

Validity Requirements for Provisional Ballots

Ohio ex rel. Skaggs v. Brunner

(*Algenon L. Marbley, S.D. Ohio 2:08-cv-1077*)

On Thursday, November 13, 2008, two Ohio voters filed a mandamus action with Ohio's supreme court on behalf of the state alleging that the secretary of state had improperly relaxed, after the election, validity requirements for provisional ballots cast in the 2008 general election.¹ At issue was whether name-and-signature requirements could be relaxed if mistakes were attributable to poll-worker error.²

The secretary removed the action to the U.S. District Court for the Southern District of Ohio on the following day.³ The court originally assigned the case to Judge Gregory L. Frost, but the secretary moved to consolidate the case with election cases already pending before Judge Algenon L. Marbley,⁴ and both judges signed an order of transfer.⁵

Because of concerns that Judge Marbley might have excessive control over Ohio elections because of an election case he once drew, the judges in Columbus all agreed that they would carefully consider the transfer of an election case.⁶ It was not enough for an election case to be about elections to be related to Judge Marbley's other cases, but the matter of provisional ballots was central to cases already before him.⁷

At 9:00 a.m. on Saturday, Judge Marbley heard a motion to remand the case.⁸ It was unusual to hold a proceeding on a Saturday, but time was of the essence and that was when all participants were available.⁹ He denied the motion on Monday.¹⁰ On Thursday, Judge Marbley granted the secretary a summary judgment.¹¹ On the following Tuesday, the court of appeals vacated Judge Marbley's deci-

1. Complaint, *Ohio ex rel. Skaggs v. Brunner*, No. 08-2206 (Ohio Nov. 13, 2008), attached to Coglianesse Affidavit, *Ohio ex rel. Skaggs v. Brunner*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 3; *Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828, 832 (S.D. Ohio 2008); *Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 822 (S.D. Ohio 2008); *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 510, 900 N.E.2d 982, 986 (Ohio 2008); see Barbara Carmen & Mark Niquette, *27,000 County Ballots on Hold*, Columbus Dispatch, Nov. 15, 2008, at 1A.

2. *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 470–71 (6th Cir. 2008).

3. Notice of Removal, *Skaggs*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 2; *Skaggs*, 588 F. Supp. 2d at 832; *Skaggs*, 588 F. Supp. 2d at 822; see Carmen & Niquette, *supra* note 1.

4. Motion to Consolidate, *Skaggs*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 6.

Tim Reagan interviewed Judge Marbley for this report by telephone on July 11, 2012.

5. Transfer Order, *Skaggs*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 9; see *Skaggs*, 588 F. Supp. 2d at 832; *Skaggs*, 588 F. Supp. 2d at 822.

6. Interview with Hon. Algenon L. Marbley, July 11, 2012.

7. *Id.*

8. *Skaggs*, 588 F. Supp. 2d at 822; see Carmen & Niquette, *supra* note 1; Jeb Phillips, *Provisional-Ballot Suit May Go Back to State Court*, Columbus Dispatch, Nov. 16, 2008, at 3B.

9. Interview with Hon. Algenon L. Marbley, July 11, 2012.

10. *Skaggs*, 588 F. Supp. 2d 819; *Skaggs*, 588 F. Supp. 2d at 832; see Mark Niquette & Jodi Andes, *Ballot Fight Staying in Federal Court*, Columbus Dispatch, Nov. 18, 2008, at 3B.

11. *Skaggs*, 588 F. Supp. 2d 828; see Jodi Andes, *Votes Count, Judge Says*, Nov. 21, 2008, at 1A.

sions and ordered the case remanded so that Ohio's supreme court could determine what validity requirements Ohio law required for provisional ballots.¹²

On December 5, Ohio's supreme court determined that the secretary's directives were too lax: valid provisional ballots must be properly prepared with both the voter's name and the voter's signature.¹³

On September 18, 2009, Judge Marbley denied the plaintiffs' request for \$59,263 in attorney fees.¹⁴ Although the court of appeals would have been inclined to grant fees had the choice been its to make in the first instance,¹⁵ Judge Marbley did not abuse his discretion in declining to award fees.¹⁶

12. *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir. 2008); see Jodi Andes & James Nash, *State Court to Decide Ballot Fight*, Columbus Dispatch, Nov. 26, 2008, at 1B.

13. *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 900 N.E.2d 982 (Ohio 2008).

14. Opinion, *Ohio ex rel. Skaggs v. Brunner*, No. 2:08-cv-1077 (S.D. Ohio Nov. 14, 2008), D.E. 48, available at 2009 WL 3064199.

15. *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 532 (6th Cir. 2010).

16. *Id.* at 532–33.