

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS

Board of Commissioners,  
Union County, Ohio, *et. al.*,

Plaintiffs,

vs.

Case No.: 08-CVH-02-2032

Judge Eric Brown

Secretary of State Jennifer Brunner,

Defendant.

MEMORANDUM CONTRA TO MOTION TO DISSOLVE  
THE TEMPORARY RESTRAINING ORDER

Now come the Plaintiffs Board of Commissioners and file their opposition to the Defendant's Motion to dissolve the temporary restraining order, and respectfully request this court to maintain the order pending the preliminary injunction hearing.

Respectfully submitted,  
DAVID PHILLIPS  
UNION COUNTY PROSECUTING ATTORNEY

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## MEMORANDUM OF LAW

### **INTRODUCTION**

This matter squarely presents one question. Can the Ohio Secretary of State overrule the Union County Commissioners decision to purchase and use DRE election equipment as the sole means of voting at the precinct level? Ohio election law clearly gives the choice of the *use* of voting equipment to local officials and not the Secretary of State.

The Secretary paints this question in terms of ‘voter choice;’ that is offering a choice between DREs and Optical Scan ballots to those voters who distrust DREs. (Motion to Dissolve at 1). As authority for Directive 2008-01, the Secretary suggests that she is making the Optical Scan System available to voters who distrust DREs. If the Secretary truly seeks to offers voters a choice, it begs the question; why doesn’t the Secretary make DREs available to those voters in Optical Scan counties who have concerns about that Optical Scan equipment? The Secretary’s own survey of Ohio election officials, conducted pursuant to Directive 2008-02 clearly demonstrates that election officials in Optical Scan counties have concerns about the security of that voting equipment.<sup>1</sup>

The answer to this question is clear; the Secretary is not concerned about voter choice. Rather, the Secretary seeks to move all counties to optical scan paper ballots. Indeed, she has

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<sup>1</sup> The results of the survey can be found at: <http://www.sos.state.oh.us/sos/media/20080124.pdf>. The results show that at least nine election officials have concerns about Optical Scan equipment. Notably, Directive 2008-02 asks county officials using DRE equipment if they would like to switch to Optical Scan, but the Secretary did not ask the county officials using Optical Scan if they would like to switch to DRE voting equipment.

publicly stated that this is her goal, irrespective of the authority of local officials. See, *Many Ohio Elections Officials' Views Inconsistent with Voters' Concern*<sup>2</sup>.

While the merits of the Secretary's choice can be debated, as can the conclusions and use or misuse of the EVEREST reports, this is not the forum for such a debate. The sole question the Commissioners present is whether the Secretary acting upon her own authority has the ability to order this change by use of a directive.

Prior to addressing the merits of this claim, however, the Secretary has suggested that several procedural roadblocks apply. As this matter is properly before the Court, the plaintiffs respectfully suggest that this Court decide the merits of the issue<sup>3</sup>.

## **LAW AND ARGUMENT**

### **I. This court has jurisdiction over this matter.**

The plaintiffs agree that this court has jurisdiction over the parties and subject matter of this case. While the Secretary filed a notice of removal with the United States District Court, the Secretary has not filed a notice of removal with this court. She has indicated that she would dismiss the federal removal petition. This court has jurisdiction.

### **II. The Union County Court of Common Pleas had jurisdiction when it issued the Temporary Restraining Order. The order was not void.**

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<sup>2</sup> <http://www.sos.state.oh.us/News/Read.aspx?ID=242> ("While the state's elections officials have important views to consider, the bottom line is that we must do what is best for the voters in this state to ensure that anyone who is eligible and wants to vote may do so without having to wait in long lines to vote on machines that have been shown to be substandard and vulnerable to performance and security problems," added Brunner.)

<sup>3</sup> The Court has ordered the parties to address the issue of standing of the Commissioners on or before Wednesday, February, 6, 2008.

**A. The Union County had subject matter jurisdiction when it issued the Temporary Restraining Order. The motion for a change of venue did not deprive the Court of Jurisdiction.**

The Secretary argues that the Union County Court of Common Pleas lacked subject matter jurisdiction to issue the temporary restraining order once she filed her motion to transfer venue in the case. This novel legal argument carries with it no citations of legal authority. This argument also confuses jurisdiction with venue and, as such, lacks merit.

