifically requires the boards of elections to follow the secretary of state's guidance with regard to providing supplies for polling places. R.C. 3501.30(B) provides: "The board of elections shall follow the instructions and advisories of the secretary of state in the production and use of polling place supplies." "Ballots" are among the polling place supplies that boards of elections must provide for each polling place under R.C. 3501.30(A). Further, under R.C. 3505.181 and Directive 2007-06, boards of elections are already required to provide optical scan ballots at all polling places for use by voters who must cast a provisional ballot. Therefore, Directive 2008-01's requirement that boards of elections provide an additional quantity of optical scan ballots for voters who do not want to vote using a DRE voting machine is consistent with R.C. 3501.30 because the directive merely requires boards of elections to provide additional supplies of optical scan ballots at all polling places. Thus, the secretary of state has the authority to issue Directive 2008-01 under several sections of the Ohio Revised Code.

Complying with Directive 2008-01 does not require the boards of elections to adopt a new voting system.

The Union County Prosecutor opined that requiring boards of elections to provide optical scan ballots at every polling place amounted to nullification of the Union County Board of Elections' decision to adopt DRE voting machines and requires the board of elections to adopt a new voting system in contravention of the board's authority under R.C. 3506.02. However, the prosecutor's opinion ignores the fact that every board of elections in Ohio, including the Union County Board of Elections, has already adopted a central count optical scan voting system for absentee ballots under R.C. 3509.01. Additionally, under Directive 2007-06, every board of elections in Ohio is already using a central count optical scan voting system for provisional ballots. The additional optical scan ballots required by Directive 2008-01 may be identical to the optical scan ballots that the board of elections is already providing each polling place for use as provisional ballots. Thus, Directive 2008-01 does not require the Union County Board of Elections to adopt a new voting system, nor does it conflict with the board of elections' authority under R.C. 3506.02.1

Because the secretary of state has the authority to issue Directive 2008-01 and because Directive 2008-01 does not violate R.C. 3506.02 or any other provision of the Ohio Revised Code, the Union County Board of Elections must follow Directive 2008-01. All board members took an oath to perform their duties to the best of their abilities and to enforce Ohio election laws.

¹ The Union County Prosecutor relied on Ohio Attorney General Opinion 2005-006 for the proposition that the secretary of state cannot require the boards of elections to adopt a particular voting system. However, as indicated above, Opinion 2005-006 is inapplicable because every board of elections in Ohio has already adopted a central count optical scan voting system for absentee and provisional ballots. Unlike the facts cited in Opinion 2005-006, Directive 2008-01 merely requires boards of elections to provide optical scan ballots at polling places and to count those optical scan ballots using the board's existing central count optical scan voting equipment.

Union County Board of Elections

Page 4 of 4

Tie Vote on whether the Board must follow Directive 2008-01

Failure of a Board of Elections member to follow Directive 2008-01 is tantamount to insubordination and could be considered a violation of his or her oath.

Decision

For the foregoing reasons, I vote with Board Chair Moots and Board Member Foust AGAINST the motion not to follow Directive 2008-01. Accordingly, the motion fails. The Union County Board of Elections is hereby instructed to follow Directive 2008-01 immediately.

Sincerely,



Jennifer Brunner

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY OHIO
CIVIL DIVISION

Union County Commissioners,
et al.,

Plaintiffs,

vs.

Secretary of State Jennifer
Brunner,

Defendant.

: Case No. 08 CVH-02-2032

: Judge Brown

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2008 FEB 19 AM 9:49
CLERK OF COURTS - CV

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a case about legal authority. The Commissioners of Union County have sued to challenge the legal authority of the Secretary of State to direct the Board of Elections in that county. The Secretary of State has questioned the legal authority of the Commissioners to bring this lawsuit. The Secretary has also questioned the legal authority of this court to decide this case in the absence of the Board of Elections. And, importantly, in this as in all cases, the court must examine its own legal authority to decide the questions presented.

In this case, the court concludes that the Commissioners lack the legal authority to challenge the Secretary of State's directive, and this court lacks the legal authority to decide this case in the absence of the Board of Elections. Consequently, this court has no legal authority to consider the Commissioners' challenge to the Secretary of State and must dismiss this case.



