

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO, *ex rel.*,  
JOHN W. PAINTER  
255 East Fifth Street, Suite 2600  
Cincinnati, Ohio 45202,**

**and**

**JOHN WILLIAMS  
6749 Wetheridge Drive  
Cincinnati, Ohio 45230,**

**Relators,**

**vs.**

**JENNIFER L. BRUNNER  
SECRETARY OF THE  
STATE OF OHIO,  
180 East Broad Street  
Columbus, Ohio 43215,**

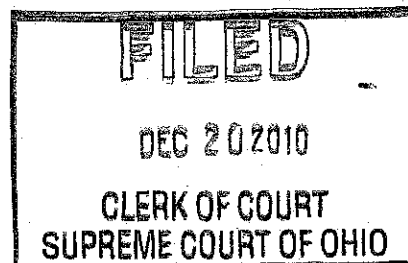
**and**

**THE BOARD OF ELECTIONS OF  
HAMILTON COUNTY, OHIO  
824 Broadway  
Cincinnati, Ohio 45202,**

**Respondents.**

**CASE NO. 10-2205**

**ORIGINAL ACTION IN  
MANDAMUS AND PROHIBITION**



**COMPLAINT FOR A WRIT OF MANDAMUS AND PROHIBITION**

**EXPEDITED ELECTION CASE**

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**COUNSEL FOR RELATORS**



reaching the final count, the Hamilton County Board of Elections had reviewed some 10,500 provisional ballots cast in the County and determined, under the rules set out in Ohio Rev. Code §3505.183, which were valid and which were not. In that process, by a bipartisan 4-0 vote, the Board determined that 849 of those provisional ballots were not valid and should not be counted because they had not been voted in the precinct in which the voter resided. Ohio Rev. Code §3505.181(C) (“ballot will not be counted if it is cast in the wrong precinct”).

3. After the final vote had been determined, Tracie Hunter, the loser of the election, filed suit in Federal Court to block certification of the election results. The District Court, in an order issued November 22, 2010, declined to interfere with certification of the election results but directed the Board to further investigate the 849 ballots to determine “whether provisional ballots cast in the correct polling location but wrong precinct were improperly cast because of poll worker error.” Affidavit of Alex Triantafolou, December 20, 2010 (“Triantafilou Aff.”) at ¶4. The Order did not specify how that investigation was to be undertaken.

4. While Relator Williams has appealed from that Order,<sup>1</sup> this action does not in any way challenge the District Court’s conclusion. Rather, it addresses exclusively the way in which that investigation should proceed under state election law – since the process and procedure for conducting the examination of provisional ballots is a matter of Ohio election law. *Sandusky County Democratic Party vs. Blackwell*, 387 F. 3d 565 (6th Cir. 2006).

5. The processes and procedures that Secretary Brunner has mandated through the issuance of three post-election-certification Directives and one Advisory Opinion depart from existing Ohio law, are different from anything contemplated by Ohio law at the time of the November 2 election, and present the likelihood of impacting this election – which Relators

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<sup>1</sup> The appeal is pending in the United States Court of Appeals for the Sixth Circuit, *Williams v. Hunter*, No. 10-4481.

believe was the intent of those Directives. For those reasons, Relators ask that this Court intervene.

6. Relators are entitled to a writ of mandamus correcting the misdirected post-election and post-election-certification instructions of the Secretary of State and stopping the process that is based on those instructions. *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 900 N.E.2d 982, 2008-Ohio-633.

### JURISDICTION

7. This Court has jurisdiction of this original action in mandamus and injunction against the Ohio Secretary of State Jennifer L. Brunner pursuant to Article IV, Section 2 of the Constitution of the State of Ohio and Chapter 2731 of the Ohio Rev. Code. This Court also has jurisdiction of this original action in mandamus and prohibition against the Hamilton County, Ohio Board of Elections because the Secretary's Directive requires that the Board act in a quasi-judicial manner.

### PARTIES

8. Relator John W. Painter is a citizen of the State of Ohio and a Hamilton County elector. Mr. Painter voted in Hamilton County, Ohio in the November 2, 2010 election and brings this action to assure that his vote is not diluted as a result of the erroneous application of Ohio law regarding the scrutiny applied to and count of provisional ballots.

9. Relator John Williams is a citizen of the State of Ohio, a Hamilton County elector, and the certified winner of the Juvenile Court Judge election for Hamilton County. While the race is non-partisan, his candidacy was endorsed by the Republican Party.

