

ORIGINAL

BEFORE THE CHIEF JUSTICE OF
THE SUPREME COURT OF OHIO

JOSHUA E. O'FARRELL
377 Cypress Circle SE
New Philadelphia, Ohio 44633

Contestor,

v.

AL LANDIS
4570 Harrold Street NW
Dover, Ohio 44622

Contestee

and

**TUSCARAWAS COUNTY BOARD OF
ELECTIONS**

101 East High Avenue
New Philadelphia, Ohio 44663

**HOLMES COUNTY BOARD OF
ELECTIONS**

75 East Clinton Street
Millersburg, Ohio 44654

Respondents

Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072398)
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Case No. **12-2151**

**PETITION FOR CONTEST OF
ELECTION PURSUANT TO R.C. 3515.08**

FILED
DEC 24 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TO: THE HONORABLE MAUREEN O'CONNOR, CHIEF JUSTICE OF THE SUPREME COURT OF OHIO

NOW COMES CONTESTOR, and for his Contest of Election Petition, hereby avers as follows:

NATURE OF THE ACTION AND JURISDICTION

1. This Election Contest Petition ("Petition") is filed pursuant to R.C. 3515.08 et seq.
2. For the reasons set forth herein, Contestor contests the certification of Al Landis for the office of State Representative for the 98th District of the Ohio House of Representatives for the term commencing on January 1, 2013.

PARTIES

3. Contestor Joshua E. O'Farrell ("O'Farrell") is the Democratic Party candidate for the office of State Representative for the 98th Ohio House District at the November 2012 General Election.
4. Contestee Al Landis ("Landis") is the Republican Party candidate for the office of State Representative for the 98th Ohio House District at the November 2012 General Election.
5. Respondent Tuscarawas County Board of Elections is the legal entity with the statutory responsibility for conducting elections and canvassing election returns in Tuscarawas County, Ohio, pursuant to R.C. 3501.11, which includes a majority of the territorial boundary of 98th District of the Ohio House of Representatives.

6. Respondent Holmes County Board of Elections is the legal entity with the statutory responsibility for conducting elections and canvassing election returns in Holmes County, Ohio, pursuant to R.C. 3501.11, which includes a portion of the territorial boundary of 98th District of the Ohio House of Representatives.

FACTS APPLICABLE TO ALL CLAIMS FOR RELIEF

7. On November 6, 2012, a General Election was held in Tuscarawas and Holmes Counties to elect a candidate for the office of State Representative for the 98th District of the Ohio House of Representatives for the term commencing January 1, 2013. The candidates were Contestor Josh O'Farrell and Contestee Al Landis.
8. On November 19, 2012, Respondent Holmes County Board of Elections conducted the official canvass of the election returns and determined that O'Farrell received 1,437 votes and Landis received 4,871 votes.
9. On November 26, 2012, Respondent Tuscarawas County Board of Elections conducted the official canvass of the election returns and determined O'Farrell received 21,941 votes and Landis received 18,521 votes.
10. Also on November 26, 2012, Respondent Tuscarawas County Board of Elections declared Contestee Landis the winning candidate and Contestor O'Farrell the defeated candidate by a vote of 23,392 to 23,378, a margin of 14 votes.
11. R.C. 3515.011 mandates that when the difference between votes cast for a declared winning candidate and a declared losing candidate is equal to or less

than one-half of one percent of the total votes cast in the candidate contest, a board of elections must conduct an automatic recount. There were 46,770 total votes cast in the election, one-half of one percent of that figure is 234 votes. Because the margin was 14 votes, far fewer than 234 votes, an automatic recount was conducted.

12. On December 4, 2012, the Holmes County Board of Elections completed its part of the recount and declared that Landis received 4,872 votes and O'Farrell received 1,437 votes in Holmes County.
13. On December 13, 2012, after conducting a recount for several days, the Tuscarawas County Board of Elections declared that O'Farrell received 21,948 votes and Landis received 18,521 votes in Tuscarawas County. Also on December 13, 2012, the Tuscarawas County Board of Elections, being the majority county of the legislative district, declared the results of the recount for the 98th Ohio House District with Contestee Landis declared as the winner of the election and Contestor O'Farrell declared as the defeated candidate by a vote of 23,393 to 23,385, a difference of 8 votes.
14. Based on the claims set forth herein, there is clear and convincing evidence that multiple election irregularities occurred and that these irregularities affected 8 votes or more, enough to change or make uncertain the result of the election. [*Machari v. Tone*, 103 Ohio St.3d 411, 2004-Ohio-5342, ¶ 21.]