This action was filed in the Union County Court of Common Pleas which, as a court of general jurisdiction, had subject matter jurisdiction and was an appropriate court to issue injunctive relief. *State ex rel. Blackwell v. Crawford*, (2005), 106 Ohio St.3d 447. (“the common pleas court[s] possess basic and statutory jurisdiction over actions for declaratory judgment and injunction”).

Defendant moved “for a change of venue, as a substantive right,” pursuant to R.C. §3501.05. This section grants the defendant the “power to have the venue changed.” *In re: Protest of Initiative Petitions Proposing the “Ohio Sales Tax Reduction Act”* (3<sup>rd</sup> App. Dist. 2004), 2004 Ohio 4147.

However, there is a distinction between jurisdiction and venue. *Nichols v. Crow*, (1982), 1982 Ohio App. LEXIS 13858. The mere “substantive right” to choose venue does not affect the jurisdiction of the transferring Court, no matter how mandatory the transfer may be. *Heckler v. Napoleon* (1937), 56 Ohio App. 110. A change of venue excludes the court from which it was removed from exercising any jurisdiction in the cause *subsequent to the change*. The temporary restraining order was issued *before* the court granted the change of venue. The court recognized that the plaintiffs needed an immediate order, as the plaintiffs were obligated to act the next day.

The Tenth District Court of Appeals for Franklin County has recognized the distinction between venue and jurisdiction:

\* \* \* "jurisdiction" refers to the judicial *power* to hear and determine a criminal prosecution (or a civil dispute). This is called "territorial jurisdiction" or "subject matter jurisdiction."

"Venue" commonly refers to the appropriate *place* of trial for a criminal prosecution within a state. *State v. Shrum* (1982), 7 Ohio App. 3d 244, 245, 7 OBR 323, 324, 455 N.E. 2d 531, 533, fn. 2.

*State v. Williams* (1988), 53 Ohio App. 3d 1 (italics added).

That the Union County judge acted in this case was fortuitous. Counsel for the Secretary first sought to have the case transferred to Franklin County, then to Federal Court and now back to Franklin County. While the Secretary possesses this right, the change from forum to forum to forum by the Secretary would have otherwise deprived the plaintiff of any place to be heard.

The granting of the temporary restraining order was the legitimate exercise of a court having subject matter jurisdiction, personal jurisdiction and venue to restrain the Secretary of State to preserve the *status quo* of the parties pending a hearing on the merits.

**B. The affidavit and temporary restraining order demonstrate immediacy and irreparable harm. The ex parte order is not void.**

The Defendant argues that the Plaintiffs did not demonstrate any specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss or damage will result to the Plaintiffs before the Defendant or her attorney could be heard in opposition.

In his affidavit, Commissioner Lee details the receipt of the tie breaking letter from the Secretary at 11:37 A.M. on February 5, 2008. The Primary Election is scheduled for March 4, 2008, a mere seventeen days after the receipt of the Defendant's Letter (Lee Affidavit, Paragraph 8). The Union County Board of Elections had a period of seventeen days to, in effect, implement

and fund a new voting system in the county (Affidavit, Paragraph 9). The Board of Elections was required to immediately research costs and submit a funding request to the Plaintiffs on February 7, 2008, approximately forty-eight hours after receipt of the Defendant's letter (Affidavit, Paragraph 13). In addition, the Commissioners must decide whether it was reasonable and necessary to provide the additional funding to the Board of Elections within forty-eight hours after receipt of the Defendant's letter (Affidavit, Paragraph 6). The failure on the part of the Plaintiffs or the Board of Elections to act immediately will jeopardize the county's ability to comply with the Defendant's Directive 2008-01 and conduct the Primary election.

The Defendants further argue that the Plaintiffs have shown no harm other than monetary damages and that this showing is not enough to sustain a Temporary Restraining Order. In his Affidavit, Gary Lee states that there will be an additional expense to Union County, Ohio in excess of the amount of \$68,000.00 (Affidavit, Paragraph 6). The monetary expenditure is not the only irreparable harm that the Plaintiffs will suffer, the Commissioners were obligated to prohibit the illegal expenditure of funds. See, R.C. 3501.17. The Defendant's Directive will result in the implementation of two separate and distinct voting systems at the precinct level that will cause confusion, turmoil and chaos for Union County voters (Affidavit, Paragraph 9). The required education for voters on the paper ballot system will negatively impact on the ability of the Board of Elections to promptly count votes and return election results (Affidavit, Paragraph 10). Because the paper ballots will be counted at a central location, there will be an increased spoilage of ballots because of "overvote" and "undervote" issues that cannot be resolved at the precinct level (Affidavit, Paragraph 16). Union County will lose space in each of the precincts in order to install the privacy booths necessary for the use of paper ballots (Affidavit, Paragraph

20). In addition, the need for voters to read the instructions on using paper ballots will cause delays in the voting process.