10. Respondent Jennifer L. Brunner is the duly elected and acting Secretary of State of Ohio (the "Secretary"). She is a Democrat who did not stand for re-election to that office. She is in the final weeks of her term, which ends January 9, 2011.

11. Respondent Board of Elections of Hamilton County, Ohio (the "Board") is the duly established election authority for Hamilton County, Ohio pursuant to Ohio Rev. Code § 3501.06.

### FACTS

12. The November 2, 2010 election for Juvenile Court Judge of Hamilton County was between Relator John Williams, a former assistant prosecutor, director of the Board of Elections, and director of the Clerk of Court's office, and Tracie Hunter, a lawyer, ordained minister, and radio personality. The election was for a judicial term to begin January 1, 2011.

13. On election night, the Board counted all of the ballots that had been cast absentee and substantially all of the ballots cast on Election Day. Mr. Williams led Ms. Hunter in the unofficial results by 2847 votes. There remained about 10,500 provisional ballots and a few other ballots that had not yet been counted. In the following days, Board staff reviewed and addressed all of the provisional ballots. On November 16, the Board met and made final determinations as to which of the provisional ballots were valid and to be counted. Included in that determination was a decision, reached unanimously, that 849 of the provisional ballots were not valid and should not be counted because they had been cast in the wrong precinct. After that meeting, the envelopes containing valid provisional ballots were opened, the ballots removed from the envelopes, and they were counted. Ohio Rev. Code 3505.183(D) ("No provisional ballots shall be counted in a particular county until the Board determines the eligibility to be counted of all provisional ballots cast in that county").

14. After the count of valid ballots showed that Mr. Williams was the winner of the Juvenile Court race, Ms. Hunter filed a Complaint in Federal District Court. *Hunter v. Board of Elections*, U.S. District Court, Case No. 1:10-CV-820. On November 22, 2010, the Federal District Court issued an order directing the Board "to examine all 849 faulty provisional ballots

for poll worker error and, if such error is found, count the ballots as part of the mandatory recount.” Triantafilou Aff. at ¶4; attached as Exhibit A to Triantafilou Affidavit.

15. On November 23, 2010, the Board voted to certify the results of the election.

**The Secretary’s post-election, post-election-certification pronouncements.**

16. After the Federal Court Order and certification of election results by the Board, the Secretary has issued three different Directives and one Advisory Opinion to the Board on how to conduct the examination that the Federal Court Order had mandated. The chronology of those pronouncements follows:

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|-------------|--|
| November 24 | Federal district court order (Triantafilou Aff. at ¶4).  |
| November 30 | <b>Directive 2010-79</b> (Triantafilou Aff. at ¶7; Exh. B) directs Board to investigate all provisional ballots in which the voter provided identification in the form of the last four digits of her/his social security number; suggests contacting and questioning poll workers in those precincts in which multiple such provisionals were cast. Questioning of poll workers to occur “at a public meeting of the board.”  |
| December 8  | Hamilton County Board staff follows the wording of Directive 2010-79 and concludes in a bipartisan manner that it should contact and question poll workers regarding only 12 provisional ballots.  |
| December 9  | <b>Directive 2010-80</b> (Triantafilou Aff. at ¶12; Exh. C) expands procedures from 2010-79 from only those voters whose sole form of identification was the last four digits of her/his social security number under 2010-79 to all 849 provisional ballots rejected for having been cast in the wrong precinct; directs Board to contact and question poll workers in all precincts and polling places in which any provisional ballot was cast in the wrong precinct. |
| December 11 | Board votes unanimously to undertake the investigation outlined in Directive 2010-80; will subpoena some 2200 poll workers for the questioning; votes unanimously to advise Ohio Supreme Court of potential that process will not be concluded in time for the winner of the election to take office January 1.  |
| December 13 | Board sends, by certified mail, first subpoenas to poll workers.   |
| December 14 | <b>Advisory 2010-08</b> (Triantafilou Aff. at ¶17; Exh. D) advises Board to issue subpoenas: Board <i>may</i> offer poll workers the   |

opportunity to answer a questionnaire in lieu of responding to a subpoena (if questionnaire is returned within 7 calendar days from when sent); questioning of poll workers “does not have to occur in the presence of the Board at a public meeting.”

December 16 First poll workers appear before the Board to testify pursuant to subpoena about their experiences on Election Day (snow storm closes Cincinnati Public Schools).

December 17 Second day of poll workers appearing before the Board to testify pursuant to subpoenas. By the end of the second day of testimony, Board has taken testimony from about 75 poll workers.

