

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.  
Jennifer Brady,

Relator,

-v-

J. Kenneth Blackwell,  
Secretary of State of Ohio, et al.,

Respondents.

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:  
: Case No. ~~1016-979~~ - 2065  
:  
: On Direct Appeal From Cuyahoga  
: County Court of Appeals, Eighth  
: Appellate District, Case No.  
: 88827  
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MEMORANDUM CONTRA OF RELATOR-APPELLEE JENNIFER BRADY  
TO APPELLANTS' MOTION TO SEAL

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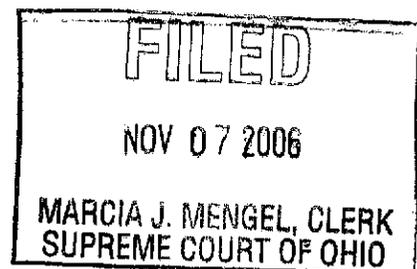
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## I. STATEMENT OF THE FACTS AND CASE

The operative facts of this matter are not in dispute.

On May 2, 2006, Michael J. O'Shea ("O'Shea") filed as a write-in candidate for the Democratic primary for the office of State Representative for the 16<sup>th</sup> Ohio House District.<sup>1</sup> Having garnered a sufficient number of write-in votes, O'Shea became the Democratic candidate.<sup>2</sup> Thereafter, O'Shea withdrew as the nominee, and on June 27, 2006, precinct members from the 16<sup>th</sup> Ohio House District conducted a meeting pursuant to R.C. 3513.31(D) and selected Relator-Appellee Jennifer Brady ("Brady") as O'Shea's replacement.<sup>3</sup>

It is undisputed that, pursuant to R.C. 3513.31(D), the Cuyahoga County Democratic Party held a district committee meeting for the sole purpose of selecting a replacement for Michael O'Shea.<sup>4</sup> It is undisputed that there was a necessary quorum and that the committee members unanimously selected Brady to run for the vacancy which she accepted.<sup>5</sup> It is undisputed that there was never any allegation of fraud, corruption, deception or any other illegality in either the selection process or in Brady's acceptance.<sup>6</sup> It is undisputed that the Cuyahoga County Board of Elections ("Board") accepted the letter from the Democratic Chairman as proper notification pursuant to R.C. 3513.31(D), and on August 7, 2006, certified Brady's candidacy and the placement of her name on the ballot.<sup>7</sup> Appellants-Respondents point out that, according to the Minutes of

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<sup>1</sup> *State ex rel. Jennifer Brady v. J. Kenneth Blackwell* (Cuyhoga App. 2006), Case No. 88827, hereafter "Opinion" (Oct. 20, 2006), Court of Appeals, p.1.

<sup>2</sup> *Opinion* (Oct. 20, 2006), Court of Appeals, p.1.

<sup>3</sup> *Opinion* (Oct. 20, 2006), Court of Appeals, pp.1-2.

<sup>4</sup> *Opinion* (Oct. 20, 2006), Court of Appeals, p.3.

<sup>5</sup> *Opinion* (Oct. 20, 2006), Court of Appeals, p.3.

<sup>6</sup> *Opinion* (Oct. 20, 2006), Court of Appeals, p.3.

<sup>7</sup> *Opinion* (Oct. 20, 2006), Court of Appeals, p.3.

the Board's August 7, 2006, meeting, the Board voted unanimously to certify the appointment of Ms. Brady as the Democratic candidate for election to the office, as the replacement for Mr. O'Shea.<sup>8</sup>

Following the uncontested certification of Ms. Brady to the ballot by the Board, on September 1, and September 6, 2006, the Board received letters challenging Ms. Brady's candidacy on various technical grounds.<sup>9</sup> The Board met to consider these protests on September 15, 2006.<sup>10</sup> Since the Board already had before it all of the filings on Ms. Brady's behalf, as well as evidence of its own certification of Ms. Brady's candidacy, no further testimonial evidence was presented, and the Board heard legal arguments from proponents and opponents of the protest, as well as from the Board's own counsel.<sup>11</sup>

The Board tied 2-2 on a motion to dismiss the protests.<sup>12</sup> There was no motion made to uphold the protest and/or to remove Ms. Brady from the ballot and the Board did not vote to do so. Pursuant to R.C. 3501.11(X), the Board forwarded the matter to the Secretary of State to break the tie.<sup>13</sup> On October 3, 2006, Assistant Secretary of State Monty Lobb broke the tie, voting with Board members in opposition to the motion to dismiss the protests.<sup>14</sup>

The Court of Appeals granted a Writ of Prohibition. On appeal, this Court reversed the issuance of the writ and remanded the case back to the Court of Appeals to "permit the parties to submit evidence on whether Assistant Secretary of State Lobb had

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<sup>8</sup> Emergency Motion for Stay (Oct. 23, 2006), p. 5, at n.2.

<sup>9</sup> Opinion (Oct. 20, 2006), Court of Appeals, p.3.

<sup>10</sup> Opinion (Oct. 20, 2006), Court of Appeals, p.4.