Case No. 08 CVH-02-2032

I. Introduction

This matter came before the court for a consolidated preliminary injunction hearing and trial on the merits on February 14, 2008. The Union County Commissioners ("Commissioners") appeared with their counsel, Union County Prosecutor David Phillips and Assistant Union County Prosecutor Melissa Chase. A designated representative of Secretary of State Jennifer Brunner appeared with her counsel, Assistant Attorneys General Richard Coglianesse and Pearl Chin.

At the conclusion of the hearing, the court allowed the parties to file post-hearing briefs. The Commissioners and the Secretary filed their briefs on February 15, 2008.

The following are the court's findings of fact and conclusions of law based upon the stipulated exhibits provided by the parties and the admissible evidence presented at trial.

II. Findings of fact

1. The Union County Board of Elections ("UCBOE") uses direct recording electronic voting machines ("DREs") on election day as its primary voting system. Before purchasing the DREs, the UCBOE researched and tested several voting systems and voting system vendors to find a suitable replacement for its outdated punch card voting equipment. In 2005, the Commissioners, upon the recommendation of

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the UCBOE, made the decision to adopt DREs for use in elections. The initial cost of these voting machines was over \$550,000.¹

2. Although the UCBOE uses DREs as its primary voting system on election day, it also uses other voting equipment and systems in connection with voting. For example, the Commissioners, upon recommendation of the UCBOE, purchased central count optical scan ("CCOS") equipment in 2005. The CCOS equipment is used by the UCBOE to vote mail-in absentee voters prior to election day and to vote provisional voters on election day. By law, the CCOS equipment may also be used to vote absentee voters who vote in person at the UCBOE office prior to election day upon the voter's request. Additionally, the CCOS equipment is used for curbside voting, if requested by a voter, and would be used in the event of an emergency, such as a power failure, that rendered Union County's DREs inoperable on election day.

3. On January 2, 2008, Secretary of State Jennifer Brunner ("the Secretary") issued Directive 2008-01 ("the Directive"). The Directive applies only to those approximately fifty-seven Ohio counties that use DREs on election day. The Directive requires the boards of elections of those counties "to provide an optical scan ballot to any voter who requests it as an alternative method to casting a ballot on a DRE voting machine."²

¹ See Plaintiff's Exhibit 10.

² Defendant's Exhibit A-1 & Plaintiff's Exhibit 1.

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The Directive sets forth a formula for determining the minimum number of optical scan ballots that a board of elections must supply for each precinct. Specifically, the Directive provides that to determine the minimum number of optical scan ballots for each precinct, a local board of elections should multiply the number of ballots cast in the precinct at a like election by 10%. In addition, the Directive provides that each board of elections must provide a secure ballot container for completed optical scan ballots and a private area for a voter to mark his or her optical scan ballot. The Directive further states that the optical scan ballots are to be centrally counted by each board on election night as part of the unofficial canvas. Finally, the Directive sets forth cost documentation requirements.³

4. On January 8, 2008, Robert Parrott, a member of the UCBOE, requested an opinion from the Union County Prosecutor regarding whether the UCBOE must comply with the Secretary's Directive. That same day, the Prosecutor advised Mr. Parrott, the UCBOE, and the Commissioners of his opinion that the Secretary lacked the authority to issue the Directive. The prosecutor opined that the Directive was not binding on the UCBOE.

5. On January 9, 2008, the UCBOE held a vote to determine whether it would follow the opinion of the Prosecutor or comply with the Directive. The initial vote resulted in a 2 to 2 tie. Although the UCBOE attempted

³ See Defendant's Exhibit A-1 & Plaintiff's Exhibit 1.

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the vote three times, each time the vote resulted in a tie. Accordingly, the UCBOE submitted the vote to the Secretary to break the tie as permitted by Ohio law.⁴

6. Because of the UCBOE's failure to submit their vote to the Secretary in the manner required by statute, the Secretary did not break the tie until February 5, 2008. At that time, the Secretary broke the tie and voted in favor of complying with the Directive.⁵ Because of this vote, the UCBOE has indicated affirmatively its intention to comply with the Directive.