All of these factors contribute to the finding of irreparable harm on to Union County and its residents as a direct and proximate cause of the Defendant's Directive.

**III. The Restraining Order is necessary to preserve the status quo. Judge Parrott correctly found that the plaintiffs had met their burden.**

**1. (A) The board(s) of elections are not necessary parties to this action.**

The Union County Board of Elections and the other eighty-Seven Boards of Elections are *not* necessary parties to the instant action.

Section 2721.12 of the Ohio Revised Code governs declaratory judgment relief and the joinder of parties to the action. It provides in pertinent part:

“(A) \* \* \* when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim *any interest that would be affected by the declaration* shall be made parties to the action or proceeding \* \* \* a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding. . .”

The substance of the Plaintiffs' claim for declaratory judgment is that the Defendant has exceeded the authority given to her by the State legislature in issuing Directive 2008-01. The Plaintiffs challenge to the Defendant's authority is based upon the statutory language in Ohio Revised Code Section 3506.02 and does not directly involve any of the boards of elections in the State of Ohio.

While it is true that the various boards of election may have a *practical* interest in the outcome of this declaratory judgment action, they have no *legal* interest in the outcome. See, *Clarke v. Warren County Commrs v. Brausch* (2000), 2000 Ohio App. LEXIS 4199. Therefore, the boards are not necessary parties to this action. *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St. 2d 263, 273.

The practical impact upon the various boards is evident, whether they will have to follow the Secretary's directive 2008-01 in the upcoming election. That same practical impact could be said to exist for any elector, candidate or even the Boards of Commissioners in each of the affected counties. However, the Secretary of State is the only party who has a *legal* interest in any declaration issued by this court, *i.e.*, whether or not she has the lawful authority to issue this Directive 2008-01 overriding the local officials' choice of the use of voting equipment.

It is quite clear that the Court can make a determination concerning the Secretary's authority without joining each of the boards of elections as parties to the action.

That this court has jurisdiction in the absence of all of the boards of elections is evident from other Ohio cases. An original action for a writ of prohibition to prevent a trial court from proceeding in a case seeking declaratory and injunctive relief against the Secretary of State was filed in *State Ex Rel. Blackwell, Secy. of State v. Crawford, Judge et al*, (2005) 106 Ohio St. 3d 447, 835 N.E. 2d 1232.

In *Blackwell*, plaintiff ES&S, a vendor of electronic voting machines filed a declaratory judgment action in the Franklin County Court of Common Pleas against the Secretary of State and challenged the lawfulness of Directive 2005-07. In that case, Plaintiff sought a declaration that “[Secretary of State] Blackwell unlawfully usurped the counties’ authority to choose a voting system as well as an injunction preventing him from enforcing Directive 2005-07.”

Plaintiff did not join any of the boards of election. Only thirty-one of the eighty-eight boards of election moved to intervene in the action.

Secretary of State Blackwell filed a writ of prohibition with the Ohio Supreme Court seeking to prevent Judge Crawford and the Franklin County Court of Common Pleas from

exercising jurisdiction in the declaratory judgment case. The Ohio Supreme Court refused the writ and found that the common pleas court had jurisdiction. The Court stated that:

“\* \* \* Blackwell has not established that Judge Crawford and the court of common pleas patently and unambiguously lack jurisdiction over the case initiated by ES&S *and later joined by Hart and numerous boards of elections.* \* \* \*.”

**(B). The failure to join a necessary party is not jurisdictional.**

The Ohio Supreme Court has clearly stated that the joinder of additional parties in a declaratory judgment action, rather than dismissal, was preferable so that the controversy between the parties could be presented to the court for disposition on the merits.” *Plumbers & Steamfitters Local Union 83, Appellant, v. Union Local School District Board of Education* (1999), 86 Ohio St. 3d 318, 715 N.E.2d 127 at syllabus.