At 4:12 pm, Secretary issues **Directive 2010-87** (Triantafilou Aff. at ¶20; Exh. E). Board must move faster; all subpoenas must be issued by December 20; all testimony must be concluded by December 23. Board *must* send questionnaires to all poll workers and give them the opportunity to answer questionnaire in lieu of responding to a subpoena (if questionnaire is returned within 2 calendar days from when sent); Entire investigation to be concluded and final determinations made by the Board no later than December 28; any tie votes of the Board on any issue are to be submitted to the Secretary within 48 hours for final determination.

17. On November 30, 2010, eight days after the District Court issued its order, Secretary Brunner issued Directive 2010-79 to Hamilton County (Triantafilou Aff. at ¶7; Exh. B). That Directive specifically addressed the need to investigate provisional ballots cast in the correct polling place but wrong precinct by voters who identified themselves by the last four digits of their social security number and to contact poll workers as a part of that investigation. That Directive followed up on earlier Directives 2010-74 (issued on November 1, 2010) and 2010-48 and a federal consent decree from April of 2010, which had introduced the concept of poll worker error into the analysis of provisional ballots in Ohio.

18. The term “poll worker error” does not appear in any Ohio statute. Ohio election statutes provide no exception – based upon poll worker error or otherwise – to the requirement that voters cast their ballots in the precinct in which they reside. In 2006, a homeless advocacy

group challenged Ohio's voter identification requirements in a federal court action in part because many homeless persons did not have the statutorily required forms of identification, but rather vote with no form of identification other than the last four digits of their social security numbers. In April of 2010, the federal court entered a consent decree that created a narrow exception to the statutory requirements of voting in the precinct of residence – persons who vote with no other form of identification other than their social security number. Such person's provisional ballots cast in the wrong precinct could still be counted so long as it was voted in the correct polling location (a multi-precinct polling location) and it was voted in the wrong precinct “for reasons attributable to poll worker error.” Consent Decree, April 19, 2010, *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio, No. 2:06-cv-896 (“NEOCH Consent Decree”) (“Defendant Secretary of State, her agents, employees and representatives will instruct Ohio's county Boards of Elections to adhere to the following rules regarding the casting and counting of provisional ballots for persons without identification other than a social security number”).

19. The concept of contacting and questioning poll workers, on a wide-scale basis after an election to determine the validity of provisional ballots is not something that is provided for in Ohio Rev. Code §3505.183 (Determination whether provisional ballot is eligible to be counted”) or elsewhere in Ohio's election statutes.<sup>2</sup> The first place that concept appeared was in Directive 2010-79 addressing the narrow circumstances under which it would be appropriate for the Board to contact poll workers and question them as to the specifics of the poll worker error that was referenced in the NEOCH Consent Decree – an undertaking limited to poll workers at

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<sup>2</sup> Contacting and questioning poll workers is not required or necessarily contemplated in the investigation the Board was directed to undertake in the District Court Order. (*Triantafilou Aff.* at ¶4). No poll worker had been contacted or questioned in connection with the original review of provisional ballots that the Board had conducted leading up to its November 16 determinations of valid and invalid provisional ballots.

polling locations in which multiple persons subject to the NEOCH Consent Decree voted in the wrong precinct. Under such circumstances, Directive 2010-79 directed that the Board “should” contact the poll workers to examine poll worker error, something the Board had not done prior to reaching its determinations on provisional ballots on November 16, 2010. Relators believe that no other county board of elections determined to contact poll workers in connection with their review of provisional ballots.

20. Directive 2010-79 also directed that if poll workers were contacted and questioned in person, the board “should” perform the questioning “at a public meeting of the board.”

21. By December 8, 2010, Board staff had worked, in their customary bipartisan fashion, to identify which provisional ballots previously rejected by the Board were ballots for which the contacting of poll workers would be called for under Directive 2010-79. Board staff determined that amounted to just twelve of the provisional ballots. That was the universe of provisional ballots as to which the Secretary’s Directive indicated there “should” be contact with poll workers.

22. Late in the afternoon of December 9, 2010, Respondent Secretary of State issued Directive 2010-80 (Triantafilou Aff. at ¶12; Exh. C) directing – for the first time in the history of Ohio – that a board of elections should individually question every poll worker who had worked at an election in any precinct or polling place in which a provisional ballot was cast by a voter in the wrong precinct so as to make a factual determination as to whether that ballot had been cast in the wrong precinct because of poll worker error. No longer was the inquiry to be limited to the provisional ballots cast by persons subject to the NEOCH Consent Decree, it was now to address all 849 provisional ballots cast in the wrong precinct. The Board was further

directed to contact all poll workers in the precincts and polling places in which any of the 849 provisional ballots had been cast and to “question each poll worker to determine whether they followed Ohio law, Secretary of State Directives, and the Poll Worker Manual procedures for casting and processing provisional ballots.”