7. Mr. Parrott testified at trial that he feared possible removal from his position on the UCBOE as a result of his vote not to comply with the Directive. While noncompliance may have presented an issue, the court finds that there is no credible evidence before the court that the UCBOE or its members had a reasonable basis to believe that they would be removed from office if they initiated a lawsuit regarding the lawfulness of the Secretary's Directive.

8. The UCBOE has participated in previous lawsuits challenging the authority of the Secretary of State to issue certain directives. Specifically, in 2005 the UCBOE formally voted to join in a lawsuit against former Secretary of State Kenneth Blackwell challenging his authority to select particular voting equipment and voting equipment

⁴ See Plaintiff's Exhibit 3.

⁵ Plaintiff's Exhibit 7.

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vendors for use by Ohio counties.⁶ Therefore, the UCBOE is aware of its ability to sue the Secretary of State regarding his or her authority to issue certain directives and has exercised that ability in the past. The UCBOE declined to exercise its ability to sue the Secretary regarding the Directive.

9. Additionally, Mr. Parrott's concerns regarding his potential removal if he participated in challenging the Directive are not credible based on his active and extensive participation as a witness for the Commissioners in this lawsuit.

10. Because the issue of the UCBOE's compliance with the Directive has been resolved, the UCBOE and its staff have been acting to implement the Directive. Although the Directive does not alter many election day procedures, the UCBOE views the Directive as necessitating two separate and parallel voting systems—a DRE voting system and a CCOS voting system. As a result, the UCBOE voted to double the number of poll workers at each precinct so that there will be four poll workers on hand on election day to process voters on the DRE system and four additional poll workers to process voters on the CCOS system. Obtaining just four poll workers per precinct is difficult in Union County, and obtaining eight poll workers per precinct may not be possible, particularly given the short period of time in which they must be hired.

⁶ See Defendant's Exhibit L-1.

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11. The UCBOE has also determined that implementation of the Directive requires the purchase of 150 new voting booths, 50 ballot boxes, 50 stub boxes, ballot envelopes, secrecy envelopes, new training manuals, and other additional supplies. The UCBOE asserts that it does not currently own these supplies, and it believes that none of its existing supplies can be easily adapted. Additionally, the UCBOE has determined that it must supply each of its precincts with CCOS ballots in the amount of 101% of all voters who voted in the precinct in the last presidential primary. Although the Directive requires only a minimum of 10%, the UCBOE has determined that it must be in a position to provide CCOS ballots for every possible election day voter in Union County to comply fully with the Directive. Consequently, the UCBOE has projected that it needs over \$86,000 in additional funds to carry out the Directive.⁷

12. Boards of elections in other counties affected by the Directive have found that implementation of the Directive will cost substantially less than projected by Union County. The other counties include both counties similar in size to Union County and counties that greatly exceed the size of Union County.

13. Because the UCBOE's 2008 budget did not include or contemplate the additional expenses projected as a result of the Directive, the UCBOE

⁷ Plaintiff's Exhibit 9.

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does not have the \$86,000 in its budget to purchase the additional supplies and to hire the additional poll workers it believes it needs.⁸

14. The UCBOE submitted a request for these additional funds to the Commissioners, but the Commissioners denied the request for the appropriation of additional funds in order to implement the Directive in the manner determined by the UCBOE.

15. Boards of elections have a statutory remedy to apply to their common pleas court to determine the funds necessary and proper for appropriation by the county commissioners. To date, it appears that the UCBOE has not filed such an application because of the Directive.

16. Rather than provide the additional funds requested by the UCBOE, the Commissioners voted to initiate a lawsuit against the Secretary challenging her authority to issue the Directive.⁹ The Commissioners, through the Union County Prosecutor, informed the UCBOE of their intention to sue the Secretary immediately upon the UCBOE's receipt of the Secretary's tie-breaking vote in favor of compliance with the Directive. Despite having been provided the opportunity to join in the Commissioners' lawsuit, the UCBOE declined to sue or participate as a party to the lawsuit.¹⁰ None of the four UCBOE members elected to join the lawsuit in their individual capacities as UCBOE members.