**THE FAILURE OF THE TUSCARAWAS COUNTY BOARD OF ELECTIONS TO
REMAKE THIRTEEN BALLOTS ON WHICH THE VOTER INTENT IS CLEAR
CONSTITUTES AN ELECTION IRREGULARITY**

15. The Tuscarawas County Board of Elections utilizes an optical scan system for the tabulation of absentee and provisional ballots cast in that county.
16. R.C. 3505.28 provides that no ballot that is marked contrary to law shall be rejected for any technical reason unless it is impossible to determine the voter's choice.
17. R.C. 3506.21(B)(1) sets forth the standards for determining voter intent with respect to marks made on an optical scan ballot:
 - (B) (1) In addition to marks that can be scanned and electronically read by automatic tabulating equipment, any of the following marks, if a majority of those marks are made in a consistent manner throughout an optical scan ballot, shall be counted as a valid vote:
 - (a) A candidate, question, or issue choice that has been circled by the voter;
 - (b) An oval beside the candidate, question, or issue choice that has been circled by the voter;
 - (c) An oval beside the candidate, question, or issue choice that has been marked by the voter with an "x," a check mark, or other recognizable mark;
 - (d) A candidate, question, or issue choice that has been marked with a writing instrument that cannot be recognized by automatic tabulating equipment.
18. On June 13, 2012, Ohio Secretary of State Jon Husted promulgated Directive 2012-22, setting forth the standards that boards of elections must follow when remaking optical scan ballots.

19. Directive 2012-22 requires that a ballot be remade, where it is possible to determine voter intent, utilizing the procedures set forth in the Directive to remake the optical scan ballot so that it may be read by the tabulating machine. The Directive provides, in part: “a board of elections has the statutory authority to determine the intent of a voter who marked the entire ballot contrary to the instructions provided and to remake the ballot to reflect that intent.” [Directive 2012-22, pp. 1-2.]
20. The Tuscarawas County ballot received by absentee and provisional voters instructed the voter to “completely darken the oval (●) to the left of your choice.”
21. Indeed, on election night, the Tuscarawas County Board of Elections did remake at least 75 ballots where the voter did not follow the instructions for marking the ballot and it was possible to determine the voter’s intent. The Board remade 10 ballots that were “double bubble,” where the voter circled in a vote for a candidate and also wrote the candidate’s name in the write-in space. Additionally, the Board remade ballots where the voter erased or used whiteout to change their vote.
22. During the recount of the 98th Ohio House District election, the Tuscarawas County Board of Elections also remade certain ballots where the voter did not follow instructions for marking the ballot, but it was possible to determine the voter’s intent, *to wit*:

12/10/2012 – Ballots remade in Precincts 15, 50, 56

12/13/2012 – Ballot remade in Precinct 63

23. On December 10, 2012, the Tuscarawas County Board of Elections tied on a motion to have the Board Members review 14 ballots, one each in Precincts 21, 26, 28, 30, 32, 34, 39, 52, 58, 60, 62, 63, 66, 69, that successfully scanned but were “flagged” by board staff or that a recount observer has asked to be reviewed by the Board to ensure that the vote in the race for the 98th Ohio House of Representatives District was properly counted. On December 12, 2012, Ohio Secretary of State Jon Husted broke the tie “in favor of using the same standard of ballot review that has already been employed by the Board.”
24. On December 13, 2012, the Board reviewed the 14 ballots and voted to remake only the one in precinct 63, leaving 13 ballots that were not remade by the Board.
25. Similar to the ballots remade on election night, and since election night, the 13 ballots at issue are ballots upon which the voter’s intent is clear but contain a technical error in that the voter marked the ballot contrary to the instructions provided by failing to completely fill in the oval next to the name of the chosen candidate and/or placing a checkmark, “x,” slash mark, or scratch mark in the oval next to the name of the chosen candidate. Thus, it is uncertain whether these votes were properly recorded by the optical scanner.
26. The failure of the Tuscarawas County Board of Elections to remake these 13 ballots upon which the voter’s intent to cast a vote for Contestor O’Farrell is

indisputable constitutes an election irregularity in not complying with R.C. §§ 3505.28, 3506.21(B)(1), Directive 2012-22, and the 12/12/2012 Tie Vote Decision issued by the Ohio Secretary of State.