In the event this court finds a board or all boards of election are necessary parties, dismissal is not appropriate. The appropriate remedy would be to order plaintiff to join the various boards of election as involuntary plaintiffs pursuant to Civ. Rule 19(A).

**2. The plaintiff will succeed on the merits. The Secretary lacks the authority to issue Directive 2008-01.**

The Secretary of State argues that she has the authority to order the Boards of Elections to have paper ballots available to “any Ohio citizen who wishes to vote on a paper ballot system is well within the power of the Secretary of State.” (Mot. at p. 4). The Secretary, apparently not realizing the full impact of her Directive, argues that she has “simply required counties to have paper ballots available to individual citizens who feel more secure in putting their votes on a piece of paper instead of a machine.” (Motion at p. 1).

The Secretary argues further that “her requirements that the boards have paper ballots in polling locations in an amount equal to at least 10% of the total registered voters at each polling

location is a reasonable number of ballots.” Thus, she concludes, she is “well within her authority in issuing this directive.”

As authority for her directive, the Secretary claims that the board must “follow the instructions and advisories of the secretary of state in the production and use of polling place supplies,” citing to R.C. 3501.30(B). The argument that the Secretary is merely telling the board how many ballots to buy is disingenuous, and more importantly, ignores the statutes which the Secretary is sworn to uphold as Ohio’s chief election officer.

The Secretary’s directive is not merely an order to have a certain number of ballots on hand. To the contrary, the directive requires a second voting system by making “paper ballots on demand” a requirement for all counties that use DRE voting equipment. The ballots must then be counted on a central count optical scan system. The Secretary lacks this authority.

The authority to give paper ballots “on demand” is expressly granted to the Boards of Election, but not to the Secretary of State. Furthermore, while her “10% directive” may or may not be “reasonable,” it is arbitrary and violates Ohio law. Indeed, following her directive may nullify the election. Finally, it is the local board, not the Secretary, who has the authority to choose the type of election equipment to use in a particular election. The argument that the Secretary is merely telling the board to order more supplies, and not which voting equipment to use, ignores the reality of the effect of the Directive.

The authority to offer paper ballots on demand lies with the local boards. Ohio Rev. Code Section 3505.11. That Section provides, in part:

(B) (1) A board of elections may choose to provide ballots on demand. If a board so chooses, the board shall have prepared for each precinct at least five per cent more ballots for an election than the number specified below for that kind of

election:

(a) For a primary election or a special election held on the day of a primary election, the total number of electors in that precinct who voted in the primary election held four years previously;

The Legislature expressly granted the decision making authority to offer “ballots on demand” to the board of elections, not the Secretary of State. Notably, the secretary cites to no legislative authority granting her the authority for her “ballot on demand” directive.

The March 4, 2008 election is a primary election. If paper ballots are given to voters “on demand,” State law clearly provides the number to be printed must be at least five percent more ballots than the total number of electors in the last primary election. The Secretary’s directive orders the boards to provide ballots on demand and orders the number to be made available to be calculated by multiplying “the number of ballots cast in each precinct at a like election by 10%.”

Assuming, by way of example then, that a precinct had 3,000 voters in the last primary, state law would obligate the Board to have 3,150 ballots on hand; the secretary’s directive requires that only 300 ballots be available.

This is not a matter of small concern. The Secretary’s directive clearly gives the voter the right to demand a paper ballot. If demanded, the board must comply with the voter’s request. As the Secretary has engaged in a widespread public campaign to discredit DRE voting machines as unreliable<sup>4</sup>, voters may understandably choose paper ballots. Directive 2008-01 requires the board to comply with the voter’s wishes (“I hereby direct all counties using direct recording

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<sup>4</sup> This is not Union County’s experience. Seven elections have been conducted on the iVotronic DREs in Union County. The last five of those elections have been tested by hand recount, including a contested Congressional election and the election which placed the Secretary of State in Office. The results of the hand recounts show 100% accuracy in the results, with a 0% overvote.

voting machines (DRE) to provide an optical scan ballot to any voter who requests it.” Directive 2008-01 at para. 1).

