

The Supreme Court of Ohio

State ex rel. STARK COUNTY	:	
BOARD OF ELECTIONS	:	
	:	CASE NO. 2021-0410
Relator,	:	
	:	Original Action in Mandamus
v.	:	
	:	
STARK COUNTY BOARD OF	:	
COUNTY COMMISSIONERS, et al.	:	
	:	
Respondents.	:	

MERIT BRIEF OF RESPONDENTS
STARK COUNTY BOARD OF COMMISSIONERS,
BILL SMITH, JANET WEIR CREIGHTON, AND
RICHARD REGULA

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**MERIT BRIEF OF RESPONDENTS STARK COUNTY BOARD OF COMMISSIONERS,
BILL SMITH, JANET WEIR CREIGHTON, AND RICHARD REGULA**

I. INTRODUCTION

Responsible local government demands transparency, diligence, and collaboration. These self-evident tenets of good government are never more important than when expending significant sums of taxpayer money. Unfortunately, in this case, Relator Stark County Board of Elections refused to follow any semblance of transparency when vetting and selecting a prospective new voting equipment system for the taxpayers of Stark County. In a hurry-up, give-us-what-we-want-or-else fashion, Relator now urges this Court to dictate that the elected officials of Stark County rubberstamp a multi-million-dollar purchase without the kind of detailed information a prudent policy maker would need to take action in even a far less costly expenditure. Misinterpreting and misapplying R.C. 3506.02 and R.C. 3506.03 and failing to even address the important interplay of R.C. 3501.17, Relator fails to satisfy any entitlement to the mandamus relief requested. Thus, good government, common sense, and Ohio law converge to indicate Relator's request should be denied.

The evidence shows that Respondents Commissioners Bill Smith, Janet Weir Creighton, and Richard Regula, when presented with a December 9, 2020 recommendation from the Board of Elections to purchase new voting equipment, merely asked for collaboration and information. Tasked with working with the County Commissioners to purchase a new system under the Ohio Secretary of State's own directive, the Board of Elections instead unilaterally fast-tracked its selection process and kept Respondents in the dark until essentially ordering them to pay up. After careful and prudent review of the Board of Elections' initial recommendation promulgated under R.C. 3506.02(B), Respondents determined that the stated financial justification for this recommendation contained material misrepresentations of fact and lacked detailed cost comparisons necessary to inform the Commissioners' final action.

When the Commissioners repeatedly asked for more information, Relator refused and willfully ignored the requests. Given Relator's unwillingness to provide insight and information about the expenditure, the Commissioners rejected the original recommendation. As a show of good faith and a desire to obtain new voting equipment for county elections, the Commissioners presented Relator with a revised, less costly proposal. Relator rebuffed this alternative solution, defiantly digging in its heels. Instead, Relator contorted its recommendation into a mandate, and publicly threatened to file a lawsuit if it did not get its way.

Yet the underlying facts make it plain that Relator Board of Elections acted under the construct of R.C. 3506.02(B) and made a *recommendation* for action to adopt and thereafter purchase new voting equipment. Only the Board of Commissioners was statutorily charged with acting on this recommendation. After the Commissioners did act, offering an alternative, better-bargain option for taxpayers (Ex. 19, March 10, 2021 Board of Commissioners Res. w/Exhibits), the Board of Elections ignored the Commissioners and continued foreclosing any possibility of collaboration as encouraged by the Secretary of State. Relator then improperly turned to R.C. 3506.02(A) and ordered Commissioners to expend \$1,475,735.46 to acquire Relator's preferred voting equipment within one week. The fact that this amount had not been appropriated for that purpose was conveniently left by the wayside on the fast track to file the action this Court now considers. From every angle, the Board of Elections has failed to satisfy the elements of a valid mandamus action. Consequently, the requested writ of mandamus must be denied.

II. STATEMENT OF FACTS

A. The Voting Equipment Acquisition Program.

In 2018, the 132nd Ohio General Assembly passed Amended Substitute Senate Bill 135, making available to all 88 Ohio counties certain funds to subsidize the purchase of new electronic

voting systems throughout Ohio. Ex. 1, Luther Aff. ¶ 5. Coinciding with passage of Am. Sub. S.B. 135 (the “Voting Equipment Acquisition Program”), the Ohio Secretary of State issued Advisory 2018-03 to all county boards of elections setting forth a preliminary funding framework. Ex. 5, SOS Adv. 2018-03. The Stark County Commissioners and staff became aware of this advisory framework around the same time. Ex. 1, Luther Aff. ¶ 5.

Under the announced funding formula, Stark County is slated to receive up to \$3,268,344.74 for the purchase of one of the new electronic voting systems certified by the State of Ohio, with any additional balance of the purchase price to be funded by the Stark County taxpayers. Ex. 2, Creighton Aff. ¶ 8; Ex. 3, Regula Aff. ¶ 9; Ex. 4, Smith Aff. ¶ 9. Later in 2018, the Secretary of State issued Advisory 2018-04, also directed to Ohio’s 88 county boards of election, stating, in part: “A county board of elections is encouraged to work with its board of county commissioners in selecting the county’s voting system.” Ex. 6, SOS Adv. 2018-4; Ex. 7, SOS Adv. 2018-04 Exhibit A; Ex. 8, SOS Adv. 2018-04 Exhibit B.