23. Because the 849 ballots were cast in more than 370 different precincts, Directive 2010-80 directs the Board to contact hundreds of poll workers and question them as to poll worker error.

24. On December 11, 2010, the Board voted 4-0 to follow Directive 2010-80 by issuing subpoenas to more than 2200 poll workers who had worked on Election Day in the precincts and polling places where the 849 provisional ballots had been cast. The Board is to become a fact-finder in those hearings, as to each of the 849 ballots, to determine if poll worker error caused the ballot to be cast in the wrong precinct.

25. Recognizing the extent of the task that the Secretary’s Directive had directed it to undertake, the resolution the Board adopted also called for the Board to immediately notify the Supreme Court of Ohio of the “potential for a vacancy on the Hamilton County Court of Common Pleas, Juvenile Division on January 1, 2011 if the board has not concluded its investigation and contact with each poll worker.”

26. Never before in an Ohio election has such a process been undertaken. It is not a process that is contemplated by the Ohio statutes; it is not something that was done as to any of the other provisional ballots that the Board reviewed and passed upon. It is plainly driven by the Secretary’s post-election and post-certification Directives. Contrary to Ohio law, it contemplates 849 mini trials in which the partisan Board interviews thousand of people under oath over a period of days and weeks. 849 mini-trials, with no standards and effectively no rules. It is the

same process that the legislature explicitly stated should be conducted by way of an election challenge administered and decided by a non-partisan court with all of the protections that our system provides for determining truth. Ohio Rev. Code § 3515.11 (“The proceedings ... shall be under the control and direction of the court which shall hear and determine the matter”).

27. With this post-hoc investigation set to begin on Thursday, December 16, Secretary Brunner stepped in to provide Advisory 2010-08 to the Board as to how it was to proceed with its hearings. (Triantafilou Aff. at ¶17; Exh. D) The Advisory provided expressly for the subpoenaing of witnesses, which the Board had started the day before. However, while Directive 2010-79 provided that any in-person questioning of poll workers be by the board “at a public meeting of the board,” Advisory 2010-08 specified that “The questioning of poll workers does not have to occur in the presence of the Board at a public meeting.” Moreover, the Advisory suggested that

the Board may send each poll worker a questionnaire. For those poll workers who also were issued a subpoena, the questionnaire may specify that if the questionnaire is completed and postmarked within seven (7) calendar days from the date the subpoena/questionnaire is sent, the poll worker may be notified by the Board that the poll worker does not have to appear and give testimony pursuant to the Board’s subpoena.

28. Examination of witnesses began Thursday, December 16. That happened to be a day on which a snowstorm closed most schools in Hamilton County, including Cincinnati Public Schools. Attendance was impacted, but by the end of the day (after three sessions from 8:00 am to 11:00 am, 1:00 pm to 4:00 pm, and 6:00 pm to 8:00 pm), the Board had heard from a little over 30 poll workers.

29. Testimony continued on Friday, December 17. By the end of the second day, the Board had heard from a total of about 75 poll workers.

30. At 4:12 pm, on the afternoon of the second day of testimony, Secretary Brunner issued her next Directive, Directive 2010-87 (Triantafilou Aff. at ¶20; Exh. E). By it, the Secretary cited the need to speed up the process dramatically. While the Board had examined 77 poll workers in the first two days, they were to examine the remainder – more than 2100 – by no later than December 23.

31. The numbers demonstrate the absurdity of the Secretary's newly revised process. If the Board met 24 hours a day with no breaks, starting at 8 am on the day after the subpoenas were sent out through midnight on December 23, they could devote less than 2 minutes to each of 2100 witnesses they are to question.

32. Nor do the changes stop there. Three days earlier, the Advisory had said the Board "may send each poll worker a questionnaire." Now the Board "must issue questionnaires." So the election is to be decided based upon what somebody – we're not sure who – writes down on a questionnaire a month and a half after the election? The option of questionnaires had been presented to the Board on December 11, and was not adopted. What was adopted was face-to-face questioning in an open meeting, which at least has some passing resemblance to our history of administrative fact-finding.