If the boards follow the Secretary’s directive, an insufficient number of paper ballots may be available. The local boards ignore her directive at their peril; she has repeatedly threatened any board member who fails to implement her directive with insubordination. (*See*, Complaint, Ex. 3 at page 2, “I compel and direct the \* \* \* Board of Elections \* \* \* provide an optical scan ballot to *any* voter who requests one.” *And see*, Motion for a Temporary Restraining Order, Ex. 2, “Failure of the Board of Elections to follow Directive 2008-01 is tantamount to insubordination and could be considered a violation of his or her oath.” )

However, the failure of the board of elections to furnish sufficient ballots so that all qualified electors who desire to vote can do so nullifies the election. *In re Gorham-Fayette Local School Dist.* (1969), 20 Ohio Misc. 222, 250 N.E.2d 104. The Secretary makes no allowance for the board to require the voter to vote on a DRE.

If an insufficient number of optical scan ballots are made available, voters who request optical scan ballots after they run out may therefore be disenfranchised. Given that this is a presidential primary election, the Secretary’s directive, if followed to the letter, may well result in chaos and a challenge to the election by state or even national candidates. The challenge to a state’s election process cannot be unknown to the Secretary of State. *See*, for example, *Bush v. Gore*, 531 U.S. 98 (2000).

Furthermore, the Secretary’s Directive goes farther than “simply requir[ing] counties to have paper ballots available to individual citizens who feel more secure in putting their votes on a piece of paper instead of a machine.” The directive obligates the local boards, at county expense, to:

1. Offer optical scan ballots to any voter upon demand.
2. Print optical scan ballots in an amount.
3. Obtain and provide secure ballot containers.
4. Provide a Voter Privacy area for marking ballots.
5. Tabulate the optical scan ballots at a central location on election night.
6. Document costs associated with the Directive.

The Secretary's assertions to the contrary, what she has ordered the County to do is set up a separate voting system to run in parallel with the DRE voting system which has previously been selected by the Union County Board of Commissioners at the recommendation of the Board of Elections. At the express direction of the Secretary, the choice as to which system to use is now up to each individual voter.

The Union County Board of Elections has recognized this fact, even if the Secretary has not. In order to comply with the Directive, the Union County Board of Elections voted 4-0 to hire, two sets of poll workers, if possible, one for DREs and one for Optical Scan. In addition, the board voted to order paper ballots in the amount of 101% of the number of registered voters (30,802). In addition, the Board of Elections was moving forward to take steps necessary to efficiently and effectively run two separate and distinct systems.

Ohio Rev. Code § 3506.02 sets forth express statutory authority for the adoption of voting machines, as follows:

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;**

(C) 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 Union County Commissioners have purchased and own approximately \$500,000.00 worth of iVotronic DRE voting equipment, at the recommendation of the Board of Elections. It is this voting equipment that has been selected “for use” in the election. The Secretary suggests that the Counties have equipment which is already used for absentee ballots and provisional ballots. This belies the issue; the Board of Elections adopted DREs for use by every voter at the precinct level. The Board of Commissioners agreed and purchased equipment based on that recommendation. The Secretary, through her directive, is overriding the decision of plaintiffs and directing the general use of Optical Scan and DRE at the precinct level at the voter’s direction.

It is true that the electorate of Union County may, by affirmative vote, determine what election equipment they desire to use. This has not happened. However, it is not true that each individual voter can, on Election Day, decide between two systems. Such is the effect of the Secretary’s order. It has placed upon the Board of Elections a tremendous burden, confused the electorate, overridden the lawful choice of the County Election Officials and threatens to throw Ohio’s election into chaos.

The Secretary relies upon her authority as the chief elections official of the State of Ohio. However, as recognized in a recent opinion by the Ohio Attorney General, her authority is not unlimited:

The Secretary of State does have authority to advise the boards of elections as to the proper methods of conducting elections. R.C. 3501.05(B). Further, R.C. 3501.05(M) expressly authorizes the Secretary of State to "compel the observance by election officers in the several counties of the requirements of the election laws." R.C. 3501.05(M) is a general directive that is meant to make clear that Ohio's election officers must be mindful of the numerous requirements imposed in Title 35, and that the Secretary of State ultimately is responsible for ensuring that those officers observe and implement such requirements. *R.C. 3501.05(M) in no way means, however, that the Secretary of State may exercise discretion conferred*

*upon those officers by specific provisions of R.C. Title 35 when he has not otherwise been granted that discretion himself.*

