

Validity Requirements for Provisional Ballots

Ohio ex rel. Skaggs v. Brunner

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

Ohio's secretary of state removed a mandamus action from Ohio's supreme court concerning validity requirements for provisional ballots. The case was assigned to a judge who was already presiding over related cases. The judge granted summary judgment to the state, but the court of appeals ordered the matter referred to the state court, which held the secretary of state's validity requirements to be too lax. The federal court of appeals affirmed the district judge's denial of attorney fees.

Subject: Provisional ballots. *Topics:* Matters for state courts; provisional ballots; removal; attorney fees.

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,⁴ but the secretary moved to consolidate the case with election cases already pending before Judge Algenon L. Marbley,⁵ and both judges signed an order of transfer.⁶

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.⁷ It was not enough for an election case to be about elections to

1. Complaint, *Ohio ex rel. Skaggs v. Brunner*, No. 08-2206 (Ohio Nov. 13, 2008), *attached to Coglianesi 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. Judge Frost retired on May 2, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

5. 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.

6. 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.

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

be related to Judge Marbley's other cases, but the matter of provisional ballots was central to cases already before him.⁸

At 9:00 a.m. on Saturday, Judge Marbley heard a motion to remand the case.⁹ It was unusual to hold a proceeding on a Saturday, but time was of the essence and that was when all participants were available.¹⁰ He denied the motion on Monday.¹¹ On Thursday, Judge Marbley granted the secretary a summary judgment.¹² On the following Tuesday, the court of appeals vacated Judge Marbley's decisions and ordered the case remanded so that Ohio's supreme court could determine what validity requirements Ohio law required for provisional ballots.¹³

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.¹⁴

On September 18, 2009, Judge Marbley denied the plaintiffs' request for \$59,263 in attorney fees.¹⁵ Although the court of appeals would have been inclined to grant fees had the choice been its to make in the first instance,¹⁶ Judge Marbley did not abuse his discretion in declining to award fees.¹⁷

8. *Id.*

9. *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.

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

11. *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.

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

13. *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.

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

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

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

17. *Id.* at 532–33.