33. In her quest for speed above all else, the Secretary no longer wants to give poll workers the *seven* calendar days from the mailing of the questionnaire to return it, which had been the message from the Advisory of three days earlier. Now the poll worker is to have just *two* calendar days from the *mailing* of the questionnaire to return it. Without doubting the capabilities of the US Postal Service during its busiest time of the year, Courts in this state universally provide 3 extra days for mail service.

34. The effect of all of this is to take a process that has nowhere been applied in Ohio that involves taking testimony from 2200 people over a short period of time, that is supposed to determine whether voters' votes will be counted and the winner of an election and move it into warp speed – ignoring the niceties of the procedural safeguards we have developed over the centuries for truth-finding bodies.

35. And for what reason? Ostensibly because the children of Hamilton County need a Juvenile Court Judge. Directive 2010-87 at 2 (“The citizens of Hamilton County in general and, specifically, the juveniles who are incarcerated and awaiting court hearings and the victims involved, should not have their legal proceedings delayed because the Board cannot proceed with an orderly investigation or with an investigation that is unhampered by tie votes at every procedural juncture.” “... delay, obfuscation and obstructionism denies the citizens of Hamilton County the benefit of having a new Juvenile Court judge in place on January 1, 2011, creating attendant problems with court administration”).<sup>3</sup> But Hamilton County has two Juvenile Court judges. Ohio Rev. Code §2151.08. If there is a caseload problem with a temporary vacancy in one of those seats, the Ohio Constitution provides the Chief Justice of this Court with the authority to deal with that problem, not the Secretary of State by cutting corners on procedures in place to guaranty the bipartisan legitimacy of elections. Art. IV, §5 (“The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division

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<sup>3</sup> Directive 2010-87 also suggests that the approach the Board adopted on December 11 and started implementing December 13 somehow falls short of the requirement of the federal district Order. Directive 2010-87 at 1 (“calls into question whether the Board is complying with Judge Dlott’s order to begin its investigation ‘immediately.’”). That issue was raised directly before the District Court in Ms. Hunter’s Emergency Motion to Enforce Preliminary Injunction Order, filed December 9, 2010, which sought an order that the Secretary’s Directive 2010-80 mandating the contact and questioning of poll workers be undertaken and concluded in five days. *Hunter vs. Board of Elections*, Southern District of Ohio No. 1:10-cv-00820-SJD, Dock. No. 20. The Court heard argument on the motion on Monday, December 13, took it under submission, and has not ruled.

thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment”).

36. What is plainly at stake here is not whether the Hamilton County juvenile justice system will come to a grinding halt if a temporary vacancy is created in one of two judge positions. The issue in the proceedings below is a question of whether poll worker error caused a voter to vote provisionally in the wrong precinct. Under settled Ohio law, poll workers are presumed to have acted in accordance with their legal duties, so to the extent that poll worker error is ever relevant, it must be demonstrated by actual evidence. *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 900 N.E.2d 982, 2008-Ohio-6333 at ¶51 (“[I]n the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”). Moreover, the standard of proof in a matter involving election irregularities is “clear and convincing.” *McMillan v. Ashtabula County Board of Elections* (1993), 68 Ohio St.3d 31; *In re Election of November 6, 1990 for the Office of Attorney General of Ohio* (1991), 58 Ohio St.3d 103.

37. Thus what is going on before the Board is 849 separate mini-trials in which evidence is sought from those who were present at the time the voters came to the polling places to vote – the poll workers. That can be the only reason for “contacting” and “questioning” – the terms used by the Secretary’s Directives – those poll workers. But that requires actually

receiving evidence, not presuming poll worker error. And for 849 individual trips to polling places by 849 people who cast provisional ballots, that takes a lot of witnesses and a lot of time. The “lot of witnesses” was recognized in the Secretary’s Directive 2010-80 when she required identifying and contacting every poll worker who had been at one of the precincts or polling places where one of the 849 provisional ballots was cast. What she does not want to provide is the time to find the truth of those encounters.

38. Secretary Brunner, having forced the Board down this path of 849 min-trials with her Directive 2010-80, now wants to short-circuit the process to get to a quick conclusion before she leaves office. Either you are looking for the evidence that this Court identified in *Skaggs* as necessary to overcome the presumption of proper performance of duties or you are not. If you are looking for that evidence, you cannot find it in 2-minute questioning sessions or asking someone to write down something about what happened 6-8 weeks ago.

