

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel.
RHONDA L. COLVIN, *et al.*

Relators,

vs.

JENNIFER BRUNNER, SECRETARY
OF STATE OF OHIO,

Respondent.

Case No. 08-1813

Original Action in Mandamus

Expedited Election Matter

Under S.Ct. Prac. R.X. § 9

ANSWER OF JENNIFER BRUNNER,
SECRETARY OF STATE

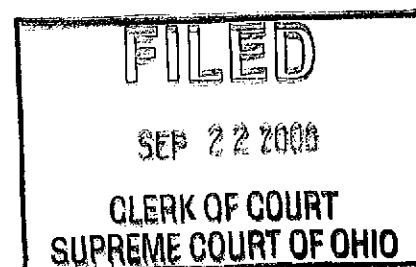
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IN THE OHIO SUPREME COURT

STATE EX REL. RHONDA COLVIN, *ET AL.*,

RELATORS,

VS.

CASE NO. 2008-1813

JENNIFER BRUNNER, Ohio Secretary of State,

RESPONDENT.

ANSWER

Now comes Respondent Secretary of State Jennifer Brunner and for her answer to the Relators' Complaint states the following:

1. Denies each and every allegation not specifically admitted to herein.
2. With respect to the allegations contained in Paragraph 1 of the Complaint, admits that Rhonda Colvin is currently registered as a voter. The Secretary further states that R.C. 3501.01(N) defines "qualified elector" as "a person having the qualifications provided by law to be entitled to vote." The Secretary denies for lack of knowledge that Rhonda L. Colvin is and will remain eligible to cast a ballot as a qualified elector in the 2008 general election.
3. With respect to the allegations contained in Paragraph 2 of the Complaint, admits that C. Douglas Moody is currently registered as a voter. The Secretary further states that R.C. 3501.01(N) defines "qualified elector" as "a person having the qualifications provided by law to be entitled to vote." The Secretary denies for lack of knowledge that C. Douglas Moody is and will remain eligible to cast a ballot as a qualified elector in the 2008 general election.

4. With respect to the allegations contained in Paragraph 3 of the Complaint, admits that Secretary Brunner is the duly elected Secretary of State of Ohio and that she has certain duties which are outlined, predominantly but not exclusively, in Title 35 of the Revised Code.
5. With respect to the allegations contained in Paragraph 4 of the Complaint, the Respondent states that she is an “election officer” or “election official” as that term is defined in R.C. 3501.01(U)(1) and that, pursuant to R.C. 3501.01(CC), she must “perform other duties required by law.” She further states that under R.C. 3501.04 she is “the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV [35] of the Revised Code.” Respondent Brunner further states that this Court has long recognized that the Secretary of State also has authority to advise county boards of elections on the proper manner of conducting elections, has the authority to compel the observation of elections laws and the performance of other such duties as required by law. *State ex rel. Cleveland City Council v. Board of Elections* (1974), 40 Ohio App.2d 299. In addition, this Court has held that the Secretary’s interpretation of Ohio election law is entitled to deference if a statute is ambiguous and subject to two or more reasonable interpretations. *Whitman v Hamilton County Board of Elections* (2002), 97 Ohio St.3d 216.
6. Denies the allegations contained in Paragraph 5 of the Complaint.
7. With respect to the allegations contained in Paragraph 6 of the Complaint admits that the Relators have quoted words or phrases contained in R.C. 3505.20. The Respondent further denies for lack of knowledge whether the Relators are qualified

voters and further denies their assertions concerning Directive 2008-63. The Respondent denies all the remaining allegations contained in Paragraph 6 of the Complaint.

8. With respect to the allegations contained in Paragraph 7 of the Complaint, the Secretary admits that she has the legal obligation to direct and instruct the members of the various boards of elections on the proper method of conducting elections. The Secretary further admits that her directives to the boards of elections bear the weight of law and must be followed by those boards. The Secretary further states that Directive 2008-63 is in full compliance with both federal and state law, including R.C. 3501.05(B) and (C), to “issue instructions by directives and advisories to members of the boards as to the proper methods of conducting elections” and to provide the necessary “rules and instructions for the conduct of elections,” that she has no clear legal duty to advise the boards of elections to disregard that directive and that, pursuant to R.C. 3501.11, requiring boards of elections to “perform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state,” it would be a violation of Ohio law for a board of elections to disregard her directive, nor does the Secretary have a clear legal duty to instruct or advise the boards of elections to violate Ohio law. The Secretary denies any remaining allegations contained in Paragraph 7 of the Complaint.
9. With respect to the allegations contained in Paragraph 8 of the Complaint, states that Chapter 3509 sets forth some of the law governing absent voter ballots. The Secretary further admits that federal statutes and constitutional provisions control or impact Ohio’s absent voter balloting procedures in light of the fact that the November 2008

general election is a federal election. The Secretary further admits that the Relators have quoted words or phrases contained in R.C. 3509.01 and 3509.02 but states that those legal provisions speak for themselves. The Secretary further avers that Paragraph 8 is not a factual allegation but merely a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