THE REJECTION OF FOUR ABSENTEE BALLOTS BASED ON A DATE OF BIRTH MISMATCH ON THE IDENTIFICATION ENVELOPE BY THE TUSCARAWAS COUNTY BOARD OF ELECTIONS AND THE UNEQUAL APPLICATION OF STANDARDS FOR DETERMINING THE VALIDITY OF ABSENTEE BALLOTS WITH NO BIRTH DATE VERSUS DATE OF BIRTH MISMATCH CONSTITUTES AN ELECTION IRREGULARITY

27. On July 12, 2012, Ohio Secretary of State Jon Husted promulgated Directive 2012-26 setting forth the requirements for absentee voting in Ohio
28. Directive 2012-26 sets forth the following procedure for determining the validity of an absentee ballot:

The board [of elections] must examine each returned absentee ballot envelope for eligibility before the board may remove the ballot from the envelope.

In order for an identification envelope to be opened and the absentee ballot to be counted, the absentee voter must provide, at a minimum, the following information on the absentee ballot ID envelope:

- Name;
- Signature; and
- Proper ID.

[Directive 2012-26, Absentee voting, pp. 9-10.]

29. R.C. 3509.07, provides, in part:

If election officials find that the statement accompanying an absent voter's ballot or absent voter's presidential ballot is insufficient, that the signatures do not correspond with the person's registration signature, that the applicant is not a qualified elector in the precinct, that the ballot envelope contains more than one ballot of any one kind, or any voted ballot that the elector is not entitled to vote, that Stub A is detached from the absent voter's ballot or absent voter's presidential ballot, or that the elector has not included with the elector's ballot any

identification required under section 3509.05 or 3511.09 of the Revised Code, the vote shall not be accepted or counted.

30. In contrast to the requirements for completion of the identification envelope described in Directive 2012-26, the Directive sets forth additional requirements for the application to receive an absentee ballot, as follows:

A voter's request in any form is sufficient if it contains ALL of the following pieces of information:

1. The voter's name;
2. The voter's signature;
3. The address at which the voter is registered to vote;
4. The voter's date of birth;
5. One of the following:
 - a. The voter's driver's license number;
 - b. The last four digits of the voter's social security number;
 - c. A copy of a current and valid photo identification, a military identification, or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of election or a notice of voter registration by a board of elections, that shows the voter's name and address.

* * *

[Directive 2012-26, Absentee Voting, pp. 1-2.]

31. Neither R.C. 3509.07, nor Directive 2012-26, require that a voter provide his or her date of birth on the absentee ballot identification envelope in order for the envelope to be opened and the ballot to be counted. Rather, the Directive requires that the absentee ballot identification envelope contain the voter's name, signature, and proper ID. [Directive 2012-26, Absentee Voting, pp. 9-10.]
32. The requirements set forth in R.C. 3509.03 and Directive 2012-26 to request an absentee ballot set forth the items which constitute proper id, *i.e.*, one of

the following: the voter's driver's license number; the last four digits of the voter's social security number; or, copy of a current and valid photo identification, a military identification, or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of election or a notice of voter registration by a board of elections, that shows the voter's name and address.

33. While a voter must provide his or her date of birth in order to obtain an absentee ballot, the voter's date of birth is not the voter's name, signature, or proper ID and thus is not required to be on the absentee ballot identification envelope in order for the envelope to be opened and the absentee ballot to be counted.
34. The Tuscarawas County Board of Elections lacks the legal authority to promulgate additional requirements for the validity of an absentee ballot identification envelope; such as requiring that a voter provide his or her birth date on the absentee ballot envelope in order to count the vote contained therein.
35. Indeed, on December 13, 2012, the Tuscarawas County Board of Elections voted to count 6 ballots that contained no date of birth information on the absentee ballot identification envelope. Specifically, the Board counted absentee ballots cast by voters Robert Lee Arnold, Bonnie Gagnon, Amilia Skidmore, Eloise Thomas, Jonathon Vitale, and Harold Williard although the

absentee ballot identification envelopes contained no date of birth information.