39. The process directed by Secretary Brunner, if not stopped, will be a travesty. It will be anything but an orderly investigation. It will be an investigation in which truth is sacrificed to speed. It will add huge costs in overtime and fatigue to Board staff who have already dealt with a major election and its aftermath; it will discourage poll workers from staying in their positions if they know that what they do on Election Day is going to be the subject of a public grilling 6-8 weeks after the fact; and it will turn a carefully crafted non-partisan process into a highly partisan and political process wherein the ultimate winner of an election is to be determined by the “final” determination of a partisan occupant of the office of Ohio Secretary of State in her last few weeks in office. Ohio Rev. Code § 3501.11(X) (“In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the director or chairperson shall submit the matter in controversy, not later than fourteen days after the tie vote or the

disagreement, to the secretary of state, who shall summarily decide the question, and the secretary of state's decision shall be final”).

### CAUSE OF ACTION

40. Relators incorporate by reference paragraphs 1-39 as if rewritten herein.

41. Relators have a clear legal right to require that the Secretary of State comply with Ohio law. *Skaggs*, ¶ 29 (“[I]f the secretary of state ‘has, under the law, misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of mandamus.’” Quoting from *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶20, and *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, 226, 43 O.O. 36, 94 N.E.2d 785).

42. Respondents have a clear legal duty to act consistent with Ohio’s election statutes in administering the November 2, 2010 election and in determining the process and procedures to investigate whether provisional ballots cast on November 2 comply with Ohio law and are eligible to be counted.

43. Changing those procedures and the level of scrutiny to be applied to provisional ballots after Election Day and after the election results have been certified is nowhere provided for under Ohio law and is contrary to Ohio law.

44. The Secretary of State’s post-election Directives mandate, for Hamilton County alone, an investigation involving individual questioning of more than 2200 poll workers from hundreds of different precincts in a manner that is neither provided for nor contemplated under Ohio law. It is the exact same process that the legislature explicitly stated should be conducted by way of an election challenge, which is administered and decided by a non-partisan court. *See* Ohio Rev. Code § 3515.11 (2010). An investigation undertaken in that fashion will unduly prolong the determination of the outcome of this or any election. No such investigation has been

done in any other County in this election or in prior elections. If applied to all of Ohio's 88 counties, such an investigation of provisional ballots cast in the wrong polling location would preclude Ohio from completing its counting of votes until many weeks following an election.

45. As but one example of the mischief created by implementation of this process, the Village of Cleves, Ohio had a tax levy on the November 2, 2010 ballot. That levy lost by 2 votes. It is eligible for an automatic recount, which recount has been delayed pending the outcome of the investigation that is being undertaken under the Secretary's post-election post-certification-of-election Directive 2010-80. Neither the Village of Cleves nor the officials responsible for preparing tax bills for residents of Cleves have any way of knowing whether its operating levy will be in place in 2011. And that situation will not change until after the questioning of the 2200 poll workers is completed.

46. Apparently recognizing, after the fact, the time issues implicated by her directive to contact and question every poll worker in every precinct and polling place where one of the 849 provisional ballots was cast, the Secretary does not solve the problem by her most recent fiat that the investigation be completed within a handful of days. All that does is substitute speed for truth. It also places even greater strain on the Board staff, which has already had to deal with a full election season and aftermath – and must prepare for the first elections of 2011 that start with absentee voting in a matter of days. It is like the classic lawyer's story in which the Judge admonishes the attorney near the end of a long day: talk faster, the court reporter is getting tired.

47. “[I]n the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully.” *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 2008-

Ohio-6333, ¶51 (quoting from *State ex rel. Speeth v. Carney* (1955), 163 Ohio St. 159, 186, 56 O.O. 194, 126 N.E.2d 449). The Secretary has repeatedly said the same thing. *E.g.*, Advisory 2010-08 (December 14, 2010) at 1 (“poll worker error will not be presumed and must be demonstrated through evidence”); Directive 2010-79 (“poll worker error will not be presumed and must be demonstrated through evidence”).

48. Under Ohio law, the goal of an investigation into poll worker error must be to provide “evidence to the contrary,” that is, evidence that in a particular instance the poll workers at a particular precinct caused a particular provisional voter to cast her or his vote in the wrong precinct. The “Objective Criteria for Determining Poll Worker Error” in Directives 2010-79 and 2010-80 provide no meaningful guidance. General questions about whether poll workers carried out their duties in accordance with directives and federal and state law or adhere to the procedures/guidelines outlined in the Poll Worker Manual have nothing to do with why a particular voter ended up in the wrong precinct polling place, unless there is a specific recollection, on the part of the poll worker, that the poll worker caused the voter to go to the wrong precinct to vote. So too with the other questions – did the poll worker check in the voter/review the supplemental voter list at the back of the poll book/examine the ID/check to see if their address was in or out of the precinct. None of those, even if a poll worker could remember them six weeks later, addresses the critical question of whether the poll worker’s actions caused a particular voter to go to the wrong precinct.

