

**IN THE SUPREME COURT OF OHIO**

**STATE EX REL. CONSTANCE A.  
GADELL-NEWTON**

1021 East Broad Street  
Columbus, OH 43205,

Relator,

v.

**CASE NO.**

**JON HUSTED**

Ohio Secretary of State  
180 East Broad Street, 16th Floor  
Columbus, OH 43215,

and

**FRANKLIN COUNTY BOARD OF  
ELECTIONS**

1700 Morse Road  
Columbus, OH 43229,  
and

**CUYAHOGA COUNTY BOARD OF  
ELECTIONS**

2925 Euclid Avenue  
Cleveland, OH 44115,

Respondents.

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**RELATOR’S COMPLAINT IN MANDAMUS**

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<p>Robert J. Fitrakis (0076796) FITRAKIS &amp; GADELL-NEWTON, LLC 1021 East Broad Street Columbus, OH 43205 Phone: (614) 307-9783 Fax: (614) 929-3513 E-Mail: fgnlegal@gmail.com</p> <p><i>Attorney for Relator</i></p>	<p>R. Michael DeWine (0009181) Attorney General of Ohio 30 East Broad Street Columbus, OH 43215 Phone: (614) 466-4986</p> <p><i>Attorney for Respondent Jon Husted Ohio Secretary of State</i></p>
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	<p>Harold J. Anderson, III (0059777) Assistant Franklin County Prosecutor 373 South High Street, 13th Floor Columbus, OH 43215 Phone: 614-525-3520</p> <p><i>Attorney for Respondent Franklin County Board of Elections</i></p> <p>Michael C. O'Malley (0059592) Cuyahoga County Prosecuting Attorney 1200 Ontario Street, 9th Floor Cleveland, Ohio 44113 Phone: 216-443-7800</p> <p><i>Attorney for Respondent Cuyahoga County Board of Elections</i></p>
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This action is brought in the name of the State of Ohio, on the relation of Constance A. Gadell-Newton (“Relator”), who petitions this Court for a writ of mandamus compelling the Respondents to preserve digital ballot images created by voting equipment used in the May 8, 2018 Primary Election.

### **NATURE OF THIS ACTION AND JURISDICTION**

1. Relator invokes the jurisdiction of this Court under Article IV, Section 2(B) of the Ohio Constitution to hear original actions in mandamus.
2. Relator also invokes the jurisdiction of this Court under R.C. 2731.02, which provides that “[t]he writ of mandamus may be allowed by the supreme court . . . and shall be issued by the clerk of the court in which the application is made . . . on the information of the party beneficially interested.”
3. This is an expedited election proceeding under Sup. Ct. Prac. R. 12.08 for “prompt disposition of an original action relating to a pending election”.
4. Relator seeks a writ of mandamus from this Court compelling the Respondents to preserve digital ballot images created by voting equipment used in the May 8, 2018 Primary Election.
5. Relator affirmatively states that she has acted with the utmost diligence in bringing this action, there has been no unreasonable delay or lapse of time in asserting their rights herein, and there is no prejudice to Respondents. (*See, e.g., State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 656 N.E.2d 1277 (1995).)
6. Due to the proximity of the May 8, 2018 Primary Election, the Relator lacks an adequate remedy in the ordinary course of law. (*See, e.g., State ex rel. Greene v. Montgomery Cty. Bd. of Elections*, 121 Ohio St.3d 631, 2009-Ohio-1716, 907 N.E.2d 300.)

## **PARTIES**

7. Relator Constance A. Gadell-Newton is a resident and qualified elector of the City of Columbus, County of Franklin, and State of Ohio.

8. Relator is also a candidate for nomination by the Green Party for election as Governor of Ohio in the May 8, 2018 Primary Election.

9. As a consequence, Relator's name will appear on the ballot in all of Ohio's counties, including Cuyahoga and Franklin counties, in the May 8, 2018 Primary Election

10. Respondent Jon Husted is the duly elected and acting Ohio Secretary of State and has the duty to follow and enforce Ohio and federal laws as they pertain to elections and preserving digital ballot images created by voting equipment used in the State of Ohio.

11. Respondent Franklin County Board of Elections is *sui juris*, is the duly established and acting election authority for Franklin County, Ohio and has the duty to follow and enforce Ohio and federal laws as they pertain to elections and preserving digital ballot images created by voting equipment used in Franklin County, Ohio.

12. Respondent Cuyahoga County Board of Elections is *sui juris*, is the duly established and acting election authority for Cuyahoga County, Ohio and has the duty to follow and enforce Ohio and federal laws as they pertain to elections and preserving digital ballot images created by voting equipment used in Cuyahoga County, Ohio.

## **CLAIM FOR RELIEF**

13. Respondents are using digital scanners in Franklin and Cuyahoga counties to count the votes in the May 8, 2018 Primary Election.

14. Digital scanners count digital images of the ballots (“digital ballot images”) rather than the ballots themselves. Thereafter, digital ballot images enter Respondents’ chain of custody and are public records.

15. In previous elections, and for the May 8, 2018 Primary Election, the Respondents have instructed or allowed, and are instructing or allowing, election officials and workers under their supervision to destroy all digital ballot images following the election.

16. Digital ballot images are a public record under Ohio Rev. Code §143.49(A)(1), which defines the term “public record” to include “records kept by any public office, including, but not limited to, state, county, city, village, township”. (*See also Matter of Kosmider v. Whitney*, 2018 NY Slip Op. 02517 (3d App. Div., Apr. 12, 2018).)

17. Digital ballot images are the property of the Respondents under Ohio Rev. Code §143.351(A), which imposes an affirmative duty on the Respondents that such records “shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of”.

18. Respondents have an affirmative duty to preserve digital ballot images under 52 U.S.C. §20701, which requires the retention of “all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election”, including ballots. Digital ballot images must be preserved 52 U.S.C. §20701 because they are ballots that are used for tabulating election results.

19. Respondents have been and will be violating Ohio and federal public records laws by instructing or allowing election officials and workers under their supervision to destroy all digital ballot images following the election.

20. Respondents have been and will be violating Ohio and federal public records laws by failing to instruct election officials and workers under their supervision to preserve all digital ballot images following the election.

21. Without the preservation of digital ballot images, Relator' rights to a fair and accurate election will be denied.

**PRAYER FOR RELIEF**

WHEREFORE, the Relator respectfully prays that this Court issue judgments, orders, and/or writs granting them the following relief:

- a. A judgment or order that digital ballot images are public records;
- b. A writ of mandamus ordering Respondents to preserve all digital ballot images from the May 8, 2018 Primary Election;
- c. An alternative writ of mandamus ordering the relief set forth above;
- d. A peremptory writ of mandamus ordering the relief set forth above after the Respondents answer this complaint;
- e. A judgment or order assessing the costs of this action against the Respondents;
- f. A judgment or order awarding the Relator their reasonable attorneys' fees, costs, and expenses; and
- g. A judgment or order granting the Relator such other relief that this Court deems just and proper.

Respectfully submitted,

*/s/Robert J. Fitrakis*

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Robert J. Fitrakis (0076796)  
FITRAKIS & GADELL-NEWTON, LLC  
1021 East Broad Street  
Columbus, OH 43205  
Phone: (614) 307-9783  
Fax: (614) 929-3513  
E-Mail: fgnlegal@gmail.com

*Attorney for Relator*