36. However, while the Tuscarawas County Board of Elections has determined that it may count absentee ballots cast by voters where the absentee ballot identification envelope contained no date of birth information, the Board has refused to count absentee ballots cast by voters where the absentee ballot identification envelope contains any mismatch of date of birth information on the identification envelope with date of birth information in the Board's voter registration records.

37. On December 13, 2012, the Tuscarawas County Board of Elections refused to count the following four absentee ballots:

(a) by Katherine A. Carruthers because the absentee ballot identification envelope indicates that her birth date is "06/03/2012" while the Board's records indicate that Ms. Carruthers was born on 06/03/1986;

(b) by Judith Suzanne Groff because the absentee ballot identification envelope indicates that her birth date is "06/14/1939" while the Board's records indicate that Ms. Groff was born on 05/14/1939;

(c) by Chloa Mae Herbert because the absentee ballot identification envelope indicates that her birth date is "01/06/2012" while the Board's records indicate that Ms. Herbert was born on 01/06/1985.

(d) by William Lee Tomer because the absentee ballot identification envelope indicates that his birth date is "07/22/1945" while the Board's records indicate that Mr. Tomer was born on 07/22/1944.

38. The Tuscarawas County Board of Elections decision not to count these four ballots is contrary to Directive 2012-26 and R.C. 3509.07. In each of these four instances, the date of birth errors are clear scribal errors. In each of these four instances, the date of birth on the absentee ballot application submitted by the voter matches the date of birth on file with the Board.
39. The Tuscarawas County Board of Elections decision to count absentee ballots where the absentee ballot identification envelope contains no birth date information and to exclude absentee ballots where the absentee ballot identification envelope contains scribal errors constitutes a violation of the Equal Protection clause of the United States Constitution, substantive Due Process as guaranteed by the United States Constitution, as well as a violation of the First Amendment to the United States Constitution. [See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).]
40. The failure of the Tuscarawas County Board of Elections to count the four absentee ballots where the absentee ballot identification envelope contained an error or mismatch in the voter's birth date field constitutes an election irregularity.

**THE FAILURE OF THE TUSCARAWAS COUNTY BOARD OF ELECTIONS TO
COUNT FOUR ABSENTEE BALLOTS BASED SOLELY ON ADDRESS
INFORMATION CONTAINED ON THE IDENTIFICATION ENVELOPE
CONSTITUTES AN ELECTION IRREGULARITY**

41. Five (5) absentee ballots were not counted by the Tuscarawas County Board of Elections because the address contained on the absentee ballot identification envelope, Secretary of State Form 11, was not the same as the voter's registration address on file with the board of elections. Those voters are: Eileen Blauch, Kathleen E. Durben, Robert L. Ehrhart, Brenda Louise Hawkins, and William Pfister.

42. Directive 2012-26 sets forth the following procedure for determining the validity of an absentee ballot:

The board [of elections] must examine each returned absentee ballot envelope for eligibility before the board may remove the ballot from the envelope.

In order for an identification envelope to be opened and the absentee ballot to be counted, the absentee voter must provide, at a minimum, the following information on the absentee ballot ID envelope:

- Name;
- Signature; and
- Proper ID.

[Directive 2012-26, Absentee voting, pp. 9-10.]

43. R.C. 3509.07, provides, in part:

If election officials find that the statement accompanying an absent voter's ballot or absent voter's presidential ballot is insufficient, that the signatures do not correspond with the person's registration signature, that the applicant is not a qualified elector in the precinct, that the ballot envelope contains more than one ballot of any one kind, or any voted ballot that the elector is not entitled to vote, that Stub A is detached from the absent voter's ballot or absent voter's presidential

ballot, or that the elector has not included with the elector's ballot any identification required under section 3509.05 or 3511.09 of the Revised Code, the vote shall not be accepted or counted.