<sup>11</sup> Opinion (Oct. 20, 2006), Court of Appeals, p.4. Incidentally, the Board's legal counsel provided an opinion recommending that the protests be rejected. Id.

<sup>12</sup> Opinion (Oct. 20, 2006), Court of Appeals, p.4.

<sup>13</sup> Opinion (Oct. 20, 2006), Court of Appeals, p.4.

<sup>14</sup> Opinion (Oct. 20, 2006), Court of Appeals, p.4.

the legal authority to break the election board tie.”<sup>15</sup> That same day, November 3, 2006, the Court of Appeals ordered Appellant Blackwell to submit evidence that the assistant secretary of state possessed the authority to break the election board tie. Also on November 3, 2006, the Court of Appeals set the matter for a hearing on November 6, 2006.

**II. ARGUMENT: THE EMERGENCY MOTION FOR ORDER TO SEAL RESULTS OF ELECTION AND TO ORDER THAT THE RESULTS NOT BE CERTIFIED MUST BE DENIED**

Appellants-Respondents’ “Emergency Motion for Order to Seal Results of Election and to Order That The Results Not Be Certified” asks this Court to order the Cuyahoga County Board of Elections to “seal the results of the election for the 16<sup>th</sup> Ohio House District and order that the Cuyahoga County Board of Elections not certify the results of the particular race.”

There is no argument with respect to the fact that the Cuyahoga County Board of Elections certified Ms. Brady to appear on the general election ballot. No vote has ever been taken to remove her from the ballot. Now, Appellants-Respondents, seek to put this Court in the position of telling thousands of Ohio voters that their votes will not count. Appellants’ Motion to Seal, filed on election day, is just another attempt to prevent voters from selecting between the unquestioned candidates offered by the parties for election to the 16<sup>th</sup> Ohio House District.

The requested order is not directed at Appellee. The ballots are held by the Board of Elections. Appellants now ask this Court to impose, by fiat, an additional duty upon the Board even though the issue before the Court concerns the authority of the assistant

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<sup>15</sup> *State ex rel. Brady v. Blackwell* (2006), \_\_ Ohio St.3d \_\_, 2006-Ohio-5752 (“*Brady I*”).

secretary of state. Appellants' Motion to Seal is effectively a misnamed request for a writ of mandamus or prohibition against the Board.<sup>16</sup>

Appellants' Motion to Seal Results cites two cases in support. In *Smith v. Granville Twp. Bd. of Trustees*, this Court granted a writ to impound ballots and not count them. In *Smith*, the writ was sought on October 28, 1996, giving the Court sufficient time to on the request act prior to the November 5, 1996, election. Indeed, the Court granted the writ prior to election day.

Appellants cite *State ex rel. Snyder v. Wheatcraft* for the proposition that the “court ordered that ballots be impounded and not counted.”<sup>17</sup> In fact, in *State ex rel. Snyder, attached*, this Court granted a petition for a writ of mandamus ***ordering the board of election to count ballots and declare the results of the election*** on a liquor option question – ***even though the petitions were determined to be invalid*** after the election, because the ***board failed to promptly make a determination with respect to a protest.***

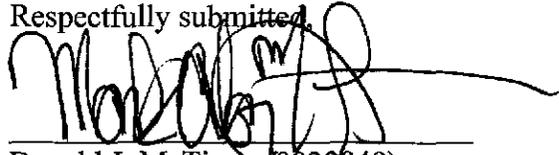
There would be no reason request this Court seal the results of the election for the 16<sup>th</sup> House District if the Secretary had properly delegated authority to the assistant secretary of state in the first instance, or produced evidence of a proper delegation when given the opportunity by this Court and the Court of Appeals. Appellants argue strict construction albeit while themselves seeking a fourth bite at the apple. Appellants should not now be rewarded with more time, at the voters expense, for the delay that their acts alone have created.

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<sup>16</sup> A request that Appellants know would go nowhere, given that the Board has, in its discretion, certified Ms. Brady to the ballot.

<sup>17</sup> Motion to Seal, p.5.

Respectfully submitted



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**CERTIFICATE OF SERVICE**

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

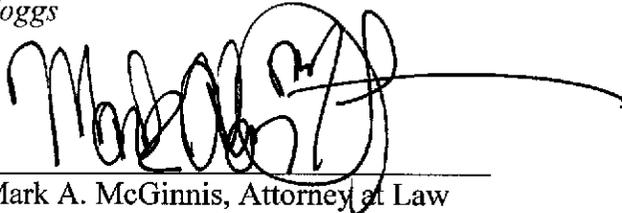
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37 Ohio St.2d 53  
**The STATE, ex rel. SNYDER,**  
 v.  
**WHEATCRAFT et al.**  
 No. 73-840.  
 Supreme Court of Ohio.  
 Feb. 8, 1974.

Petition for writ of mandamus directing county board of elections to count ballots cast in local option election and declare results of election. The Supreme Court held that county board of election breached duty to hear and finally determine protest contesting validity of local option election petition at earliest practicable time before election.

Writ allowed.