⁸ Plaintiff's Exhibit 6.

⁹ Plaintiff's Exhibit 8.

¹⁰ See Plaintiff's Exhibit 2.

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17. The Commissioners filed this action in the Union County Common Pleas Court on February 5, 2008. Later that day, the Secretary appeared in the case and filed a motion with the Union County Common Pleas Court requesting that venue be transferred to this court in accordance with R.C. 3501.05.

18. In the morning of February 6, 2008, the Commissioners filed an *ex parte* motion for a temporary restraining order with the Union County Common Pleas Court. The motion was improperly granted approximately a half hour later without any notice to the Secretary and without providing the Secretary an opportunity to be heard in opposition. In the court's *ex parte* temporary restraining order, the court also transferred this action to the Franklin County Common Pleas Court.

19. Because the transfer of the case from Union County to Franklin County was made by ordinary mail, Franklin County Common Pleas Court did not receive the case until late in the day on Friday, February 8, 2008. At that time, the Secretary filed a motion to dissolve the temporary restraining order. The Union County Prosecutor was notified immediately and this court awaited his arrival before proceeding to consider the Secretary's motion. After an oral hearing and after granting the prosecutor's request for the parties to brief the issues more fully, this court dissolved the temporary restraining order on February 11, 2008.

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20. Because of this court's dissolution of the temporary restraining order and the UCBOE's vote to comply with the Directive, the UCBOE is proceeding to implement the Directive for the March 4, 2008 primary.

21. Despite the court repeatedly informing the parties of its concerns regarding the maintenance of this action in the absence of the UCBOE, no party has moved to join or amend their pleadings to add the UCBOE as a party to this lawsuit.

III. Conclusions of law

1. As an initial matter, the court finds that the Secretary raises three procedural, non-substantive issues with this lawsuit: (1) the Commissioners' lack of standing; (2) the jurisdictional defect of the Commissioners' failure to join the UCBOE as a party; and (3) the mootness of the issues raised by the Commissioners based upon the UCBOE's current implementation of the Directive. Contrary to the prosecutor's assertions, the doctrines of standing, jurisdiction, and mootness are important principles of law that cannot be glossed over or ignored. These principles are fundamental to our system of justice, and the law requires this court to address these issues before considering the merits of the Commissioners' claims.

A. Standing

2. Before a court can consider the merits of an action, the court must make a preliminary inquiry into a litigant's standing to prosecute

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the legal claims.¹¹ The question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.¹²

3. Generally, in order for a party to demonstrate a personal stake in the outcome of a legal controversy, the party must demonstrate that it will suffer some direct and concrete injury because of the controversy.¹³

4. The doctrine of standing is based on the principle that courts should decide only cases or controversies between litigants whose interests are adverse to each other and should refrain from giving advisory opinions to avoid the imposition by judgment of premature declarations or advice upon potential controversies.¹⁴ The standing requirement prohibits the "use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government."¹⁵ The doctrine of standing directs those persons to other forums.

5. In this case, the Commissioners challenge the Secretary's authority to issue the Directive. In their pretrial briefing and at trial, the Commissioners argue that they, and by extension Union County, will

¹¹ *Cuyahoga Cty. Bd. of Comms. v. State* (2006), 112 Ohio St. 3d 59, 62.

¹² *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St. 2d 176, 178-79, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732.

¹³ See *Cuyahoga Cty. Bd. of Comms. v. State*, 112 Ohio St. 3d at 62.

¹⁴ *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13, 14.

¹⁵ *Racing Guild of Ohio, Local 304 v. Ohio State Racing Com.* (1986), 28 Ohio St. 3d 317, 321.

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suffer two types of direct and concrete injury if the Directive is implemented and enforced: (1) the unlawful usurpation of their authority to select voting equipment for use in the County and (2) the unlawful expenditure of county funds by the UCBOE. The court will address each of these alleged injuries separately.