49. Those “objective criteria” underline one of the critical problems with the process the Secretary’s Directives have dictated occur here. There is no standard – anywhere in Ohio election law – for making these determinations. The phrase “poll worker error” does not appear in the Ohio Revised Code. Due to the partisan nature of the Election – especially when the

Board knows that the provisional ballots may potentially change its outcome – such determinations should only be made, as the legislature expressly provided, in an election contest. *See* Ohio Rev. Code § 3515.11 (2010); *Gibraltar Mausoleum Corp. v. City of Cincinnati* (1981), 1 Ohio App.3d 107, 439 N.E.2d 922.

50. The process the post-election Directives have directed the Board to follow is one that has all of the elements that the Ohio Legislation has prescribed, under Ohio Rev. Code § 3515.12, for an election contest. It does not, however, have the safeguards the Legislation set up for such a contest – including the requirement that the proceedings “be under the control and direction of the court.” Rather, this is a proceeding with literally thousands of witnesses required by subpoena to appear, sworn testimony taken, and determinations to be made based upon that testimony by an administrative tribunal that does not have guidance from the legislature or courts as to what they are looking for, or guidance on what procedures to follow. What they do know, in a race in which the difference is 23 votes, is that every vote counts and if the ballot is one from a district that is likely to go to one party or the other there is every reason to accept it based upon that fact alone.

51. Moreover, this is a setting in which two of the four Board members have already stated publicly that they believe – contrary to the law set out in *Skaggs* – that anytime a voter votes in the right location but the wrong precinct of a multi-precinct polling location, that must have been the result of poll worker error and his or her vote should be counted:

Frankly, I think under those circumstances, a multiple polling place, every vote that’s cast in the right room but at the wrong table should in fact be counted, because I regard that as evidence of our poll workers not having gotten them to the correct table.

Board member Burke, November 23, 2010  
Board meeting, page 25, lines 5-12.

So I would argue actually that at least in the instance of multiple-precinct ballots that we can conclude that in the absence of a note from the poll worker saying that this voter was informed that they were voting in the wrong precinct, we can conclude that there was poll worker error and we can go ahead and count those votes.

Board member Faux, December 3, 2010  
Board meeting, page 38, lines 11-18.

52. Consistent with those beliefs, those two board members voted to accept and count 284 ballots of the 849 that were cast in the right location, but wrong precinct, without further inquiry or evidence. Such a conclusion is directly counter to the law of Ohio as expressed by this Court in *Skaggs*.

53. Beyond the problems with the process that the Secretary's Directives have created are the other problems with the Directives themselves. Directive 2010-87 asserts the unilateral right that the Secretary has to direct the actions of the Board and its staff. That is not the way the legislature set up the system. The Board is not a functionary of the Secretary. The Board does not answer to the Secretary. The Board is an independent body set up by the legislature in each county to manage the elections within that county. The Secretary is not a board member. The Secretary's role in the operations of the Board is to appoint board members, appoint directors and deputy directors of the board, and to break tie votes at the Board level.

54. The Board determined in its meeting on December 11, 2010, that it would in complying with the Secretary's Directive 2010-80, contact and question poll workers in person, rather than by questionnaire. The Board voted 2-2 to use questionnaires; and then voted 4-0 to subpoena persons to come before the Board for questioning. In the guise of a Directive, the Secretary now wants to revisit that decision of the Board and reverse it – requiring that questionnaires be sent out no later than Monday, December 20. In essence, the Secretary is

wanting to break a tie vote that occurred last Saturday on a method that was rejected by a subsequent unanimous vote.

55. Which leads to the issue of breaking future ties. The revised code requires that such ties be submitted to the Secretary within 14 days. Ohio Rev. Code §3501.11(X). That has always been interpreted as giving each side the time to pull together their arguments and present them in a cogent fashion to the Secretary. Does it take time? Yes. It is a part of the legislature's carefully crafted statutory scheme in which elections are run at the local level and require the two parties to work at getting along with one another. With Directive 2010-87, the Secretary labels the statutory approach as "delay, obfuscation and obstructionism" and asserts the right to change the 14-day period prescribed by the statute to 48 hours. (Triantafilou Aff. at ¶20)

56. The Secretary of State's erroneous and inconsistent post-election and post-certification-of-election instructions, directed solely at Hamilton County, Ohio is against the express requirements of Ohio law.