10. With respect to the allegations contained in Paragraph 9 of the Complaint, states that the Relators have quoted words or phrases contained in R.C. 3505.20 and that the statute speaks for itself. The Secretary further avers that Paragraph 9 is not a factual allegation but merely a legal conclusion and that no response to the allegation is required. To the extent a response is required, it is denied.
11. With respect to the allegations contained in Paragraph 10 of the Complaint, admits that the Relators have quoted words or phrases contained in R.C. 3509.03. The Secretary further admits that an application for an absent voter's ballot, pursuant to R.C. 3509.03(G) requires, "A statement that the person requesting the ballot is a qualified elector." The Secretary further states that the requirements for obtaining an absentee ballot are listed in R.C. 3509.03, and the statute speaks for itself. Therefore, no further response to this allegation is required. To the extent any further response is required, all remaining allegations in Paragraph 10 of the Complaint are denied.
12. With respect to the allegations contained in Paragraph 11 of the Complaint, admits that the Relators have quoted words or phrases contained in R.C. 3501.01(N) and (O). The Secretary further states that these statutes speak for themselves and that no

further response to these allegations is required. To the extent a response is required, it is denied.

13. With respect to the allegations contained in Paragraph 12 of the Complaint, the Secretary states that Article V Sec 5 of the Ohio Constitution does not exist. However, to the extent that the Relators intend to cite Article V Section 1, the Secretary admits that the Relators have attempted to quote Art. V Sec. 1 of the Ohio Constitution. The Secretary further states that this constitutional provision speaks for itself and that no further response to these allegations is required. To the extent a response is required, it is denied.
14. With respect to the allegations contained in Paragraph 13 of the Complaint, admits that the Relators have quoted words or phrases contained in R.C. 3503.01. The Secretary further states that this statute speaks for itself and that no further response to this allegation is required. To the extent a response is required, it is denied.
15. With respect to the allegations contained in Paragraph 14 of the Complaint, admits R.C. 3509.03 and 3509.04 contain some of the legal requirements for a person to be issued an absentee ballot. The Secretary further admits that federal statutes and constitutional provisions control or impact Ohio's absent voter balloting procedures in light of the fact that the November 2008 general election is a federal election. The Secretary further states that these statutes speak for themselves and that no further response to this allegation is required. The Secretary further admits that an election officer may not deliver an absent voter's ballot to a person who has not provided information required by R.C. 3509.03, including a statement that he or she is a

“qualified elector.” To the extent any further response is required, all remaining allegations in Paragraph 14 of the Complaint are denied..

16. With respect to the allegations contained in Paragraph 15 of the Complaint, admits that R.C. 3503.15 details some of the requirements for a statewide voter registration database. The Secretary further admits that R.C. 3503.15 was adopted in response to the Help America Vote Act, 42 USC 15301, *et seq.* (“HAVA”) which also mandates that states provide a statewide voter registration database. The Secretary further states that under the Supremacy clause of the United States Constitution, provisions of HAVA control over conflicting provisions of Ohio law. The Secretary further states that Ohio’s 30-day registration period, on its face or as applied, and whether contained in R.C. 3503.01 or Article V sec. 1 of the Ohio Constitution, also must conform to the requirements of federal law, including the National Voter Registration Act, 42 USC 1973gg, *et seq.* The Secretary denies that any 30-day period alleged by Relators applies to a deadline for registering before ballots may be both cast and counted and has no impact upon the issuance of absentee ballots. Finally, the Secretary states that the allegations in Paragraph 15 are legal conclusions and not factual allegations and that no further response is required. To the extent any further response is required, it is denied.
17. With respect to the allegations contained in Paragraph 16 of the Complaint, the Secretary admits that she issued Directive 2008-63 and that a true and accurate copy is attached to the Complaint. The Secretary further states that the Directive speaks for itself and that no further response concerning these allegations is required. To the extent a response is required, the allegations are denied.