6. Boards of elections occupy a somewhat unique position in the scheme of local government. Unlike county agencies, boards of elections are under the control of and answerable only to the Secretary of State and are not county officers.¹⁶ Except in those limited instances where boards of county commissioners are given explicit statutory authority,

boards of county commissioners have no authority to control the actions of boards of elections. Such a separation of boards of elections and the county protects the independence of the county boards of elections so that the boards may effectively and efficiently conduct public elections and avoid political maneuvering that might compromise the independence of elections.

7. R.C. 3506.02 provides:

Voting machines, marking devices, and automatic tabulating equipment may be adopted for use in elections in any county in the following manner:

- (A) By the board of elections;
- (B) By the board of county commissioners of such county on the recommendation of the board of elections;

¹⁶ See *State ex rel. The Columbus Blank Book Mfg. Co. v. Ayres* (1943), 142 Ohio St. 216, paragraph 2 of the syllabus and 222; see also *State ex rel. Ruggles v. Howser* (1988), 1988 Ohio App. LEXIS 1678, at *8.

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(C) By the affirmative vote of a majority of the electors of such county....

Accordingly, by statute, the Commissioners have some limited authority to adopt certain recommended voting equipment for use in Union County elections.

8. The Commissioners assert that R.C. 3506.02 is applicable to this case because the CCOS equipment required by the Directive is "automatic tabulating equipment." The Secretary argues that the Directive does not implicate R.C. 3506.02 because it merely requires that additional paper ballots be supplied to precincts on election day and does not require the adoption of a new or different voting system. The Secretary contends that a "ballot" is an election supply and not a voting machine, marking device, or automated tabulating equipment.

9. Even assuming that the Secretary's Directive implicates R.C. 3506.02, this court finds that the Commissioners have failed to demonstrate any direct and concrete injury to their rights under R.C. 3506.02 by the Directive.

10. In 2005, the Commissioners, upon the recommendation of the UCBOE, voted to adopt DREs for use in Union County elections. There is no evidence in the record that the Commissioners' vote to purchase the DREs specified the particular elections use for which the DREs were purchased. The Commissioners also voted to adopt CCOS equipment for use in Union County elections upon the recommendation of the UCBOE.

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Again, there is no evidence that the Commissioners specified the particular elections use for which the CCOS equipment was purchased.

11. The Commissioners argue that the Secretary's Directive infringes upon or usurps their authority to adopt certain voting equipment for use by mandating that another, additional voting system be used in Union County and other similarly situated counties. According to the Commissioners, the Secretary is unlawfully substituting her preferred voting system for the DRE voting system lawfully adopted by the Commissioners.

12. Upon review of R.C. 3506.02, this court finds that the statute grants three entities the authority to adopt voting equipment for use in elections. The statute lists the three entities with authority to adopt voting equipment in neither the conjunctive nor the disjunctive. There is no provision in the statute that renders one entity superior to another or that indicates that the action of one entity precludes action by another. However, boards of county commissioners may act under R.C. 3506.02 only on the recommendation of the local board of elections.

13. R.C. 3506.02 does not preclude the UCBOE from adopting CCOS equipment for use in elections in the manner suggested by the Secretary's Directive without the approval of the Commissioners. The evidence in the record demonstrates that the UCBOE voted to comply with the Directive. Additionally, the evidence demonstrates that the UCBOE declined to join the Commissioners in this lawsuit or otherwise

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to challenge the Secretary's authority to issue the Directive. As a result, even assuming that R.C. 3506.02 is applicable, the UCBOE has acted in accordance with that section and adopted the CCOS equipment and ballots for use in elections as directed by the Secretary. The UCBOE's decision is in accordance with Ohio law and does not infringe upon the rights of the Commissioners under R.C. 3506.02. Given that the UCBOE independently could have effected the exact outcome required by the Directive, it does not appear that the Commissioners have suffered any loss of authority or other injury because of the Directive.