57. Inasmuch as the Secretary of State will impose her erroneous interpretations of these statutorily mandated requirements and inasmuch as the Board of Elections will follow the erroneous interpretations of the Secretary of State, or alternatively, the Secretary of State will impose her erroneous interpretations pursuant to her authority under Ohio Rev. Code 3501.11(X) to break ties among the members of the Board of Elections, Relator Painter lacks an adequate remedy in the ordinary course of the law to protect his rights as an elector and prevent an illegal diminution of his votes. Relator Williams lacks an adequate remedy in the ordinary course of the law because the procedure set forth in Directive 2010-80 and 2010-87, which requires the counting of all provisional ballots that the partisan Board concludes were cast in the wrong precinct due to poll worker error, denies Relator Williams of his statutorily conveyed right to

challenge the outcome of the election by way of an election contest. In order to count the provisional ballots as required under the statute, the Board is required to separate the ballots from their envelopes and commingle those ballots to protect the secrecy of the ballots. Accordingly, even if court were to find in an election contest that a particular ballot should not have been counted; there would be no remedy for Mr. Williams because it would be unknown how that particular person voted.

### **ANCILLARY RELIEF REQUESTED**

58. Relators incorporate by reference paragraphs 1-57 as if rewritten herein.

59. Unless restrained or enjoined by an ancillary temporary restraining order or other injunction, the Respondents will rush through an investigation of 849 ballots for poll worker error in an erroneous and illegal manner, then make determinations on the validity of certain of those ballots, open each of the contested Provisional Ballot envelopes and separate the ballot from its envelope; and they will commingle the contested provisional ballots with those that do not have these infirmities and are therefore legally eligible to be counted. In doing so, Respondents will make it impossible to determine which votes are eligible to be counted under Ohio law and which are not.

60. This Court must enter an ancillary injunction to stop the Board from proceeding with its current form of investigation so as to protect the rights of the Relators. Without ancillary injunctive relief pending this Court's review of the merits of Relators' claims, Relator Painter will be denied his rights as a citizen and elector of Ohio because his vote will be diluted with those who have voted improperly. Respondent Williams will have votes counted in his race and he will be unable to challenge whether any particular vote should have been counted because even if her were to prevail on an argument in an election contest that particular ballots should not

have been counted, he nonetheless will not have a remedy because it will be unknown how that particular voter voted.

61. Relators lack an adequate remedy at law and requires ancillary injunctive relief pending adjudication of the merits of his claim.

### **PRAYER**

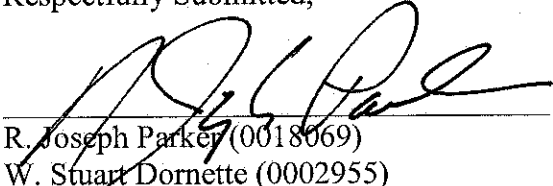
Relators therefore prays that the Court:

- A. Issue a writ of mandamus compelling Respondent Secretary of State to rescind Directive 2010-87 as an erroneous interpretation of Ohio law.
- B. Issue a writ of mandamus compelling Respondent Secretary of State to rescind Directive 2010-80 as an erroneous interpretation of Ohio law insofar as it involves contacting and questioning of individual poll workers in a quest for poll worker error in circumstance beyond those that were covered in Directive 2010-74, in effect prior to the Election.
- C. Issue a writ of mandamus compelling Respondent Board of Elections of Hamilton County to rescind its determination to subpoena poll workers to testify before the Board.
- D. Issue a writ of prohibition requiring Respondent Board of Elections of Hamilton County to refrain from further contacts and questioning of poll workers.
- E. Issue a writ of mandamus directing Respondent Board of Elections to follow Ohio law and review the 849 provisional ballots with exactly the same procedures and the most stringent level of scrutiny that was applied to any provisional ballots during the Board's review of those leading up to its votes on November 16. Specifically, the Board may not assume that poll worker error occurred in the

absence of specific evidence to the contrary that is developed during the course of that review.

- F. Issue a temporary restraining order or other interim ancillary injunctive relief enjoining and restraining the Board of Elections from continuing its process of contacting and questioning poll workers and from opening and commingling any provisional ballots until this Court can adjudicate the Relators' request for writs of mandamus and prohibition.
- G. Issue such further and other relief as the Court deems appropriate.

Respectfully Submitted,



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