18. With respect to the allegations contained in Paragraph 17 of the Complaint, admits that the Relators have quoted words and phrases contained in Directive 2008-63 and further states that the Directive speaks for itself. The Respondent further admits that the Directive repeats the requirements of both federal and state law. To the extent any further response is required, the allegations are denied.
19. With respect to the allegations contained in Paragraph 18 of the Complaint, admits that the Relators have quoted words and phrases contained in Directive 2008-63 and further states that the Directive speaks for itself. The Respondent further admits that the Directive repeats the requirements of both federal and state law. To the extent any further response is required, the allegations of paragraph 18 of the Complaint are denied.
20. With respect to the allegations contained in Paragraph 19 of the Complaint, admits that the Relators have quoted words or phrases contained in R.C. 309.09(A) and further admits that the Relators have attached what purport to be legal opinions from three county prosecutors concerning Directive 2008-63. The Secretary denies that the legal opinion of the county prosecutors is correct or may be relied upon by boards of elections. Furthermore, the Secretary states that the legal opinion of a county prosecutor is not binding upon her. Instead, the Secretary admits that a board of elections is obliged to follow her interpretation of state law due to her position as the State's chief elections official pursuant to R.C. 3501.04 and 3501.05 and other requirements of state law and this Court's historic deference to the Secretary of State's interpretation of Title 35. The Secretary denies the remaining allegations contained in Paragraph 19 of the Complaint.

21. With respect to the allegations contained in Paragraph 20 of the Complaint, states that the Relators have quoted a portion of what purports to be the legal opinion of the Holmes County Prosecutor but states that the prosecutor's opinion inaccurately states statutory text. The Secretary further states that had the prosecutor relied on accurate statutory text, she believes that he would have reached an opinion consistent with her own. The Secretary denies that the legal opinion of the county prosecutors is correct or may be relied upon by boards of elections. Furthermore, the Secretary states that the legal opinion of a county prosecutor is not binding upon her. Instead, the Secretary admits that a board of elections is obliged to follow her interpretation of state law due to her position as the State's chief elections official pursuant to R.C. 3501.04 and 3501.05 and other requirements of state law and this Court's historic deference to the Secretary of State's interpretation of Title 35. Finally, the Secretary states that Paragraph 20 of the Complaint merely states legal conclusions rather than factual ones and that no response is required to the allegations. To the extent any further response is required, the allegations of paragraph 20 of the Complaint are denied.
22. With respect to the allegations contained in Paragraph 21 of the Complaint, denies for lack of knowledge when Gary Nasal issued the referenced opinion to the Miami County Board of Elections and further denies for lack of knowledge whether the attached opinion is actually the opinion of the prosecutor. The Secretary further states that the opinion of the prosecutor is not binding upon her and states that the prosecutor has reached an opinion contrary to both Ohio and federal law. The Secretary denies that the legal opinion of the county prosecutors is correct or may be

relied upon by boards of elections. Furthermore, the Secretary states that the legal opinion of a county prosecutor is not binding upon her. Instead, the Secretary admits that a board of elections is obliged to follow her interpretation of state law due to her position as the State's chief elections official pursuant to R.C. 3501.04 and 3501.05 and other requirements of state law and this Court's historic deference to the Secretary of State's interpretation of Title 35. Finally, the Secretary states that Paragraph 21 contains legal conclusions, not factual allegations, and that no response is necessary. To the extent any further response is required, the allegations of paragraph 21 of the Complaint are denied.

23. With respect to the allegations contained in Paragraph 22 of the Complaint, denies for lack of knowledge when Stephen Proanai issued the referenced opinion to the Madison County Board of Elections and further denies for lack of knowledge whether the attached opinion is actually the opinion of the prosecutor. The Secretary further states that the opinion of the prosecutor is not binding upon her and that the prosecutor has reached an opinion contrary to both Ohio and federal law. The Secretary denies that the legal opinion of the county prosecutors is correct or may be relied upon by boards of elections. Furthermore, the Secretary states that the legal opinion of a county prosecutor is not binding upon her. Instead, the Secretary admits that a board of elections is obliged to follow her interpretation of state law due to her position as the State's chief elections official pursuant to R.C. 3501.04 and 3501.05 and other requirements of state law and this Court's historic deference to the Secretary of State's interpretation of Title 35. Finally, the Secretary states that Paragraph 22 of the Complaint contains legal conclusions, not factual allegations, and

that no response is necessary. To the extent any further response is required, the allegations of paragraph 22 of the Complaint are denied