44. Each of the five voters listed their registration address on their absentee ballot applications pursuant to R.C. 3509.03.
45. In two instances, the address listed by the voter on the identification envelope [Form 11] is the address of the polling place. These are clear unintentional errors due to the voter misreading the field.
46. The rejection of these ballots by the Tuscarawas County Board of Elections is contrary to R.C. 3509.07 and Secretary of State Directive 2012-26.
47. The failure of the Tuscarawas County Board of Elections to count the five absentee ballots based solely on the address information contained on Form 11 constitutes an election irregularity.

THE FAILURE OF POLL WORKERS TO COMPLY WITH MANDATORY STATUTORY DUTIES IN DETERMINING VOTERS' ASSIGNED PRECINCTS, DIRECTING VOTERS TO THEIR ASSIGNED PRECINCTS, AND/OR WARNING VOTERS THAT THEIR VOTES WOULD NOT BE COUNTED IF CAST IN THE INCORRECT PRECINCT CONSTITUTES AN ELECTION IRREGULARITY

48. Ohio law sets forth thirteen (13) instances in which a voter is not permitted to cast a regular ballot, and instead must cast a provisional ballot – one of which is when the voter is not included on the precinct list. [R.C. 3505.181(A)(1); see also, 3501.181(A)(2)-(13).]
49. Upon arrival at a polling location, voters are processed by pollworkers who have a statutory duty to determine and direct voters to the correct precinct. R.C. 3505.181(C)(1) provides:

If an individual declares that the individual is eligible to vote in a jurisdiction other than the jurisdiction in which the individual desires to vote, or if, upon review of the precinct voting location guide using the residential street address provided by the individual, an election official at the polling place at which the individual desires to vote determines that the individual is not eligible to vote in that jurisdiction, the election official shall direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote, explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct, and provide the telephone number of the board of elections in case the individual has additional questions.

50. When the pollworker complies with his or her mandatory statutory duties as set forth in R.C. 3505.181, the only instance in which an individual could possibly cast a provisional ballot in the wrong precinct is when the voter refuses to travel to the correct polling place despite being informed by the pollworker of the correct polling place and additionally being informed by the pollworker that the provisional ballot cast in the wrong precinct will not be counted.
51. Some Tuscarawas County pollworkers working at the November 6, 2012 general election failed to perform their mandatory statutory duty to inform voters that they were in the wrong place, failed to inform voters of their correct polling place, and/or failed to inform voters that any provisional ballot cast in the incorrect polling place would not be counted. The failure of these pollworkers to fully perform these mandatory statutory duties resulted in the rejection of provisional ballots cast by 18 voters who were registered electors, eligible to vote at the election, but were at a polling location different from the location to which the voter's precinct was assigned. The voters are April

Marie Babarcik, Natasha Renee Benson, Robert M. Buzzeo, Michael A. Cottrell, II, Dustin M. Freitag, Cheryl Lynn Harris, Dale E. Johnson, Carl D. King, Kelly Marie Lucas, Robert L. Morris, Robert L. Patterson, II, Melissa S. Patterson, Erin Lee Pierson, Ginger D. Raber, Courtney Joann Rees, Tina Louise Snyder, Brandy M. Swanson, Carrie M. Thomas, and Douglas Courtney Vaughn.

52. Voters whose votes were excluded because they were not in the location where their precinct was assigned would have traveled their assigned location on election day if they would have been informed by the pollworker that they were not in the correct polling place, if the pollworker would have informed the voter of the correct polling place, and/or if the pollworker would have informed the voter that a vote cast in the incorrect polling place would not be counted.
53. These pollworker duties are not new. R.C. 3505.181 has been in place since 2006 and have received significant media attention as a result of ongoing litigation concerning pollworker error. The General Assembly initially repealed these requirements in House Bill 194 (129th General Assembly). However, the General Assembly reaffirmed these pollworker duties in 2012 by re-enacting them House Bill 295 (129th General Assembly).
54. The exclusion of a vote cast by an elector who is inarguably a registered voter and qualified to vote at the election in question solely on the basis that the pollworker failed to inform the voter that he or she was not at the correct

polling place, failed to direct the voter of the correct polling place, and/or failed to inform the voter that his or her vote would not be counted if cast at the incorrect polling place is a violation of the voter's First Amendment rights, right of Equal Protection, and right of substantive Due Process as guaranteed by the United States Constitution.