B. The Commissioners and Stark County’s aging voting equipment.

The Stark County Board of Commissioners is Stark County’s taxing, budgeting, and purchasing authority. Currently, and at all times relevant to this action, the Board has been comprised of Janet Weir Creighton, Richard Regula, and Bill Smith. Ex. 2, Creighton Aff. ¶ 2; Ex. 3, Regula Aff. ¶ 2; and Ex. 4, Smith Aff. ¶ 2. Almost every county office, including Relator Board of Elections, relies on the Board of Commissioners for appropriations. As such, expenses of Relator Board of Elections are subject to appropriation by the Board of Commissioners. Ex. 4, Smith Aff. ¶ 5.

Over the past several years, the Board of Commissioners has planned for the large expected purchase of a new voting equipment system in order to replace Stark County’s aging “Diebold TSX” voting system and has reserved the funds necessary for the purchase of a new voting system

for the county. Ex. 3, Regula Aff. ¶ 7. While expending funds has been anticipated, no official appropriation has yet been made to the Board of Elections for this purpose. Ex. 1, Luther Aff. ¶ 7.

Stark County's Diebold TSX voting system, still in use today, was originally procured in 2004. The Board of Commissioners authorized the purchase of these current machines following a transition from paper ballots. Thereafter, Diebold divested its elections business, and eventually certified voting system vendor Dominion Voting Systems ("Dominion") took over ownership and operation of the remaining Diebold TSX equipment. In April 2013, the Board of Elections' entire inventory of Diebold TSX equipment was destroyed when the roof of a warehouse containing the machines collapsed. Insurance proceeds were available to replace the damaged equipment, which allowed the Board of Commissioners (in October 2013) to purchase 1,400 used Diebold TSX machines from Dominion. The used machines purchased from Dominion were similarly constructed and operative to the destroyed equipment. These machines have been utilized in Stark County elections since that time. Ex. 3, Regula Aff. ¶¶ 7,8.

C. Voting system vendor demonstrations in September 2018.

On September 12, 2018 and on September 24, 2018, Relator Board of Elections invited the Board of Commissioners to attend separate demonstrations of two voting equipment systems to be considered for purchase. These demonstrations were offered as part of the initial vetting process for vendors of Ohio-certified electronic voting systems. All three Commissioners attended. While both demonstrations provided information on how the equipment operated, no detailed financial information on projected costs, including purchase quotes, maintenance, software, upgrade costs, or any other contract terms were discussed or conveyed to the Board of Commissioners at either demonstration. Ex. 4, Smith Aff. ¶ 10.

Following those demonstrations and issuance of SOS Adv. 2018-04, the Board of Commissioners received no further communications, documentation, or information from the

Board of Elections regarding the vetting and selection process for a new voting system. The only notable information Respondents received from Relator on this topic was the Board of Elections' annual placeholder budget requests of \$7,600,000 for future electronic voting equipment, and a brief discussion during the Board of Elections' February 11, 2019 Capital Budget Hearing. Indeed, no additional information on cost proposals or the selection process for new voting equipment was provided to the Board of Commissioners between late September 2018 and December 2020. Ex. 2, Creighton Aff. ¶ 12; Ex. 3, Regula Aff. ¶ 13; Ex. 4, Smith Aff. ¶ 12.

D. December 9, 2020 telephone calls from Board of Elections Director.

On December 9, 2020, Commissioner Creighton and Stark County Administrator Brant Luther each received telephone calls from Board of Elections Director Jeff Matthews. Ex. 1, Luther Aff. ¶ 8; Ex. 2, Creighton Aff. ¶ 13. Director Matthews contacted both, notifying them that the Board of Elections would vote *that day* to recommend the purchase of a new voting system from Dominion for Stark County and *urging immediate action* by the Board of Commissioners to approve this multi-million-dollar purchase. *Id.*

In response to Director Matthews' request, Commissioner Creighton informed him that the request was not procedurally proper and not how Stark County handled major purchases requiring the expenditure of taxpayer funds. Ex. 2, Creighton Aff. ¶ 14. As the Board of Commissioners routinely and consistently vets large purchases to be appropriated by the Commissioners through work sessions exchanging basic documentation (cost proposals, contract terms, and background information on the recommended vendor), Commissioner Creighton asked Director Matthews to work with Administrator Luther to set up a work session before the Commissioners took action on this significant recommended purchase. *Id.*

The next day, on December 10, 2020, Administrator Luther exchanged emails with Director Matthews, tentatively scheduling an upcoming work session between Relator and

Respondents to discuss the recommended purchase in more detail. Ex. 9, Dec. 10, 2020 emails exchanged between Administrator Luther and Director Matthews.

Following further discussions with each Commissioner and staff, on December 17, 2020, on behalf of the Commissioners, Administrator Luther sent a follow-up email to Director Matthews. Administrator Luther asked to postpone the previously penciled-in work session until specific documentation could be provided by the Board of Elections regarding its recommendation, including the following: 1) the Board of Elections' official recommendation of a vendor and equipment type to be purchased; 2) a list of the top three options considered by the Board of Elections (vendor and equipment type), together with a detailed summary of the pros and cons of each of those three options, and whether each vendor was asked to provide a trade-in credit for the County's current Diebold TSX voting machines; and 3) a detailed explanation as to why the Board of Elections selected its final recommended vendor and equipment-type. Ex. 10, Dec. 17, 2020 email from Administrator Luther.