14. Similarly, there is nothing in R.C. 3506.02 to suggest that the Commissioners could not have adopted both DREs and CCOS equipment for use in elections. In fact, this is exactly what occurred. The Commissioners adopted DREs for use in elections, presumably for use as the primary voting method on election day, and the Commissioners adopted CCOS equipment for use in elections, presumably for use with absentee, provisional, and certain other types of ballots.

15. Although R.C. 3506.02 provides that the Commissioners may adopt certain voting equipment for use in elections, R.C. 3506.02 does not define "use" or require boards of county commissioners to specify exactly how certain voting equipment must be used by the UCBOE. Once commissioners adopt certain voting equipment for use in county elections, the commissioners do not have the additional authority to dictate how that equipment will be used. Boards of county

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commissioners do not have the authority to determine how elections will be conducted. Those decisions are left exclusively to boards of elections and the Secretary of State.¹⁷ As a result, the court finds that the Commissioners have not demonstrated that they have any authority to dictate how the DREs and CCOS equipment purchased for the county will be used on election day. This court concludes that the Commissioners' lack of authority to prescribe how the county's existing voting equipment will be used on election day renders them without injury based upon the Secretary's issuance of a directive that merely directs how Union County's existing voting equipment will be used.

16. For these reasons, the court concludes that the Commissioners' have not demonstrated that the Secretary's Directive directly and specifically affects or diminishes their limited statutory rights under R.C. 3506.02.

17. The Commissioners also argue that they will incur additional financial costs because of the Secretary's Directive, and these costs constitute a direct and concrete injury to the Commissioners and, by extension, to the county. In support of this argument, the Commissioners cite the approximately \$86,000 the UCBOE projects it will cost in order to comply with of the Directive.

18. By statute, a board of county commissioners possesses the authority initially to review and pass upon the budgetary request of a

¹⁷ See R.C. 3501.11 and 3501.05.

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board of elections.¹⁸ However, the court finds no authority to support the proposition that this budgetary authority grants boards of commissioners the right to control how elections are conducted or provides them the right to challenge election decisions made by the Secretary of State or the local board of elections.

19. In the event that a board of commissioners refuses to grant a board of elections the necessary and proper funds requested, a board of elections may apply to the common pleas court to fix the amount to be appropriated.¹⁹

20. The monetary burden of implementing the Secretary's Directive falls directly upon the UCBOE, not the Commissioners. The UCBOE must expend the funds that are necessary and proper to carry out the Directive. If, as in this case, the UCBOE lacks the funds to do so, the UCBOE may request additional funds from the Commissioners.

21. The undisputed evidence before the court demonstrates that the Commissioners have denied the UCBOE's request for the additional \$86,000 the UCBOE believes it needs to comply with the Directive. As a result, the Commissioners have not incurred any additional expenses because of the Secretary's Directive at this time. Accordingly, the Commissioners' assertion that the Directive will cause them to incur financial obligations is premature.

¹⁸ R.C. 3501.17(A).

¹⁹ R.C. 3501.17(A).

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22. R.C. 3501.17(A) precludes a board of elections from expending funds that it does not have. The Commissioners assert that their failure to appropriate the approximately \$86,000 requested by the UCBOE to implement the Directive automatically will result in the UCBOE's violation of R.C. 3501.17. The Commissioners seem to suggest that they have some obligation to prevent the UCBOE from unlawfully expending funds. This argument is flawed for two reasons.

First, there is no evidence in the record that the UCBOE intends to expend funds in violation of R.C. 3501.17. Although the Commissioners have denied the request for an additional \$86,000, the UCBOE may take a variety of actions that will not require the expenditure of \$86,000 it does not have. The UCBOE may revisit the number additional poll workers and the number and types of supplies it initially believed to be necessary to implement the Directive. The UCBOE may determine that it can modify existing supplies or otherwise "make do" as other counties have done in order to reduce the potential cost of implementing the Directive. The UCBOE may have sufficient funds to cover these reduced costs or a reduced request may be submitted to the Commissioners.

Alternatively, the UCBOE may decide to apply to the Union County Common Pleas Court, pursuant to R.C. 3501.17(A), to fix the amount to be appropriated in order to implement the Directive. Unlike this case, that action undoubtedly would require findings regarding the reasonableness of the UCBOE's decisions regarding what additional poll

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workers and supplies truly are required by the Directive. However, no such application has been filed and there is no evidence in the record that the UCBOE intends to file such an application at this time.