55. Further, votes that were cast by voters who were at the right polling place but voted at the wrong precinct were counted for the candidates and issues upon which the voter was entitled to vote had the voter cast the vote in the correct precinct. Voters who cast a vote in the election for the office of State Representative for the 98th District are similarly situated in that the district spans the entire county. Accordingly, there is no basis for excluding a vote cast by a registered and qualified elector of the Tuscarawas County for that office whether or not it was cast in the correct precinct.
56. Records of the Tuscarawas County Board of Elections indicate that in some cases pollworkers made errors in determining which polling location was assigned to particular voters. In many of these instances, forms completed by the pollworker indicated that the pollworker believed that the voter was in the correct polling location despite the fact that the ballot was later rejected by the Board of Elections because the voter was not in the correct polling location.
57. Despite these errors, which were plainly documented by their own records and the statements made by the pollworkers on these documents, the

Tuscarawas County Board of Elections did not conduct any inquiry into whether pollworkers complied with their mandatory statutory duties in properly directing voters on election day.

58. The failure to make any inquiry as to whether pollworkers complied with R.C. 3505.181(C)(1) constitutes an election irregularity.
59. The failure of certain pollworkers to perform their statutorily mandated duties clearly constitutes an election irregularity.
60. The failure to count a vote cast for the office of State Representative for the 98th District solely because it was cast in the wrong precinct, when pollworkers did not perform the duties imposed under R.C. 3505.18, constitutes an election irregularity.

THE REJECTION OF A BALLOT CAST BY VOTER WHO PROVIDED THE SAME INFORMATION ON THE VOTER'S ABSENTEE BALLOT IDENTIFICATION ENVELOPE CHANGE OF NAME AS THE VOTER PROVIDED TO OBTAIN THE ABSENTEE BALLOT CONSTITUTES AN ELECTION IRREGULARITY

61. Karie Jo Mathias is a registered elector of Tuscarawas County who was eligible to vote at the November 6, 2012 general election.
62. The voter applied to the Tuscarawas County Board of Elections for an absentee ballot using her registration name, Karie Jo Mathias, and signed that request using her married name, Karie Jo Milburn.
63. Despite the fact that the signature on the absentee ballot application did not match the name of the individual requesting the absentee ballot, the Tuscarawas County Board of Elections transmitted a ballot to the voter.

- 64. The voter voted the ballot, completed the absentee ballot identification envelope, and signed the envelope using her married name, Karie Jo Milburn, and timely returned the ballot.
- 65. The Tuscarawas County Board of Elections rejected the ballot because the voter signed Milburn, rather than Mathias.
- 66. The failure of the Tuscarawas County Board of Elections to count the voter's ballot after issuing the ballot to the voter based on her new name constitutes an election irregularity.

**THE FAILURE OF THE TUSCARAWAS COUNTY BOARD OF ELECTIONS TO
COUNT AN INCOMPLETE FORM 12-D CONSTITUTES AN ELECTION
IRREGULARITY**

- 67. R.C. 3505.182 sets forth the form to be used for the voter affirmation and poll worker verification of the voter's affirmation on provisional ballots.
- 68. Contained on the form, in quotation marks, is the following verification statement to be completed by the election official (pollworker):

* * * Verification Statement

(To be completed by election official)

The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this day of (Month), (Year).

(If applicable, the election official must check the following true statement concerning additional information needed to determine the eligibility of the provisional voter.)

..... The provisional voter is required to provide additional information to the board of elections.

..... An application or challenge hearing regarding this voter has been postponed until after the election.

(The election official must check the following true statement concerning identification provided by the provisional voter, if any.)

..... The provisional voter provided a current and valid photo identification.

..... The provisional voter provided a current valid photo identification, other than a driver's license or a state identification card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.

..... The provisional voter provided a military identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address.

..... The provisional voter provided the last four digits of the voter's social security number.

..... The provisional voter is not able to provide a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does have one of these forms of identification. The provisional voter must provide one of the foregoing items of identification to the board of elections within ten days after the election.

..... The provisional voter is not able to provide a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does have one of these forms of identification. Additionally,

the provisional voter does have a social security number but is not able to provide the last four digits of the voter's social security number before voting. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

..... The provisional voter does not have a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or a social security number, but has executed an affirmation.

