

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

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BRIEF OF JENNIFER BRUNNER,  
SECRETARY OF STATE

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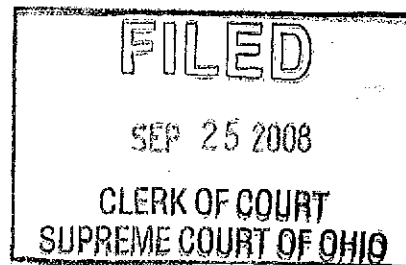
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## INTRODUCTION

The most cherished right of a citizen of the United States is the ability to decide, through peaceful means, who will exercise sovereign power. In the voting booth where all are equal and the opinions and desires of each citizen are measured equally without regard to class, income, gender, race, or any other difference. The history of America has been one of continually expanding the franchise. We have done so internally through the adoption of constitutional amendments and the enactment of laws recognizing the importance of this principle to our democracy. And consistent with this fundamental American principle, Ohio, in 2006, eased exercise of the franchise by allowing “no fault” absentee balloting. Prior to this amendment, Ohioans could only cast an absentee ballot if they met one of a short list of statutory criteria. Yet, after June of 2006, any voter in the State of Ohio may obtain and cast an absentee ballot without stating his or her reason for choosing this method of casting a ballot.

Ohio, following both its state constitution and numerous provisions of federal law, allows any eligible citizen to cast a ballot in an election so long as he or she registered to vote at least 30 days before that election. However, since 1981, Ohioans are also entitled to obtain an absentee ballot as early as 35 days before the election. Thus, Ohio law creates a five-day window during which a prospective voter can both register and request an Absent Voter Ballot. The window has existed in the law for years without complication and without challenge.

This mandamus action seeks to close the 5-day window and effectively disenfranchise registering Ohioans who want or need to vote an absentee ballot. To do so would violate federal law in this federal election. Going one step further, Relators ask this Court to create a 30-day waiting period for new registrants before they may receive absentee ballots, a waiting period that does not currently exist under Ohio election law and that is contrary to the election system

established by the General Assembly. Relators' petition for a writ of mandamus should be denied for at least four reasons.

First, this Court lacks subject matter jurisdiction over this case. Although presented as a petition for a writ of mandamus, the substantive relief Relators actually seek is an injunction preventing Secretary of State Jennifer Brunner from enforcing her interpretation of election law, as articulated in Directive 2008-63 and Directive-2008-91. This Court lacks original jurisdiction over an action seeking injunctive and/or declaratory relief.

Second, a host of equitable considerations bar relief through mandamus. The first of these equitable objections is the doctrine of laches. Relators waited 30 days to bring this suit, an unreasonable delay that precludes the relief they seek. Second, mandamus is not available because Relators are trying to compel the Secretary to perform a discretionary, not a mandatory, act, which is an improper use of the writ. And finally, on the equitable side of the ledger, issuing this mandamus writ would be contrary to public policy: it would interject administrative confusion and chaos into the election and retroactively disenfranchise qualified residents who have already voted their absentee ballots, while adding nothing to the safeguards against voter fraud already in place.

Third, even if Relators were correct about Ohio law, the 30-day waiting period they wish to create would place Ohio squarely in conflict with *federal* law, which governs this federal election. Adopting Relators' argument would place Ohio's electoral scheme in violation of the Voting Rights Act of 1970, the National Voter Registration Act of 1993, and the Uniformed and Overseas Citizens Absentee Voting Act, all of which guarantee the franchise, including the absentee ballot, to all residents who register to vote no later than 30 days before Election Day. In addition, the practical effect of adopting Relators' interpretation of the Ohio Revised Code would

be to create an unconstitutional durational residency requirement for voting, in violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States Constitution. Finally, if boards of elections were to disregard the requirement in Ohio law of following the uniform directives of the Secretary of State and instead follow whatever decision their local county prosecutors reached, such non-uniform treatment would violate the equal protection requirements laid out by the US Supreme Court in *Bush v. Gore* (2000), 531 U.S. 98.