Second, the Commissioners have presented no evidence or cited any legal authority to support their assertion that they have the authority proactively to prevent the UCBOE from making an expenditure that exceeds the UCBOE's budget. More importantly, the Commissioners have presented no evidence or legal authority to establish that the Commissioners have the power to enforce R.C. 3501.17 once the statute has been violated. R.C. 3501.17 is silent as to the party or entity that is responsible for ensuring compliance. However, R.C. 3501.05(M) provides that the Secretary of State is responsible for compelling the observance of the election laws by county election officers, which suggests that the Secretary is the appropriate party to ensure the UCBOE's compliance with R.C. 3501.17. Furthermore, even if the Commissioners had the authority proactively to prevent an unlawful expenditure by the UCBOE, an action against the UCBOE to enjoin it from such an expenditure would be the appropriate course of action, not a lawsuit against the Secretary.

23. For these reasons, the court finds that the Commissioners have failed to present evidence that they will incur a direct and concrete financial injury as a result of the Directive.

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24. The court recognizes that in their brief regarding standing, the Commissioners suggest that the Secretary's Directive renders them potentially subject to a lawsuit from the American Civil Liberties Union ("ACLU"). The Commissioners assert that the ACLU has sued the Cuyahoga County Commissioners and the Cuyahoga County Board of Elections in federal court concerning the use of a CCOS system on election day. According to the Commissioners, their implementation of the Directive utilizing CCOS ballots may subject them to the same type of suit brought against the Cuyahoga County Commissioners and Board of Elections.

25. The court finds that the speculative threat of a lawsuit by a third party does not confer standing upon the Commissioners. There is no evidence in the record that any individual or group has or even intends to sue Union County if the UCBOE implements the Directive. Furthermore, the ACLU lawsuit against the Cuyahoga County Commissioners and Board of Elections is not based upon Cuyahoga County's implementation of the Directive. In fact, as a county that has opted not to use DREs on election day, Cuyahoga County is not even subject to the Directive.

26. In certain limited circumstances, a party that otherwise lacks standing may be permitted to prosecute an action on behalf of a third-party when the party lacking standing establishes that it: (1) suffers its own injury in fact; (2) possesses a sufficiently close relationship with the

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person or entity who possesses the right; and (3) shows some hindrance that stands in the way of the third-party from seeking relief on its own behalf.²⁰

27. The Commissioners allude that they are bringing this action on behalf of Union County citizens as well the UCBOE and its individual members. The court finds that the Commissioners have presented no evidence to establish that Union County citizens, the UCBOE, or UCBOE members have some hindrance that stands in the way of them seeking relief on their own behalf. The court again notes that the UCBOE has joined in lawsuits challenging the authority of the Secretary to issue particular directives and orders in the past. There is no evidence in the record to suggest that the UCBOE could not itself challenge the Secretary's authority to issue the Directive.

28. For all of the foregoing reasons, the court concludes that the Commissioners have not demonstrated that they have suffered or will suffer any direct and concrete injury as a result of the Secretary's issuance of the Directive. The Commissioners also have not demonstrated that they have the authority to prosecute this action on behalf of some other individuals or entities. Accordingly, the court concludes that the Commissioners lack standing to assert the claims before the court.

²⁰ *City of N. Canton v. City of Canton* (2007), 114 Ohio St. 3d 253 citing *Kowalski v. Tesmer* (2004), 543 U.S. 125.

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29. It is undisputed that the UCBOE would have standing to challenge the lawfulness of a directive of the Secretary of State. However, in this case, the UCBOE has voted to comply with the Directive and not to challenge the authority of the Secretary.

B. Failure to join the UCBOE as a party

30. In addition to demonstrating that they have the standing to prosecute this action, the Commissioners also must demonstrate that this court has jurisdiction to decide these claims.