..... The provisional voter does not have a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or a social security number, and has declined to execute an affirmation.

..... The provisional voter declined to provide a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or the last four digits of the voter's social security number but does have one of these forms of identification or a social security number. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

(Signature of Election Official)

69. Rather than prescribe the form as prescribed by statute in R.C. 3505.182, the Ohio Secretary of State promulgated a different form for the affirmation and verification of provisional ballots, Form 12-B, prescribed January, 2012.
70. Form 12-B does not contain the verification statement required by R.C. 3505.182, nor does it require any signature of the election official. Form 12-B contains lines for the precinct election official to indicate the precinct

number, the name or number of the location, the election official's printed name, and the date.

71. The provisional ballot cast by Tim Kramer was rejected solely because Mr. Kramer did not sign the affirmation on one side of Form 12-B, despite the fact that: he completed all other information on the front and back of the form and signed the back of the form under penalty of election falsification; the information on the back of the form establishes that he is a qualified elector for the precinct; and the polling place official completed her part, which by law is a verification that the voter signed the required form in her presence.
72. The provisional ballot cast by David Amato was rejected solely because he did not complete one side of Form 12-B despite the fact that: he completed all other information on the other side of the form and signed that side of the form under penalty of election falsification; the information on the back of the form establishes that he is a qualified elector for the precinct; and the polling place official completed her part, which by law is a verification that the voter signed the required form in her presence.
73. The information provided by these two voters substantially if not fully complies with the voters' legal duties and the Tuscarawas County Board of Election's failure to count these ballots constitutes an election irregularity.
74. Form 12-B as promulgated by the Secretary of State is such a substantial deviation from the form required by statute, R.C. 3505.182, that to use any

alleged defect in completing Form 12-B so as to invalidate the vote of any qualified elector, and specifically with respect to these two voters, constitutes an election irregularity.

THE FAILURE BY THE TUSCARAWAS COUNTY BOARD OF ELECTIONS TO COUNT AN ABSENTEE BALLOT RETURNED BY A VOTER TO HER POLLING PLACE ON ELECTION DAY PRIOR TO THE CLOSE OF VOTING CONSTITUTES AN ELECTION IRREGULARITY

75. R.C. 3509.05 provides that an elector may return an absentee ballot to the director via mail or via personal delivery to the director.
76. The absentee ballot cast by Leslie Besozzi was rejected because it was delivered by her to elections officials at her polling location on election day. Her ballot was then delivered to the board of elections office by these election officials.
77. Absentee ballots which were delivered by voters to the Tuscarawas County Board of Elections office were not rejected based on the failure to deliver the ballot directly to the director of the board of elections.
78. The Tuscarawas County Board of Elections decision to count absentee ballots which were not returned directly to the director, but were returned to other employees at the board of elections office, and not to count a ballot which was not returned directly to the director but was returned to elections officials at the voters polling location is contrary to R.C. 3509.05 and constitutes a violation of the Equal Protection clause of the United States Constitution, substantive Due Process as guaranteed by the United States Constitution, as

well as a violation of the First Amendment to the United States Constitution.

[See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).]

79. The failure of the Tuscarawas County Board of Elections to count this ballot where the absentee ballot was returned to election officials at the voter's polling location on election day constitutes an election irregularity.

THE FAILURE BY THE TUSCARAWAS COUNTY BOARD OF ELECTIONS TO COUNT ABSENTEE BALLOTS RETURNED WITHOUT AN IDENTIFICATION ENVELOPE [FORM 11], WITHOUT FIRST GIVING THE VOTER THE SAME OPPORTUNITY TO CURE AS IS GIVEN TO A VOTER WHO RETURNS A BLANK OR INCOMPLETE FORM 11, CONSTITUTES AN ELECTION IRREGULARITY

80. The absentee ballot return envelope contains Form 11 which is completed by the voter to determine the validity of the ballot contained therein.
81. The Ohio Secretary of State has promulgated Directives 2012-48 and 2012-48-2, which mandate that a board of elections "must contact any absentee voter who provided insufficient information on their absentee ballot identification envelope [Form 11] to give the voter an opportunity to supplement the voter's identification envelope so the voter's ballot can be tabulated." The notice must include a copy of Form 11-S, upon which the voter can provide the information. Form 11-S duplicates all the same information requested on Form 11.
82. Absentee voters who provided an incomplete or blank Form 11 were notified by the Tuscarawas County Board of Elections of the opportunity to complete Form 11-S in order to have their ballot counted. However, any voters who failed to return Form 11 were not notified by the Tuscarawas County Board

of Elections of the deficiency or given the opportunity to complete Form 11-S in order to have their ballot counted.