E. January 13, 2021 written recommendation from the Board of Elections.

On January 13, 2021, *for the first time*, the Board of Elections sent the Board of Commissioners its official, written recommendation for the purchase of a new voting. Ex. 2, Creighton Aff. ¶ 18; Ex. 3, Regula Aff. ¶ 19; Ex. 4, Smith Aff. ¶ 19. The next day, the Board of Elections also sent a single banker's box of documents that contained none of the information previously requested by Administrator Luther. Ex. 1, Luther Aff. ¶ 11; Ex. 11, banker's box list of contents sent on Jan. 14, 2021. The recommendation itself also provided none of the requested information. Indeed, to date, the Board of Elections has never provided this specific information to the Board of Commissioners. Ex. 2, Creighton Aff. ¶ 18; Ex. 12, Jan. 13, 2021 email and accompanying letter from Director Matthews.

In its initial email and accompanying letter provided by Director Matthews, the Board of Elections expressed its recommendation to purchase the new voting system from Dominion. Ex. 12; *see also* Ex. 13, voting equipment proposal; Ex. 14, draft contract; and Ex. 15; draft resolution and sublease. Later that afternoon, Director Matthews sent a separate email on behalf of the Board of Elections to the Commissioners, seemingly contradicting the earlier correspondence from that day, which had designated the Dominion purchase as a *recommendation*. In this subsequent email and accompanying letter, the Board of Elections claimed the Board of Commissioners *had no authority to alter or take action contrary to the Board of Elections' recommendation for new voting equipment*. Otherwise stated, this separate correspondence indicated the Board of Elections was now dictating, rather than recommending, the Board of Commissioners' action to purchase the Dominion voting system. Ex. 16, Jan. 13, 2021 email from Director Matthews.

F. February 2, 2021 work session.

The Board of Commissioners scheduled and held a public work session on February 2, 2021 to hear a presentation from the Board of Elections on the selection process and to examine the reasoning that led to their recommendation. All three Commissioners were present, but only two of the four Board of Elections members chose to attend. A PowerPoint presentation was shown by the Board of Elections during this work session. Ex. 17, Feb. 2, 2021 Board of Elections full PowerPoint presentation. None of the Commissioners found this work session to be at all helpful or informative as to the Board of Elections' selection and review process for new voting equipment. Ex. 2, Creighton Aff. ¶ 20; Ex. 3, Regula Aff. ¶ 21; Ex. 4, Smith Aff. ¶ 21.

During this work session, Director Matthews represented to the Board of Commissioners that, as between the two competing vendors the Board of Elections considered (Dominion and Elections Systems and Software ("ES & S")), Stark County would have to pay \$2,019,932.80 more (out of pocket) if Dominion was not selected. Ex. 2, Creighton Aff. ¶ 21. Commissioner Creighton

asked specifically, aside from price, what set Dominion apart from the other vendors considered. The response provided indicated that Dominion was selected based upon past familiarity with and having provided good support to the Board of Elections. *Id.* ¶ 22. Commissioner Regula asked whether the Board of Elections undertook any negotiations with Dominion or the other vendors to obtain a trade-in credit for the machines currently in use. Director Matthews stated there was not any such negotiation conducted. Ex. 3, Regula Aff. ¶ 23. Commissioner Smith asked about receiving a source list of Dominion’s system parts and components. While he was promised to be provided such a list, he never was. Ex. 4, Smith Aff. ¶ 24.

After the February 2, 2021 work session, Commissioner Regula requested from the Board of Elections a copy of the election equipment quote from vendor ES & S, which had been solicited by the Board of Elections in 2019, and then refreshed in December 2020. Upon receiving these quotes from Board of Elections staff, Commissioner Smith, Director of Management and Budget Chris Nichols (“Director Nichols”), and Administrator Luther conducted an in-depth financial analysis and comparison of the Dominion and ES & S price quotes. This inquiry and side-by-side cost comparisons between the Dominion and ES & S proposals (viewed as a 10-year contract as opposed to solely first-year costs) demonstrated significant discrepancies in the financial information that had been presented to the Board of Commissioners at the work session. Ex. 1, Luther Aff. ¶ 15.

Further follow-up inquiries to ES & S regarding the ES & S November 2020 pricing proposal and the selection process leading thereto actually resulted in a revised proposal being submitted by ES & S, yielding a savings of \$143,262 to Stark County in comparison to the Dominion pricing proposal – over the full 10-year life of the contract.

G. Board of Commissioners' March 10, 2021 resolution.

On February 23, 2021, Director Matthews sent an email and accompanying letter to the Board of Commissioners requesting an update regarding future action on the Board of Elections' recommendation to purchase the Dominion equipment. Ex. 18, Feb. 23, 2021 email from Director Matthews. Thereafter, on March 10, 2021, the Board of Commissioners rejected a resolution that would have approved the Board of Elections' recommendation to acquire the Dominion voting system. The Commissioners then sent a packet to the Board of Elections and its staff which included a copy of the March 10, 2021 resolution, the revised ES & S proposal, and the financial analyses conducted by Administrator Luther, Commissioner Smith, and Director Nichols. Ex. 19, March 10, 2021 Board of Commissioners Res. w/Exhibits. No response was ever received from the Board of Elections regarding the revised, *less costly* ES & S proposal. Ex. 1, Luther Aff. ¶ 17.

Instead, on March 26, 2021, the Board of Elections moved to adopt the same electronic voting system provided by Dominion, this time purportedly acting with authority from R.C. 3506.02(A). Ex. 20, March 26, 2021 Board of Elections' Approved Mtns. The Board of Elections also presented an ultimatum for the Board of Commissioners to act on this purchase by no later than the Commissioners' next meeting, less than one week later. On March 31, 2021 the Commissioners took no action in response to the Board of Elections' motion or ultimatum, having received no new information or analyses from the Board of Elections by that date. Ex. 2, Creighton Aff. ¶ 27, 28; Ex. 3, Regula Aff. ¶ 28, 29; Ex. 4, Smith Aff. ¶ 33, 34.