24. With respect to the allegations contained in Paragraph 23 of the Complaint, admits that the Relators have accurately quoted a portion of an article attached to the Complaint, but denies that any reasonable person could read the purported quote as advocating that any individual who is not a resident of the State of Ohio register and request an absentee ballot in the State of Ohio. The Secretary further denies that Directive 2008-63 allows any individual, whether it is a college student or a senior citizen, to register and vote in Ohio if he or she is not a resident of the State. The Secretary also avers that the statement purportedly attributed in the newspaper article is hearsay and is not, nor can it be used, as evidence in this case. Finally, the Secretary denies the remaining allegations contained in Paragraph 23 of the Complaint.
25. Denies the allegations contained in Paragraph 24 of the Complaint and further states that all county boards of elections are statutorily required to “[p]erform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state.” R.C. 3501.11(P). The Secretary further states that since every board of elections in the State, including the boards which received opinions from their prosecutors, are statutorily obligated to follow the Secretary’s directives and advisories, including the Secretary’s interpretation of the laws of this state concerning the administration of elections, regardless of their prosecutor’s opinion, such statutory requirements ensure statewide uniformity in affording all Ohio electors the same opportunities to exercise

the franchise of voting in this state for both state and federal elections, including voting via the distribution and counting of absentee ballots.

26. With respect to the allegations contained in Paragraph 25 of the Complaint, states that the Relators have asserted a legal conclusion, not a factual allegation. The Secretary further states that the holding in *Bush v. Gore* (2000), 531 U.S. 98, was simply that different inter and intra county definitions of what constituted a legal vote using the same voting technology constituted a violation of the equal protection clause and that the holding of that case was specifically limited to the facts at hand. The Secretary further states that since R.C. 3501.11(P) mandates that all counties follow her directives regardless of the opinion of their local prosecutors concerning the administration of elections, such uniformity ensures that no equal protection violation can or will occur. Finally, the Secretary states that no response is necessary to the allegations contained in Paragraph 25 but to the extent one is, it is denied.
27. Denies the allegations contained in Paragraph 26 of the Complaint.
28. With respect to the allegations contained in Paragraph 27, admits that the Relators are currently listed as registered voters on the Secretary's statewide database but denies for lack of knowledge whether they are qualified to vote. The Secretary denies that either of the Relators is impacted in any way by Directive 2008-63. The Secretary denies the remaining allegations contained in Paragraph 27 of the Complaint.
29. With respect to the allegations contained in Paragraph 28 of the Complaint, admits that the deadline to register to vote in any election in the state of Ohio is 30 days before the election is held. The Secretary further admits that Ohio law has provided that a person can register to vote and at the same time obtain an absentee ballot by

appearing at board of elections since at least 1981. The Secretary also admits that since amendments to R.C. 3509.02(A), permitting any qualified elector to vote an absent voter's ballot, became effective in June 2006, boards of elections across the State have permitted Ohio citizens to register to vote and obtain an absentee ballot at the same time without any known incidence of illegal voting. The Secretary states that the rest of the allegations contained in Paragraph 28 of the Complaint are legal conclusions rather than factual allegations and that no further response is required. To the extent a response is required, the allegations of Paragraph 28 of the Complaint are denied.

30. With respect to the allegations contained in Paragraph 29 of the Complaint, states that some of the requirements for obtaining an absentee ballot are located in R.C. 3509.02 and 3509.03. The Secretary further admits that the Relators have quoted words or phrases contained in R.C. 3509.02(A). The Secretary denies that only persons who have been registered to vote for a full 30-day-period may be provided an absentee ballot and further states that under federal law, an absentee ballot is considered to have been voted on Election Day – not on the day the ballot is filled out or returned to the board of elections. The Secretary further states that the allegations contained in Paragraph 29 are legal conclusions and not factual allegations and that no response is required. To the extent any further response is required, is the allegations of Paragraph 29 of the Complaint denied.

31. With respect to the allegations contained in Paragraph 30 of the Complaint, states that R.C. 3509.03 lists some of the statutory requirements for an elector to receive an absentee ballot. The Secretary further states that there are other federal and state

statutory requirements for absentee ballots not listed in R.C. 3509.03. The Secretary admits that one of the requirements for obtaining an absentee ballot is to provide the board of elections with the applicant's address. The Secretary denies the remaining allegations contained in Paragraph 30 of the Complaint.