83. The Tuscarawas County Board of Elections decision to contact voters who returned incomplete or blank Form 11s and provide them with Form 11-S in order to have their ballot counted, while not notifying voters who failed to return Form 11 of the deficiency or providing them with the opportunity to complete Form 11-S in order to have their ballot counted constitutes a violation of the Equal Protection clause of the United States Constitution, substantive Due Process as guaranteed by the United States Constitution, as well as a violation of the First Amendment to the United States Constitution. [See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).]

84. The voters who returned absentee ballots without the identification envelope [Form 11] are: Martha Ann Buss, Carol S. Fichter, Ashley Bruce Luthy, William R. McGinnis, Benton L. Soure, David Allen Schwab, Eathen M. Weaver, and Lori Ann Williams.

85. The failure of the Tuscarawas County Board of Elections to notify voters who failed to return Form 11 of the deficiency and to provide those voters with Form 11-S in order to have their ballots counted constitutes an election irregularity.

CONCLUSION

86. Based on the claims as set forth above, there is clear and convincing evidence that multiple election irregularities occurred and that these irregularities

affected 8 or more votes, enough to change or make uncertain the result of the election. [*Machari v. Tone*, 103 Ohio St.3d 411, 2004-Ohio-5342, ¶ 21.]

Prayer for Relief

WHEREFORE, Contestor respectfully prays for the following relief:

- A. To fix a suitable time for hearing the contest filed herein pursuant to R.C. 3515.10, to conduct a trial pursuant to R.C. 3515.11, and upon completion of the trial to forward a transcript of all testimony taken and all evidence adduced for filing with the Clerk of the Ohio House of Representatives pursuant R.C. 3515.14;
- B. Conduct a hand recount of the absentee and provisional ballots in Tuscarawas County precincts 21, 26, 28, 30, 32, 34, 39, 52, 58, 60, 62, 63, 66, and 69 pursuant to R.C. 3515.13;
- C. Count or order that all the ballots described herein be counted;
- D. Pronounce Judgment or a Determination as to which candidate was elected as a Member of the Ohio House of Representatives to represent the 98th Ohio House District in the 130th Ohio General Assembly at the November 6, 2012 election or that the results of the election are uncertain and therefore the election is voided;
- E. That the costs of this action be assessed pursuant to R.C. 3515.09;
- F. Award Contestor his attorneys' fees and expenses; and
- G. Award such other relief as may be appropriate.

Respectfully submitted,



Donald J. McTigue (0022849)

Mark A. McGinnis (0076275)

J. Corey Colombo (0072398)

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Counsel for Contestor

VERIFICATION

STATE OF OHIO)
COUNTY OF TUSCARAWAS)

I, Joshua E. O'Farrell, being first duly cautioned and sworn, depose and say that I am the Contestor in the above-captioned Contest of Election Petition; that I have carefully read the above Petition; and that the facts and allegations contained therein are true.

Joshua E. O'Farrell
Joshua E. O'Farrell

Sworn and subscribed in my presence this 22nd day of December, 2012.



Elizabeth A. Burns
Notary Public, State of Ohio
My Commission Expires
November 14, 2016

Elizabeth A. Burns
Notary Public

PRECIPE

TO THE CLERK OF THE OHIO SUPREME COURT:

Request is hereby made, pursuant to Ohio Revised Code Section 3515.10, that you serve, or cause to be served, a copy of the above Contest of Election Petition upon Contestee and respondents herein:

AL LANDIS
4570 Harrold Street NW
Dover, Ohio 44622

TUSCARAWAS COUNTY BOARD OF ELECTIONS
101 East High Avenue
New Philadelphia, Ohio 44663

HOLMES COUNTY BOARD OF ELECTIONS
75 East Clinton Street
Millersburg, Ohio 44654



Donald J. McTigue, Attorney at Law