III. LAW AND ANALYSIS

A. **A board of county commissioners holds exclusive authority to act on a board of elections' recommendation to adopt voting machines expressly made under R.C. 3506.02(B).**

Despite Relator Board of Elections' claims to the contrary, only Respondents could have adopted the Dominion voting machines on the Board of Elections' initial *recommendation*, pursuant to R.C. 3506.02(B). R.C. 3506.02 states, in relevant part, that voting machines may be adopted for use in county elections:

- (A) By the board of elections;
- (B) ***By the board of county commissioners of such county on the recommendation of the board of elections;***
- (C) By the affirmative vote of a majority of the electors of such county...

R.C. 3506.02 (emphasis added).

Following the adoption of certain voting machines for use in the county, R.C. 3506.03 further directs that:

Upon the adoption of voting machines, marking devices, and automatic tabulating equipment ***either by the action of the board of elections or by the board of county commissioners, on the recommendation of the board of elections...*** such board of county commissioners shall acquire the equipment by any one or by any combination of the following methods...

R.C. 3506.03 (emphasis added).

This statutory construct provides options for a county's acquisition and purchase of new voting equipment. Relator overlooks and chooses to ignore the express statutory authority conferred on the Board of Commissioners to select and acquire voting systems on Relator's recommendation. *See Union Cnty. Cmm'rs v. Brunner*, 146 Ohio Misc. 2d 40, 50, 2008-Ohio-1459, 152 N.E.3d 267 (Franklin Cnty. C.P., Feb. 19, 2008) (recognizing the explicit statutory authority of county commissioners to adopt voting equipment recommended by boards of elections).

Instead, Relator attempts to rewrite history by suggesting that its initial recommendation to Respondents to purchase new equipment was not a *recommendation* under R.C. 3506.02(B), but rather an unfunded *mandate* under R.C. 3506.02(A). Yet, the Board of Elections' December 9, 2020 motion was, for all intents and purposes, a recommendation to the Board of Commissioners to adopt the Dominion voting machines, pursuant to R.C. 3506.02(B). Each of Commissioners Creighton, Regula and Smith easily understood Relator's vote on that day to constitute a recommendation and request for funding to the Board of Commissioners. Ex. 2, Creighton Aff. ¶¶ 16; Ex. 3, Regula Aff. ¶ 17; Ex. 4, Smith Aff. ¶ 17. Administrator Luther also interpreted Relator's vote as a recommendation as displayed through his follow-up emails with Director Matthews. Ex. 10, Dec. 17, 2020 email from Administrator Luther. Each of Relator Board of Elections' own subsequent, written communications to the Board of Commissioners through Director Matthews characterized the December 9 vote as a recommendation. Ex. 12, Jan. 13, 2021 email from Director Matthews (including the subject heading "Recommendation for acquisition," with attached "Recommendation to the Commissioners.pdf" and stating that Relator had "voted unanimously to acquire the Dominion Voting Systems ImageCast X *and to recommend to the Stark County Board of Commissioners* to acquire the system..." (emphasis added).

If it walks like a recommendation and talks like a recommendation – and is labeled by the recommenders as a recommendation – then in operation and in fact, it is a recommendation. As a result of the Board of Elections' December 9, 2020 motion, only the Board of Commissioners could adopt the Dominion voting machines on the Board of Elections' initial recommendation pursuant to R.C. 3506.02(B). Relator Board of Elections can try now to course-correct and attribute different meanings to clear wording, but that cannot change the operative fact that it made an official recommendation to Respondents under R.C. 3506.02(B). Once this recommendation was

made, Respondents had every right to review the recommendation and request reasonable information to inform their decisions in acting on it. Relator Board of Elections thwarted this recommendation process, which Respondents aimed to be collaborative and in line with Secretary of State Advisory 2018-04, by ignoring information requests and demanding an unquestioned rubber-stamping by the Board of Commissioners.

B. A board of elections lacks authority to purchase voting machines pursuant to R.C. 3506.02(A) unless the board of elections already has the funds in its budget to pay for them.

Ignoring the plain language of the *recommendation* and all related communications conveyed by it to the Board of Commissioners, Relator Board of Elections claims that it voted, twice, to adopt a new voting system not under R.C. 3506.02(B), but under R.C. 3506.02(A) (Relator's Br. 20). Even assuming *arguendo* that Relator's claim is accurate, given the lack of any appropriation available to Relator for this new equipment, Relator lacked authority to legally and legitimately pursue this option under R.C. 3506.02(A).

R.C. 3506.02(A) provides one avenue (of three available avenues) for the acquisition of voting machines – the option which allows voting equipment for use in county elections to be adopted “[b]y the board of elections.” Relator Board of Elections essentially argues that, under R.C. 3506.02(A), the Board of Commissioners has no more discretion in purchasing voting machines than a bank teller does in cashing a check. Yet, even a bank teller is not required to cash a check if there are insufficient funds in the account.

Similarly, a board of elections lacks authority to purchasing voting equipment, without the consent of the board of county commissioners, if the board of elections does not have sufficient funds appropriated to the board of elections to meet that obligation. R.C. 3501.17(A) states, in relevant part:

The board of elections shall not incur any obligation involving the expenditure of money *unless there are moneys sufficient in the funds appropriated therefor to meet the obligation.*

R.C. 3501.17(A) (emphasis added).