Fourth, but certainly not least, Relators have incorrectly interpreted the language of the Ohio Revised Code. R.C. 3503.06(A) makes clear (consistent with federal law) that the only relevant consideration in determining a registered voter's right to vote is whether the prospective voter registered 30 days *before the election*. Relators completely ignore this straightforward provision, and instead make a tortured semantic argument, based on the statutory definition of a "qualified elector," to claim that a new registrant must wait thirty days *from the date of registration* before obtaining an Absent Voter Ballot.<sup>1</sup> Imposing a 30-day waiting period for an absentee ballot would contradict R.C. 3503.06(A) and effectively require voters to register at least 31 days before the election.

#### STATEMENT OF THE CASE

Ohio law requires county boards of elections to make Absent Voter's Ballots available 35 days prior to the election. R.C. 3509.01. Registration to vote continues for another 5 days, up to the 30<sup>th</sup> day before the election. R.C. 3503.01.

On August 13, 2008, Respondent Jennifer Brunner, Ohio Secretary of State, issued Directive 2008-63, which, among other things, instructed County Boards of Elections to develop procedures for same-day registration and distribution of absentee ballots during the 5-day

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<sup>1</sup> Although the terms "absentee voting" and "absentee ballot" are commonly used, Chapter 35 of the Revised Code uses the term "absent voter's ballot" in connection with the process.

overlap period. If, during that time, a new registrant requests an Absent Voter Ballot, Secretary Brunner directed the County Boards to provide the Ballot upon completion of the registration process. Directive 2008-63 did not change existing law, did not conflict with any term in the Revised Code, and was a valid exercise of the Secretary's powers and responsibilities as the state's chief election official.

The absentee ballot application can be divided into four simple steps: [1] applying for an absentee ballot, [2] verification of the absentee ballot application, [3] casting and submitting the absentee ballot, and [4] processing and tabulation of the absentee ballots.

In order to obtain an absentee ballot an elector must first acquire and complete an absentee ballot application. R.C. 3509.03; Wolfe Aff., ¶ 5, Respondent's Submission of Evidence. Although there is no mandatory form that this application must take, R.C. 3509.03 lists the specific requirements that must be contained in the absentee ballot application. Wolfe Aff., ¶ 8. As a courtesy to the voters, the Secretary of State has provided a template of the application, which can be found in Form 11-A. Wolfe Aff., ¶ 6. An absentee ballot application sent by mail must be received by the board of elections by noon on the third day before the election. R.C. 3509.03; Wolfe Aff., ¶ 9. However, if an absentee ballot application is delivered in person, it does not need to be received by the board of elections until close of business hours on the day before the election. R.C. 3509.03; Wolfe Aff., ¶ 10.

Upon receiving an absentee ballot application, the board of elections must review the application for completeness. Wolfe Aff., ¶ 12. If the application is incomplete, the board must notify the applicant of the information which is needed in order to complete the application. Wolfe Aff., ¶ 13. Once it has been verified that the application is complete, the board of elections is then required to deliver an absentee ballot to the applicant, which may be done in

person or by mail. Wolfe Aff., ¶ 14. In order to preserve the privacy of the absentee voter's vote, all absentee ballots, regardless of the form of delivery, must be delivered in an unsealed identification envelope, the form of which is prescribed by R.C. 3509.04(B). Wolfe Aff., ¶¶ 15-16.

After receiving an absentee ballot a voter must fill out the ballot and submit it. If the elector chooses to vote in person, the elector votes through the voting system in place by his/her county board of elections. Wolfe Aff., ¶ 22.

Finally, the boards of elections must process and then count the absentee ballots. Pursuant to Secretary of State Directive 2008-67, boards of elections may begin **processing** absentee ballots no earlier than ten days before Election Day. Wolfe Aff., ¶ 24 (emphasis added). For purposes of absentee ballots, "processing" refers to the handling and examining of the absentee ballots; however, it does not include tabulation or counting of the votes. Wolfe Aff., ¶ 24. Under no circumstances may absentee ballots be tabulated or counted before Election Day. Wolfe Aff., ¶ 30. In fact, Secretary of State Directive 2008-67 expressly forbids the counting of absentee ballots before Election Day by stating "[u]nder no circumstances may tabulation of any votes occur before 7:30 p.m. on Election Day." Directive 2008-67; Wolfe Aff., ¶ 24. Furthermore, pursuant to Secretary of State Directive 2008-67, the only way an absentee ballot may even be scanned before Election Day is if the ballot scanning device can scan the ballots without tabulating or counting the votes scanned on the ballot. Wolfe Aff., ¶ 29.

