

IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex rel.*
JENNIFER BRADY,

Appellee/Relator,

v.

J. KENNETH BLACKWELL, *et al.*,

Appellants/Respondents.

: Case No. **06-1079-2065**
:
: On Direct Appeal from the
: Cuyahoga County Court of Appeals,
: Eighth Appellate District
:
: Court of Appeals Case No.
: 88827
:
: **Election Case**
: **Expedited Review Requested**
:
:
:

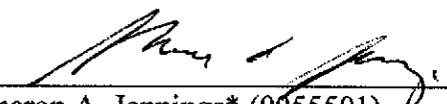
**EMERGENCY MOTION FOR ORDER TO SEAL RESULTS OF ELECTION AND TO
ORDER THAT THE RESULTS NOT BE CERTIFIED**

Appellant/Respondent Secretary of State J. Kenneth Blackwell (the "Secretary") hereby moves this Court, to seal the results of the election for representative of the 16th district of the Ohio House of Representatives. The results should be sealed in order to preserve the status quo while this Court resolves the appeal currently pending before it, which concern the qualifications of one of the candidates to appear on the ballot. If the results are not sealed, then a candidate who has not complied with the statutory requirements could be declared the victor, simply because of the time necessary to adjudicate this case to a final result.

FILED
NOV 07 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Respectfully submitted,

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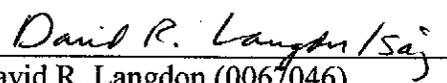
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 20, 2006, the Cuyahoga County Court of Appeals, in reviewing a tie-breaker vote by the Secretary, issued a writ of prohibition ordering that Jennifer Brady (“Brady”), a candidate for state representative for the 16th Ohio House District, remain on the ballot. This Court reviewed this matter, and reversed and remanded that decision in order for the Court of Appeals to take evidence on the authority of the Assistant Secretary to break the tie. After considering the evidence filed by the Secretary, and the responses to that evidence, the Court of Appeals issued another writ of prohibition on November 6, 2006. The Court found that the evidence submitted was not sufficient because the certified letter submitted was a copy and not an original, and because the Court did not find the content of the letter sufficient to establish the Secretary’s authority. See Decision, attached to Notice of Appeal. The Secretary now seeks an order sealing the results of the election and ordering that the results not be certified, which is necessary and appropriate in order to permit this adjudication to be completed before the results of this election are announced.

II. STATEMENT OF FACTS

The detailed facts regarding the failure of the district committee to comply with R.C. 3513.31(D) are set forth in the Emergency Motion for Stay filed late yesterday afternoon. The facts relevant to this motion began when the Board tied 2-2, and the tie vote was submitted to the Secretary of State to break the tie, pursuant to R.C. 3501.11(X). In a letter dated October 3, 2006, Assistant Secretary of State Monty Lobb broke the tie opposing the motion to reject the protests.

On October 5, 2006, Brady commenced this action seeking the issuance of a writ of mandamus to compel Respondents to place or to keep Brady’s name on the November 7, 2006

ballot. On October 20, 2006, the Court granted the first writ of prohibition, holding that there was no evidence that the Assistant Secretary had authority to break the tie, and that under a liberal construction of the relevant statutes, Brady is entitled to remain on the ballot because there was no evidence that fraud occurred during the process.

That decision was appealed to this Court, which reversed and remanded, so that the Court of Appeals could consider evidence on the authority of the Assistant Secretary of State to break the tie. On remand, the Secretary submitted a notarized letter that indicates that he delegated authority to the Assistant Secretary to break the tie in this case. The Court of Appeals held this letter was insufficient, and once again issued a writ of prohibition based upon the asserted lack of authority of the Assistant Secretary of State.

This case is now back before this Court on a second appeal as of right to determine the authority of the Assistant Secretary of State and to determine whether the candidate failed to comply with R.C. 3513.31(D). (The remand was expressly for the limited purpose of taking evidence on the authority issue. Hence, the issue of whether the Court of Appeals initially erred when it held that the candidate sufficiently complied with the statute is now back before this Court.) However, if this Court does not seal the results of the election, it seems unlikely that these issues can be resolved before the votes are counted.

III. LAW AND ARGUMENT

The Results Of The Election Should Be Sealed Until After This Court's Resolution Of This Appeal.

In this case, a timely protest was filed with the Board of Election on September 1, 2006. Despite the due diligence of all parties, this action still has not yet been resolved, and today is election day. Since this action was filed on October 5, 2006, the Court of Appeals has issued two different erroneous decisions. Under these extremely unusual circumstances, an order sealing the results is appropriate and necessary for no other reason than to preserve the status quo

pending this Court's resolution of both issues before it: the authority of the Secretary of State to delegate authority to the Assistant Secretary of State and whether one of the candidates complied with R.C. 3513.31(D). See *Smith v. Granville Twp. Bd. of Trustees* (1996), 77 Ohio St.3d 1215 (granting emergency writ to impound ballots and not count them); *State ex rel. Snyder v. Wheatcraft* (1974), 37 Ohio St.2d 53 (court ordered that ballots be impounded and not counted). The Secretary is entitled to prevail on both of these issues, as is set forth in greater detail in the Emergency Motion for Stay filed late yesterday afternoon.

That the decision on the Secretary's authority is erroneous becomes clear upon further consideration of the principles involved. While R.C. 111.04 does provide that the Assistant Secretary serves as Secretary upon the absence or disability of the Secretary, it also provides for a general delegation of duties. It is this general delegation of duties that is evidenced in the Secretary's letter that was timely filed with the Court of Appeals on November 3, 2006, and which was properly authenticated by the filing of a certified copy of this letter, a public document, after Respondents challenged it for lack of authentication. Stated another way, simply because this statute provides circumstances in which the Assistant Secretary by law must act for the Secretary, that does not mean that these are the only circumstances under which authority may be delegated to the Assistant Secretary. If this were so, the Secretary would personally have to perform all duties set forth in R.C. 3505.05, including working behind the counter to receive initiative and referendum petitions and verifying the signatures on those petitions. Likewise, if Relator's reasoning is correct, then only the Attorney General could personally appear in all court actions because the Attorney General "shall" represent all state clients in court. See R.C. 109.02. This, of course, is not the law. Similarly, the intent of R.C. 111.04 was not to place a limitation on the authority of the Assistant Secretary, but merely to create a statutorily designated official, who in addition to the general authority delegated to him

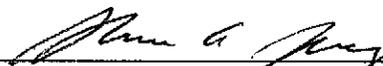
by the Secretary, also must fulfill the responsibility of taking the place of the Secretary when he is absent or under a disability. In this case, the general delegation of authority included the authority to execute tie-votes from March 2006 until the present day.

IV. CONCLUSION

For all of the reasons set forth above, this Court should seal the results of the election for the 16th Ohio House District and order that the Cuyahoga County Board of Elections not certify the results of this particular race.

Respectfully submitted,

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CERTIFICATE OF SERVICE

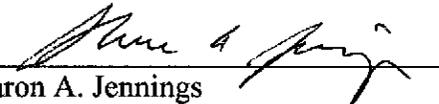
The undersigned certifies that a copy of the foregoing Motion was served this 7th day of November, 2006 upon the following counsel via facsimile:

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