Applied here, Relator Board of Elections admittedly lacks sufficient funds appropriated to it to purchase the machines on its own. Ex. 1, Luther Aff. ¶ 7; Rel. Ex. A-8 (December 9, 2020 meeting minutes of Relator indicating motion to “request funding from [the Commissioners] for the purchase on the terms that have been presented”). Only annual placeholder budget *requests* of \$7,600,000 signaling a future need for new machines were given to Respondent Board of Commissioners in 2019, 2020, and 2021. *Id.*; *see also* Ex. 2, Creighton Aff. ¶ 12, Ex. 3, Regula Aff. ¶ 13, Ex. 4, Smith Aff. ¶ 12. Despite these placeholder budget *requests*, the necessary funds for a new voting system were not actually appropriated and have never been appropriated to the Board of Elections to date. *Id.* All other necessary funds for conducting Stark County elections and operating the Board of Elections were indeed appropriated for that same timeframe. *Id.* Thus, R.C. 3501.17 prohibits Relator Board of Elections from *unilaterally* adopting and acquiring the voting machines pursuant to R.C. 3506.02(A).

The difference between appropriated and unappropriated expenditures by a board of elections is precisely the reason why there is a statutory difference between having a board of county commissioners consider and act on a *recommendation* of a board of elections to buy voting machines pursuant to R.C. 3506.02(B) (when the board of elections does not have sufficient funds in its budget to buy them, as here), and having a board of elections acquire voting machines without input from the county commissioners pursuant to R.C. 3506.02(A) (when a board of elections already has sufficient funds in its budget to buy them). R.C. 3506.02, and, for that matter, R.C. 3506.03, are to be read and applied *in pari materia* with R.C. 3501.17.

Relator’s interpretation of R.C. 3506.02 would make R.C. 3506.02(B) a meaningless “courtesy” rather than an effective portion of the statute. There would be no reason to merely “recommend” that voting machines be acquired if a board of elections could always acquire them with or without the county commissioners’ consent. Since “it is presumed that...[t]he entire statute is intended to be effective” (R.C. 1.47(B)), Relator’s interpretation making R.C. 3506.02(B) superfluous is untenable.

This does not mean a board of county commissioners can unreasonably refuse either to appropriate funds or approve a recommendation. If, hypothetically, a board of county commissioners should *unreasonably* refuse to appropriate necessary and appropriate funds to a board of elections, there is an adequate remedy at law – in the county common pleas court, *not* in the Ohio Supreme Court. R.C. 3501.17(A) states, in relevant part:

If the board of county commissioners fails to appropriate an amount sufficient to provide for the necessary and proper expenses of the board of elections pertaining to the conduct of elections, the board of elections may apply to the court of common pleas within the county, which shall fix the amount necessary to be appropriated and the amount shall be appropriated.

R.C. 3501.17(A).

Ohio law does not give unelected boards of elections authority to write blank checks spending taxpayers’ money without any oversight by the elected board of commissioners. A board of elections may:

- (1) Spend money that has already been appropriated to it (per R.C. 3506.02(A) and R.C. 3501.17(A));
- (2) *Recommend* that a board of county commissioners purchase voting machines (per R.C. 3506.02(B)); or,
- (3) Litigate in the *county common pleas court* the reasonableness of an appropriation or lack thereof (per R.C. 3501.17(A)).

But Relator Board of Elections has no authority to bypass the R.C. 3501.17(A) common pleas court process to directly seek a writ of mandamus from the Ohio Supreme Court to appropriate funds for the purchase of voting machines – under the apparent theory that once the board of elections has hastily decided on a particular vendor, no further inquiry is permitted. A board of elections is not the sole judge and jury of how it spends taxpayers’ money.

Where, as here, the funds to purchase the voting machines have not previously been appropriated and included in a board of elections’ budget, and the board of elections has made no effort to challenge the amount of the appropriation in the county common pleas court, the board of elections is prohibited by R.C. 3501.17(A) from invoking R.C. 3506.02(A) to demand that the board of county commissioners spend taxpayer funds to buy the machines without reviewing the appropriateness of doing so.

Ohio law simply does not impose upon Respondents Board of Commissioners a non-discretionary duty to sign – blindly – whatever check the unelected Relator Board of Elections drafts for the Commissioners’ signature.

C. It would be unreasonable to interpret Ohio law to *require* boards of county commissioners to make large expenditures of taxpayers’ dollars without having information establishing a reasonable, adequate basis for such expenditures.

“In enacting a statute, it is presumed that...[a] just and reasonable result is intended.” R.C. 1.47(C). “If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters...[t]he object sought to be attained [and]...[t]he consequences of a particular construction....” R.C. 1.49(A) and (E).

Even if the statutes at issue, R.C. 3506.02 and R.C. 3506.03, were ambiguous, they would need to be interpreted in a reasonable, rather than an unreasonable, manner. A sound public policy requires that boards of county commissioners receive a reasonable, adequate basis and information

justifying the significant expenditure of public funds demanded by Relator Board of Elections. Indeed, Ohio Secretary of State Advisory 2018-04 (Ex. 6), reasonably and appropriately asked Relator Board of Elections “to work with its board of county commissioners in selecting the county’s voting system.” Unfortunately, and unequivocally, Relator Board of Elections chose not to follow this reasonable, prudent, and good government-focused directive.