Regardless of when the processing begins, all boards must examine the validity and sufficiency of the absentee ballot identification envelope before an absentee ballot may be counted. Wolfe Aff., ¶ 25. Once the absentee ballots have been verified, the absentee ballot is eligible for counting. Wolfe Aff., ¶ 26. R.C. 3509.07 provides a list of reasons under which a

board of elections may find an absentee ballot insufficient. Wolfe Aff., ¶ 27. In the event an absentee ballot is disputed, prior to the official canvass, the board of elections must investigate whether the ballot should be counted. Wolfe Aff., ¶ 32. If it is determined that the disputed absentee ballot should be counted, it must be included in the totals of the official canvass. *Id.*

The Complaint in this case seeks a writ of mandamus to compel the Secretary to take two actions: (1) to instruct county boards of elections to void any applications for absentee ballots that were “accepted” by election officials less than 30 days after the date of voter registration; and (2) to instruct county boards of elections that thirty days must elapse from the date of registration before the prospective voter may be given an absentee ballot. Under state and federal law registered voters are immediately eligible to request and receive absentee ballots. Relators, however, ask this court to judicially create a 30-day “waiting period” before registered voters may receive an absentee ballot. The Court should not grant this request.

## LEGAL ARGUMENT

### I. This Court Lacks Subject Matter Jurisdiction Because Relators Are Seeking Declaratory Judgment And Injunctive Relief

The Ohio Constitution confers original jurisdiction upon this Court over mandamus proceedings but not over original actions seeking injunctive relief. *State ex rel. Stine v. McCaw* (1939), 136 Ohio St. 41, 44. Article IV, Section 2, Ohio Constitution. The difference between the two remedies is simply stated: a writ of mandamus compels the performance of a preexisting legal duty, whereas an injunction restrains action. *State ex rel. Smith v. Industrial Comm'n.* (1942), 139 Ohio St. 303, 306. This Court has consistently held “if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and

must be dismissed for want of jurisdiction." *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006-Ohio-4334, ¶ 19; *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St. 3d 629, 634.

In this case, Relators have improperly disguised a prayer for injunctive relief as a petition for a writ of mandamus. Simply stated, Relators seek an order to stop the Secretary from enforcing Directive 2008-63. This is apparent from the allegations in the Complaint: that Directive 2008-63 is unlawful, Complaint, ¶ 28; that the Directive orders local election officials to act contrary to Ohio law, *id.*, ¶ 36; that election officials who comply with the Directive are potentially guilty of a felony, *id.*, ¶ 37; that the issuance of Directive 2008-63 was unlawful, *id.*, ¶ 38; and that Directive 2008-63 will cause "irreparable harm," including requiring citizens to make false attestations. *Id.*, ¶ 38. Though the Complaint frames the request in terms of a writ compelling the Secretary to rescind Directive 2008-63, the reality is that the petition seeks to restrain the Secretary of State from enforcing Directive 2008-63.

This Court has, on more than one occasion, looked past the form of a purported mandamus petition to the substance of the case, and dismissed a mis-captioned "mandamus" petition. For example, in *State ex rel. Smith v. Industrial Comm'n.* (1942), 139 Ohio St. 303, the petitioner sought a writ of mandamus to bar the Ohio Industrial Commission from disbursing funds. The Court denied the writ because an order compelling one to desist from some action is an injunction, which is beyond the original jurisdiction of the Ohio Supreme Court. As the Court observed, "[t]he nature of the writ sought is not to be determined by the label attached thereto by the relator." *Id.* at 308. Likewise, the fact that the petitioner in *State ex rel. Stine v. McCaw* (1939), 136 Ohio St. 41, sought a writ of mandamus did not alter the essential nature of the requested relief, which was an injunction to prevent payment of salary to the woman hired to replace the petitioner. *See also State ex rel. Grendell v. Davidson* (1999), 86 Ohio St. 3d 629,

634 (Supreme Court dismissed a petition seeking to declare statutes unconstitutional for lack of original jurisdiction, notwithstanding the fact that the request was joined as part of a plea for a mandamus writ).