*Further, as noted above, county boards of elections, working with their boards of county commissioners, are given authority to make decisions about voting systems for their counties, and also about financial aspects of providing those systems. It is clear that various costs are involved in the selection and operation of different types of voting systems. Some systems have high initial costs for equipment but low costs for maintenance and operation. Other systems that might initially cost less may require substantial outlays for operations. For example, electronic systems generally come with an enclosure for voting, whereas the implementation of a PCOS system might require the purchase of voting booths. Further, the operation of a PCOS system requires the printing of paper ballots, with attendant issues of how many to have available at each polling site and the different ballots required in overlapping political districts. Some of the costs, such as printing ballots, are borne by local jurisdictions in some elections. See 2004 Op. Att'y Gen. No. 2004-008. It is appropriate for a local body to make the decisions that impact upon the local community with respect to the various costs related to the selection and operation of voting equipment.*

2005 Ohio Op. Atty. Gen. No. 6.

Ohio courts, as well as Ohio's Chief Legal Officer, have recognized the discretion of local officials. Boards of election were established on a county basis so that they could tailor their decisions and actions to the needs of individual counties. See *State ex rel. City of North Olmsted v. Cuyahoga County Bd. of Elections*, 93 Ohio St. 3d 529, 533, 757 N.E.2d 314 (2001) (boards of elections are the local authorities that are best equipped to gauge compliance with election laws). The Secretary of State acknowledged this factor in the State Plan outlining the program for Ohio's compliance with HAVA.

### **3. Union County will be harmed if the Temporary Restraining Order is Dissolved**

The Secretary's assertion to the contrary, not only will Union County be forced to expend money which has not been appropriated by plaintiffs in accordance with Ohio law, the County will be required by the Directive to implement two separate and distinct voting systems. The County will be required to pay to train poll workers on two systems and educate voters on the

new Optical Scan option. The Board of Commissioners must purchase and store secure ballot boxes and privacy booths. This will, in essence, totally change the precinct based voting system. The Commissioners have, in accordance with Ohio law, selected and funded a DRE voting system, not a dual system. The Commissioners, in the lawful exercise of their authority over the county general fund, have refused to appropriate the additional \$68,000.00 necessary to meet the Secretary's directive.

**4. The Secretary will not be irreparably harmed if her Directive is not carried out in the March election.**

The *status quo* in 57 of Ohio's 88 counties is the use of DRE voting equipment at the sole means of precinct based voting. It is the Secretary, not the plaintiffs, who seek to implement a change in the voting systems. The Secretary issued her Directive on January 2, 2008 and ordered these changes for the March 4 primary election. It is the Secretary who, through her unlawful order, has "changed the rules at the last minute." The preservation of the *status quo* will guard taxpayer money, prevent the illegal expenditure of unappropriated funds and allow this matter to be heard in an orderly fashion.

**5. The public interest is supported by maintaining the Temporary Restraining Order.**

The Secretary claims that "some members of the public do not have faith that DRE machines correctly and accurately count their ballots." If true, the fault for that lies, in large measure, with the Secretary. The Secretary can point to no example of fraud or machine error – and certainly cannot do so in Union County. But, even if the confidence of the voter has been undermined by press releases, speculation as to potential problems with DREs or otherwise, that alleged lack of confidence does not provide a legal basis for the Secretary's Directive. If publicity has undermined the elector's confidence in DRE voting machines, Ohio law provides

that the Electorate may choose a voting machine to use. What Ohio law does not provide is for the Secretary of State to impose a voting system upon a county.

## **6. Conclusion**

The temporary restraining order issued by Judge Parrott recognizes, as have courts, the Ohio Legislature and the Ohio Attorney General, that the choice of voting systems belongs with the local authorities. It is the local boards of elections and commissioners who are in the best position to judge the needs of the local electorate, budget, physical plant and other resources, and purchase and use a voting system to meet those needs.

Plaintiff respectfully requests the Court maintain the Temporary Restraining Order pending the hearing on the Preliminary Injunction.

Respectfully submitted,  
DAVID PHILLIPS  
UNION COUNTY PROSECUTING ATTORNEY

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing has been served upon the Defendant's counsel, Richard Coglianesse, Assistant Attorney General, 30 East Broad Street, 16<sup>th</sup> Floor, Columbus, Ohio, 43215 by fax and ordinary U.S. Mail, this 11th day of February, 2008.

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David W. Phillips (0019966)