Respondents requested information from Relator Board of Elections for *four months* leading up to this action. Ex. 2, Creighton Aff. ¶ 18; Ex. 3, Regula Aff. ¶ 19; Ex. 4, Smith Aff. ¶ 19. This request was in keeping with Stark County process and procedure involving collaborative work sessions to consider contract proposals and anticipated significant public purchases. Ex. 3, Regula Aff. ¶ 6. Indeed, Respondent Commissioners simply wanted to have basic questions answered and essential documentation provided – including cost proposals, contract terms, side-by-side cost comparisons of evaluated vendors, and insight into what, if any, vigorous negotiation ensued during the selection process. *Id.* at ¶¶ 15, 32. To this day, Relator has balked at and stonewalled these requests, failing to provide necessary information for Respondents to responsibly act on Relator’s “desire” (Relator’s Br. 11) for the acquisition of particular voting equipment. Any delay in the process to select and purchase a new voting system was caused by the Board of Elections’ improper refusal to provide to the Board of Commissioners all necessary information to reasonably make an informed decision that benefits Stark County taxpayers.

In making a rather simple request for basic information and comparative values between various models of voting equipment, Respondents Board of Commissioners did not ask Relator Board of Elections to painstakingly catalogue every option and possibility under the heavens. It is eminently reasonable for the elected officials ultimately responsible for the expenditure of Stark County tax dollars to ask appointed Board of Elections members and staff for a thoughtful

explanation as to why a particular model from one corporate vendor might be a better choice than another model from the same or a competing vendor.

Having doggedly refused to provide this information at every turn, Relator now asks this Court to declare that no board of county commissioners has any right to receive any information on the appropriateness of spending millions of taxpayers' money on voting machines, so long as the board of elections desires to spend the money. To create the new rule of law demanded by Relator Board of Elections would cause an unjust and unreasonable result, and further frustrate the very object and purpose of requiring involvement by the board of county commissioners, in violation of R.C. 1.47 and R.C. 1.49. It is both right and just to permit boards of county commissioners to request and receive from boards of elections the necessary information to reasonably make an informed decision benefitting the public. Any duty of Respondents to act and authorize multi-million-dollar purchases under R.C. 3506.02 and R.C. 3506.03 should only be triggered upon receiving all necessary and appropriate information. The plain meaning of the statutes authorizes this and, even if the statutes were found to be ambiguous, the rules of construction would preclude the "check signer acting under duress" interpretation that Relator seeks.

D. Relator has failed to satisfy the necessary elements of a cognizable mandamus action.

Each of the above failures inherent in Relator Board of Elections' arguments prohibits Relator from the mandamus relief sought. The requirements for mandamus are well-established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 3, 591 N.E.2d 1186 (1992). Mandamus may compel a court to exercise judgment or discharge a function, but it may not control judicial discretion,

even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Moreover, mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 631 N.E.2d 119 (1994). Stated differently, if the relator had an adequate remedy, including an appeal or some statutory form of relief, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 676 N.E.2d 108 (1997).

Here, the Board of Elections lacks any clear legal right to the requested relief asking this Court to compel Respondent Commissioners to make a multi-million-dollar purchase of a new voting system, using taxpayer funds, on the Board of Elections' finger-snapped order. Relator's initial recommendation under R.C. 3506.02(B) conferred exclusive decision-making authority to approve or reject said recommendation on the Board of Commissioners. And, even if Relator's contention that it appropriately moved to acquire new voting equipment under its own authority per R.C. 3506.02(A) is correct, R.C. 3501.17(A) is the barrier to any clear legal right, since Relator Board of Elections lacked the funds sufficient to make the purchase on its own.

Moreover, no clear legal duty is imposed on the Board of Commissioners, under either R.C. 3506.02(A) or R.C. 3506.02(B), compelling the Board of Commissioners to sign off on Relator's preferred voting system without having received reasonable and adequate information about the selection process leading to the purchase. No precedent has ever been established requiring Respondents to sign blank checks for voting equipment because Relator says so. And, sound public policy calls for due diligence and a collaborative exchange of information before elected public officials approve million-dollar purchases.

Furthermore, as shown above, Relator Board of Elections has an adequate remedy at law pursuant to R.C. 3501.17(A). Relator's request for immediate relief based upon a supposed,

arbitrary, self-imposed June 15 deadline (Relator’s Br. 22) does not usurp the express relief made available to Relator under R.C. 3501.17(A), allowing it to apply to the Stark County Common Pleas Court to fix the amount necessary to be appropriated for a new voting system. Relator Board of Elections has never made this application nor pursued this adequate remedy at law. Ex. 1, Luther Aff. ¶ 7. A writ of mandamus to this Supreme Court is not an allowable substitute for this express remedy. An extraordinary writ must only be granted when all of the extraordinary elements to it are fully in place. Lacking any of the well-established elements for a cognizable mandamus action, Relator Board of Elections’ requested writ must be denied.

IV. CONCLUSION

The Stark County Commissioners understand and respect the need to obtain high-quality voting equipment for the voters of Stark County to use in the years to come. To achieve that laudable goal requires diligence, understanding, and very basic communication among county government partners. Through every event leading up to this action, Relator Board of Elections has sailed well clear of that mainstream maxim. The Board of Elections kept the Commissioners and Stark County taxpayers in the dark throughout the entire vetting and review process for this significant public purchase. Relator unfortunately and inaccurately claims that, by asking to press the pause button in the interests of transparency and providing comparative financial information to the voters and taxpayers themselves, the Commissioners somehow “politicized” this matter and “overstepped their authority.” Relator’s Br. 23. Sadly, by shielding information from the public and asking its elected representatives to sign a \$1,475,735.46 check up-front, and a check for \$4,459,685 over the 10-year life of the maintenance contract, no questions asked, it is Relator that is overstepping.