32. With respect to the allegations contained in Paragraph 31 of the Complaint, the Secretary states that the Relators have misstated the requirements of R.C. 3509.07 by omitting part of the phrase they quoted. R.C. 3509.07 provides that if an elections official finds that an "applicant is not a qualified elector **in the precinct**... the vote shall not be accepted or counted" (emphasis added). The Secretary further states that R.C. 3509.07 speaks for itself and that no response is necessary. To the extent a response is required, it is denied.
33. With respect to the allegations contained in Paragraph 32 of the Complaint, admits that the Relators have attached a copy of a Form 11-A to the complaint and further admits that the form speaks for itself. Thus, no further response is required to this allegation. To the extent a response is required, it is denied.
34. With respect to the allegations contained in Paragraph 33 of the Complaint, states that Form 11-speaks for itself. To the extent a response is required, it is admitted.
35. With respect to the allegations contained in Paragraph 34 of the Complaint, state that R.C. 3509.03(G) and Form 11-A speak for themselves and that no response is required. The Secretary further states that any allegation concerning R.C. 3509.03(G) is a legal conclusion, not a factual allegation, and no response is necessary. The Secretary further states that a citizen must be a qualified elector for his or her

absentee ballot to be counted in the official canvass of the election. To the extent a further response is required, the allegations are denied.

36. With respect to the allegations contained in Paragraph 35 of the Complaint states that Directive 2008-63 speaks for itself. The Secretary further states that the requirements to obtain an absentee ballot are statutory and speak for themselves. The Secretary denies that any person who registers to vote and obtains an absentee ballot at the same time is making a false affirmation or acting in contravention of Ohio law, since both federal and state law recognize that the absentee ballot is cast on Election Day, not on the day it is acquired or returned to the board of elections. The Secretary denies the remaining allegations contained in Paragraph 35 of the Complaint.
37. Denies the allegations contained in Paragraph 36 of the Complaint.
38. With respect to the allegations contained in Paragraph 37 of the Complaint, states that Form 11-A speaks for itself. The Secretary denies the remaining allegations contained in Paragraph 37 of the Complaint.
39. With respect to the allegations contained in Paragraph 38 of the Complaint, denies for lack of knowledge the purported belief of Relators. To the extent that Paragraph 38 properly summarizes the beliefs of the Relators, the Secretary denies that their beliefs are correct and further states that Directive 2008-63 is in compliance with Ohio and federal law and is in recognition of how the Ohio Constitution and Ohio law have been applied in the administration of elections since at least 1981-- allowing a person to register to vote and obtain an absentee ballot at the same time in conformance with the statutory time limits established for those two acts.
40. Denies the allegations contained in Paragraph 39 of the Complaint.

41. With respect to the WHEREFORE Paragraph and its respective subparagraphs, denies that the Relators are entitled to any of the relief stated therein or to any relief whatsoever.

WHEREFORE, having answered the Relators' complaint, the Respondent asserts the following defenses, including affirmative defenses:

First Defense

42. This Court lacks subject matter jurisdiction to hear the Relators' claims.

Second Defense

43. The Relators have failed to state a claim upon which relief can be granted.

Third Defense

44. The Relators are estopped from bringing their claims. Their arguments are contrary to those made by similar electors in concurrently pending litigation relating to the question of whether or not the statement required by R.C. 3509.03(G) must be included in an application for an absent voter's ballot.

Fourth Defense

45. Directive 2008-63 is in compliance with Ohio and federal law and is in recognition of how the Ohio Constitution and Ohio law have been applied in the administration of elections since at least 1981-- allowing a person to register to vote and obtain an absentee ballot at the same time in conformance with the statutory time limits established for those two acts.

Fifth Defense

46. The Secretary's issuance of a directive is a discretionary act which cannot be reviewed by this Court in mandamus.

Sixth Defense

47. The Relators' claim is barred by the doctrine of laches.

Seventh Defense

48. Directive 2008-63 is fully in compliance with both state and federal law, including the National Voter Registration Act, 42 USC 1973gg.

Eighth Defense

49. The Relators do not have a clear legal right to the relief requested.

Ninth Defense

50. The Secretary does not owe a clear legal duty to the Relators.

Tenth Defense

51. The Relators have an adequate remedy at law.

Eleventh Defense

52. The Secretary reserves the right to add additional defenses, including additional affirmative defenses, as discovery proceeds in this case.

WHEREFORE, having answered the Relators' complaint, the Respondent requests that this Court dismiss this case.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing *Answer of Jennifer Brunner, Secretary of State* was served on this 22nd day of September, 2008, by electronic mail, facsimile transmission and ordinary, postage prepaid U.S. mail to:

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Elizabeth J. Watters (0054055)

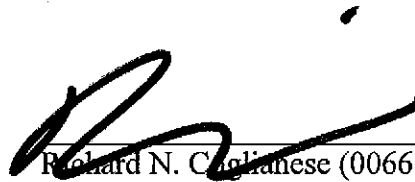
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