**1. Intoxicating Liquors** §32(2)

Purpose of statutes allowing protest to local option election petitions and hearing thereon is for resolution and determination of a protest by a board of elections in sufficient time before election to allow orderly processes of campaigning and voting without uncertainties caused by irresolution of protest. R.C. §§ 4301.33, 4305.14.

**2. Intoxicating Liquors** §32(2)

Statutes allowing protest to local option election petition and hearing thereon contemplate prompt hearing of a protest filed to local option election petitions and prompt decision of protest by board of elections. R.C. §§ 4301.33, 4305.14.

**3. Intoxicating Liquors** §32(2)

Where hearing on protest contesting validity of local option election petitions was held less than two weeks before election, validity of petitions was not ruled

upon by county board of elections at hearing, time allowed by board for filing of briefs after hearing extended time for determination of protest beyond date set for election and decision on protest was not rendered until more than one month after local option election, county board of elections failed to perform its statutory duty to hear and finally determine protest promptly at earliest practicable time before the election. R.C. §§ 4301.33, 4305.14.

On August 8, 1973, relator filed local option election petitions with the Board of Elections of Crawford County, which petitions the board found to be valid.

A protest, filed to the petitions on August 31, alleged, *inter alia*, that two of the precincts were not a "residence district," and that, because of misrepresentations of the circulators, the petitions were fraudulent. A hearing on the protest was held on September 25, and the local option issues were ruled off the ballot on the ground that the two contiguous precincts did not constitute a "residence district." The board did not rule on any other allegation of the protest.

On October 1, the Secretary of State notified the board that its decision concerning "residence precincts" was incorrect<sup>1</sup> and that the petitions were not to be invalidated on that basis alone. The board then determined that it would conduct a further hearing on the protest on October 25, 1973.

On October 11, 1973, relator filed a mandamus action in this court for an order directing respondents Board of Elections of Crawford County to hold the local option election for which petitions had been filed.<sup>2</sup> On October 16, the Prosecuting Attorney of Crawford County filed a motion to dismiss the mandamus action, and, on October 19, this court overruled the motion to dismiss, dismissed the Secretary of State

1. See *Stewart v. Trumbull County Bd. of Elections* (1973), 34 Ohio St.2d 129, 296 N.E. 2d 676.

2. The protestors took no part in this mandamus action.

as a party, and ordered that the election be held, but that the ballots be impounded and not counted.

Respondents then conducted a hearing on the protest on October 25 and 26, at the conclusion of which both sides were given time to file briefs, which extended the time for determination of the protest beyond November 6, 1973, the date set for the election.

On December 14, 1973, respondents decided that petitions were invalid and that, therefore, there were not enough signatures to place the local option issues on the ballot at the election which *had been held* on November 6, 1973. A copy of respondents' December 14, 1973, decision was forwarded to this court on January 16, 1974.

Stouffer, Wait & Ashbrook and William G. Harrington, Columbus, for relator.

Robert L. Brown, Prosecuting Atty., for respondents.

#### PER CURIAM.

Relator requests this court to order respondents to count the ballots cast on November 6, 1973, and certify the results of the election.

[1] The purpose of the statutes allowing protest to local option election petitions and hearing thereon is for resolution and determination of a protest by a board of elections in sufficient time before the election to allow the orderly processes of campaigning and voting without the uncertainties caused by irresolution of protests.

R.C. 4305.14 and 4301.33 provide that:

"(A) Such board shall, not later than the eighty-fourth day before the day of a general election, examine and determine the sufficiency of the signatures, [and] determine the validity of such petition [for local option] \* \* \*

"(B) If the petition is valid ["sufficient" in R.C. 4301.33] \* \* \* the board

\* \* \* shall order the holding of a special election in the district for the submission of the questions specified \* \* \* on the day of the next general election

\* \* \*

"\* \* \* Upon filing of such protest [against local option petitions] the election officials with whom it is filed shall promptly fix the time for hearing the same \* \* \*. At the time so fixed such election officials shall hear the protest and determine the validity or invalidity of the petition."

[2,3] Those statutes contemplate the *prompt* hearing of a protest filed to local option election petitions and the *prompt* decision of that protest by a board of elections. In this case, the hearing on October 25, and 26, 1973, was less than two weeks before the election. Furthermore, the time allowed by respondents for the filing of briefs necessarily extended a decision on the protest beyond election day. That decision was not rendered until more than one month after the election. It should be noted, also, that at the September 25, 1973, hearing on the protest respondents, apparently without objection, did not rule on the validity of the petitions, even though that issue was before them.

Under the facts of this case, respondents were under a duty to hear and *finally determine* the protest promptly at the earliest practicable time *before* the election. This, they failed to do.

Therefore, a writ of mandamus is allowed directing the Board of Elections of Crawford County to count the ballots cast in the November 6, 1973, local option election and declare the results of the election.

Writ allowed.

C. WILLIAM O'NEILL, C. J., and HERBERT, CORRIGAN, STERN, CELEBREZZE, WILLIAM B. BROWN and PAUL W. BROWN, JJ., concur.