Respondents, Stark County Board of Commissioners, Bill Smith, Janet Weir Creighton, and Richard Regula respectfully request that this Court deny Relator's request for a writ of mandamus, dismiss this original action with prejudice, and order any other relief deemed necessary by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May 2021, I electronically filed a copy of the foregoing ***Merit Brief of Respondents Stark County Board of Commissioners, Bill Smith, Janet Weir Creighton, and Richard Regula***. This pleading also was served, via e-mail, on the 10th day of May 2021, upon the following:

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APPENDIX

Ohio Revised Code

Section 3501.17 Expenditures and costs.

Effective: September 8, 2016

Legislation: House Bill 166 - 131st General Assembly

(A) The expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in the same manner as other county expenses are paid. If the board of county commissioners fails to appropriate an amount sufficient to provide for the necessary and proper expenses of the board of elections pertaining to the conduct of elections, the board of elections may apply to the court of common pleas within the county, which shall fix the amount necessary to be appropriated and the amount shall be appropriated. Payments shall be made upon vouchers of the board of elections certified to by its chairperson or acting chairperson and the director or deputy director, upon warrants of the county auditor.

The board of elections shall not incur any obligation involving the expenditure of money unless there are moneys sufficient in the funds appropriated therefor to meet the obligation. If the board of elections requests a transfer of funds from one of its appropriation items to another, the board of county commissioners shall adopt a resolution providing for the transfer except as otherwise provided in section 5705.40 of the Revised Code. The expenses of the board of elections shall be apportioned among the county and the various subdivisions as provided in this section, and the amount chargeable to each subdivision shall be paid as provided in division (J) of this section or withheld by the county auditor from the moneys payable thereto at the time of the next tax settlement. At the time of submitting budget estimates in each year, the board of elections shall submit to the taxing authority of each subdivision, upon the request of the subdivision, an estimate of the amount to be paid or withheld from the subdivision during the current or next fiscal year.

A board of township trustees may, by resolution, request that the county auditor withhold expenses charged to the township from a specified township fund that is to be credited with revenue at a tax settlement. The resolution shall specify the tax levy ballot issue, the date of the election on the levy issue, and the township fund from which the expenses the board of elections incurs related to that ballot issue shall be withheld.

(B) Except as otherwise provided in division (F) of this section, the compensation of the members of the board of elections and of the director, deputy director, and regular employees in the board's offices, other than compensation for overtime worked; the expenditures for the rental, furnishing, and equipping of the office of the board and for the necessary office supplies for the use of the board; the expenditures for the acquisition, repair, care, and custody of the polling places, booths, guardrails, and other equipment for polling places; the cost of tally sheets, maps, flags, ballot boxes, and all other permanent records and equipment; the cost of all elections held in and for the state and county; and all other expenses of the board which are not chargeable to a political subdivision in accordance with this section shall be paid in the same manner as other county expenses are paid.

(C) The compensation of precinct election officials and intermittent employees in the board's offices; the cost of renting, moving, heating, and lighting polling places and of placing and

removing ballot boxes and other fixtures and equipment thereof, including voting machines, marking devices, and automatic tabulating equipment; the cost of printing and delivering ballots, cards of instructions, registration lists required under section 3503.23 of the Revised Code, and other election supplies, including the supplies required to comply with division (H) of section 3506.01 of the Revised Code; the cost of contractors engaged by the board to prepare, program, test, and operate voting machines, marking devices, and automatic tabulating equipment; and all other expenses of conducting primaries and elections in the odd-numbered years shall be charged to the subdivisions in and for which such primaries or elections are held. The charge for each primary or general election in odd-numbered years for each subdivision shall be determined in the following manner: first, the total cost of all chargeable items used in conducting such elections shall be ascertained; second, the total charge shall be divided by the number of precincts participating in such election, in order to fix the cost per precinct; third, the cost per precinct shall be prorated by the board of elections to the subdivisions conducting elections for the nomination or election of offices in such precinct; fourth, the total cost for each subdivision shall be determined by adding the charges prorated to it in each precinct within the subdivision.

(D) The entire cost of special elections held on a day other than the day of a primary or general election, both in odd-numbered or in even-numbered years, shall be charged to the subdivision. Where a special election is held on the same day as a primary or general election in an even-numbered year, the subdivision submitting the special election shall be charged only for the cost of ballots and advertising. Where a special election is held on the same day as a primary or general election in an odd-numbered year, the subdivision submitting the special election shall be charged for the cost of ballots and advertising for such special election, in addition to the charges prorated to such subdivision for the election or nomination of candidates in each precinct within the subdivision, as set forth in the preceding paragraph.

(E) Where a special election is held on the day specified by division (E) of section 3501.01 of the Revised Code for the holding of a primary election, for the purpose of submitting to the voters of the state constitutional amendments proposed by the general assembly, and a subdivision conducts a special election on the same day, the entire cost of the special election shall be divided proportionally between the state and the subdivision based upon a ratio determined by the number of issues placed on the ballot by each, except as otherwise provided in division (G) of this section. Such proportional division of cost shall be made only to the extent funds are available for such purpose from amounts appropriated by the general assembly to the secretary of state. If a primary election is also being conducted in the subdivision, the costs shall be apportioned as otherwise provided in this section.