31. The Commissioners have filed this action for declaratory judgment pursuant to R.C. 2721.12. That statute provides that when declaratory relief is sought, "all persons who have or claim an interest that would be affected by the declaration shall be made parties to the action or proceeding."

32. The absence of an interested and necessary party to a declaratory judgment action constitutes a jurisdictional defect that precludes a court from rendering a declaratory judgment.²¹ In addition, the absence of a necessary party in a declaratory judgment action renders all other issues moot, including the merits.

33. The declaratory judgment statute is a substantive law that cannot be abridged, enlarged, or modified by the Civil Rules. Accordingly, joinder pursuant to Civ. R. 19 and 19.1 cannot be used to add an

²¹ *Copeland v. Tracy* (10th Dist. 1996), 111 Ohio App. 3d 648, 655-56; see also *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist.* (1999), 86 Ohio St. 3d 318, 321.

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interested and necessary party to a declaratory judgment action.²² However, a party seeking declaratory relief may add an interested and necessary party to an action by amending its pleading in accordance with Civ. R. 15.²³

34. In this case, the Secretary argues that the UCBOE, as well as the boards of elections of the other counties to which the Directive is applicable, are interested and necessary parties to the Commissioners' declaratory judgment action.

35. The court has reviewed the evidence and finds that the UCBOE has a legal interest that would be affected by a declaration regarding the Secretary's authority to issue the Directive. The UCBOE is the specific entity charged with implementation of the Directive. As a result, the UCBOE has an undisputable legal interest in a declaration regarding whether the Directive is lawful because such a declaration directly affects whether the UCBOE will implement the Directive or not. This court therefore finds that the UCBOE is an interested and necessary party to the declaratory judgment action.

36. The presence of the UCBOE is further necessitated by the fact that in accordance with R.C. 3506.02²⁴ boards of county commissioners have no independent authority to adopt voting equipment. The

²² *Copeland*, 111 Ohio App. 3d at 655-56.

²³ *Plumbers & Steamfitters*, 86 Ohio St. 3d at 323.

²⁴ Assuming again that the Commissioners are correct that the Directive implicates R.C. 3506.02.

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Commissioners are authorized to act under R.C. 3506.02 only upon the recommendation of the UCBOE.

37. Although the Commissioners have been notified throughout this litigation of the potential jurisdictional deficiencies with proceeding in the absence of the UCBOE, the Commissioners have declined to seek leave to amend their complaint to add the UCBOE as a party.

38. This court concludes that, in the absence of the UCBOE, it lacks jurisdiction to decide the Commissioners' declaratory judgment claims and that this jurisdictional defect cannot be remedied. The court finds that it is unnecessary to determine whether the board of elections for every county subject to the Directive are interested and necessary parties to a declaratory judgment regarding the lawfulness of the Secretary's Directive.

C. Mootness

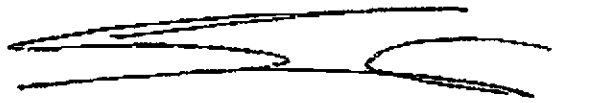
39. The Secretary further argues that the issues raised by the Commissioners have been rendered moot because of the UCBOE's compliance with the Directive.

40. Because the other two significant procedural defects identified by the Secretary preclude this court from addressing the merits of the Commissioners' claims, the court declines to address the mootness argument raised by the Secretary.

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IV. Conclusion

For the foregoing reasons, the court concludes that the Commissioners lack standing to prosecute these claims. The court further concludes that even if the Commissioners had standing to prosecute these claims, the court lacks jurisdiction to adjudicate the declaratory judgment claims due to the Commissioners' failure to join the UCBOE as a party. As a result, this court lacks the authority to consider whether the Directive violates state and federal law and the court must refrain from issuing an advisory ruling regarding the lawfulness of the Directive. Counsel for the Secretary shall submit an entry reflecting this decision to the court promptly, but no later than noon on Friday, February 22, 2008.



Judge Eric Brown

19 Feb 2008
Date

Copies to:

David Phillips, Union County prosecuting attorney

Melissa Chase, assistant Union County prosecuting attorney

Richard Coglianese and Pearl Chin, assistant attorneys general