(F) When a precinct is open during a general, primary, or special election solely for the purpose of submitting to the voters a statewide ballot issue, the state shall bear the entire cost of the election in that precinct and shall reimburse the county for all expenses incurred in opening the precinct.

(G)

(1) The state shall bear the entire cost of advertising in newspapers statewide ballot issues, explanations of those issues, and arguments for or against those issues, as required by Section 1g of Article II and Section 1 of Article XVI, Ohio Constitution, and any other section of law.

Appropriations made to the controlling board shall be used to reimburse the secretary of state for all expenses the secretary of state incurs for such advertising under division (G) of section 3505.062 of the Revised Code.

(2) There is hereby created in the state treasury the statewide ballot advertising fund. The fund shall receive transfers approved by the controlling board, and shall be used by the secretary of state to pay the costs of advertising state ballot issues as required under division (G)(1) of this section. Any such transfers may be requested from and approved by the controlling board prior to placing the advertising, in order to facilitate timely provision of the required advertising.

(H) The cost of renting, heating, and lighting registration places; the cost of the necessary books, forms, and supplies for the conduct of registration; and the cost of printing and posting precinct registration lists shall be charged to the subdivision in which such registration is held.

(I)

(1)

(a) At the request of a majority of the members of the board of elections, the board of county commissioners may, by resolution, establish an elections revenue fund. Except as otherwise provided in this division and in division (I)(2) of this section, the purpose of the fund shall be to accumulate revenue withheld by or paid to the county under this section for the payment of any expense related to the duties of the board of elections specified in section 3501.11 of the Revised Code, upon approval of a majority of the members of the board of elections. The fund shall not accumulate any revenue withheld by or paid to the county under this section for the compensation of the members of the board of elections or of the director, deputy director, or other regular employees in the board's offices, other than compensation for overtime worked.

(b) Notwithstanding sections 5705.14, 5705.15, and 5705.16 of the Revised Code, the board of county commissioners may, by resolution, transfer money to the elections revenue fund from any other fund of the political subdivision from which such payments lawfully may be made. Following an affirmative vote of a majority of the members of the board of elections, the board of county commissioners may, by resolution, rescind an elections revenue fund established under this division. If an elections revenue fund is rescinded, money that has accumulated in the fund shall be transferred to the county general fund.

(2)

(a) The board of county commissioners of a county that receives a payment from a political subdivision under division (J) of this section shall, by resolution, establish a special elections fund. The purpose of the fund shall be to accumulate revenue paid to the county by political subdivisions under division (J) of this section for the cost of preparing for and conducting special elections.

(b) If both of the following apply, the board of county commissioners may, by resolution, rescind the special elections fund and transfer any remaining money in the fund to the county general fund or to the elections revenue fund:

(i) All notifications and payments required under division (J)(3) of this section have been made.

(ii) The county has not received any payments from political subdivisions under division (J)(2) of this section for a future special election.

(J)

(1) Not less than fifteen business days before the deadline for submitting a question or issue for placement on the ballot at a special election, the board of elections shall prepare and file with the board of county commissioners and the office of the secretary of state the estimated cost, based on the factors enumerated in this section, for preparing for and conducting an election on one question or issue, one nomination for office, or one election to office in each precinct in the county at that special election and shall divide that cost by the number of registered voters in the county.

(2) The board of elections shall provide to a political subdivision seeking to submit a question or issue, a nomination for office, or an election to office for placement on the ballot at a special election with the estimated cost for preparing for and conducting that election, which shall be calculated either by multiplying the number of registered voters in the political subdivision with the cost calculated under division (J)(1) of this section or by multiplying the cost per precinct with the number or precincts in the political subdivision. A political subdivision submitting a question or issue, a nomination for office, or an election to office for placement on the ballot at that special election shall pay to the county special elections fund sixty-five per cent of the estimated cost of the election not less than ten business days after the deadline for submitting a question or issue for placement on the ballot for that special election.

(3) Not later than sixty days after the date of a special election, the board of elections shall provide to each political subdivision the true and accurate cost for the question or issue, nomination for office, or election to office that the subdivision submitted to the voters on the special election ballots. If the board of elections determines that a subdivision paid less for the cost of preparing and conducting a special election under division (J)(2) of this section than the actual cost calculated under this division, the subdivision shall remit to the county special elections fund the difference between the payment made under division (J)(2) of this section and the final cost calculated under this division within thirty days after being notified of the final cost. If the board of elections determines that a subdivision paid more for the cost of preparing and conducting a special election under division (J)(2) of this section than the actual cost calculated under this division, the board of elections promptly shall notify the board of county commissioners of that difference. The board of county commissioners shall remit from the county special elections fund to the political subdivision the difference between the payment made under division (J)(2) of this section and the final cost calculated under this division within thirty days after receiving that notification.

(K) As used in this section:

(1) "Political subdivision" and "subdivision" mean any board of county commissioners, board of township trustees, legislative authority of a municipal corporation, board of education, or

any other board, commission, district, or authority that is empowered to levy taxes or permitted to receive the proceeds of a tax levy, regardless of whether the entity receives tax settlement moneys as described in division (A) of this section;

(2) "Statewide ballot issue" means any ballot issue, whether proposed by the general assembly or by initiative or referendum, that is submitted to the voters throughout the state.