The same principle has been applied more recently, in a closely analogous case, *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006-Ohio-4334. Evans brought suit to challenge then-Secretary of State Blackwell's decision to transmit an initiated statute to the Ohio General Assembly before all the statutory protests were completed in the common pleas courts. Evans sought a writ of mandamus to bar the House and Senate Clerks from maintaining receipt of the proposed law, and therefore treat the transmittal as never having occurred, and declaring the Secretary's actions null and void. The Supreme Court recognized that Evans was seeking an injunction, and ruled that only the Common Pleas Court had original jurisdiction over the case. *Id.* at ¶ 19. The only difference between *Evans* and the present case is that, in the former, the petitioner asked the Court to declare Secretary Blackwell's action void, whereas here Relators want the Court to order Secretary Brunner to declare her own actions void. Either way, the substance of the Complaint is a request to enjoin the Secretary from carrying out her Directive. This court lacks original subject matter jurisdiction over that request.

Regardless of how Relators couch their relief, it is clear that they are improperly asking this Court to exercise original action jurisdiction in a declaratory judgment case. It is also clear that the Court lacks original jurisdiction to hear declaratory judgment cases. As a result, this Court should dismiss Relators' request for lack of subject matter jurisdiction.

## **II. Relators Cannot Meet The Necessary Elements For A Writ Of Mandamus**

Even assuming, *arguendo*, that Relators' complaint satisfies the Court's jurisdictional requirements (and it does not), Relators cannot satisfy the requirements for relief in mandamus.

"Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board,

or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” *State ex rel. Smith v. Indus. Comm’n* (1942), 139 Ohio St. 303, 306. In order to obtain a writ of mandamus in this case, Relators must show (1) that they have a clear legal right to the requested relief, (2) that the respondents are under a clear legal duty to perform the requested act, and (3) that Relators do not have an adequate remedy at law. *State ex rel. Nat’l City Bank v. Bd. of Ed.* (1977), 52 Ohio St. 2d. 81, 83. Relators cannot satisfy any of these requirements.

Relators must first establish that they have a clear legal right to preclude the Secretary of State from issuing Directive 2008-63. *Id.* Relators claim that right based upon their belief that the Directive is in violation of statute, specifically Chapters 3503 and 3509 of the Ohio Revised Code. However, the Directive is a proper interpretation of the governing statutes. Moreover, as discussed more fully in Section VI below, Relators have no “clear legal right” to prevent the Secretary of State from exercising her discretion to issue proper Directives that enfranchise voters and ensure their fundamental right to vote, and the Secretary is under no “clear legal duty” to rescind a proper Directive.

In addition, Relators are not entitled to mandamus because they have an adequate remedy at law. Several statutes allow a challenge to any absentee ballot which was improperly cast. R.C. 3509.06 and R.C. 3509.07 provide for the correction of any precinct registration list, or a challenge to the right to vote of any registered elector included on any precinct registration list, not later than twenty days before an election. A challenge or request for correction under R.C. 3503.24 requires the board of elections with which the action is filed to hold a hearing before the election and determine the eligibility of the elector to vote in that precinct. Absentee ballots, although they may be returned to the board of elections as early as 35 days before a general

election, are not processed until after the eleventh day before the election. On September 11, 2008, the Secretary issued Directive 2008-91, which establishes a system for tracking and challenging absentee ballots. Additionally, R.C. 3509.06(D) provides that each identification envelope purporting to contain a marked absent voter's ballot must be thoroughly examined, and may be challenged for cause, by elections officials before the envelope is unsealed and the ballot removed. Absentee ballots also may be rejected for any of the reasons specified in R.C. 3509.07. Thus, procedures exist to protect against improper inclusion of absentee ballots in the official canvas of an election, rebutting Relators' argument that a 30-day waiting period is required before boards may issue an absentee ballot to a newly-registered voter. Mandamus is not available because adequate remedies for the concerns raised by Relators may be addressed through the normal operation of law.

But this is only the beginning of the flaws in Relators' mandamus petition.

**A. Relators' Claims are Barred by the Equitable Doctrine of Laches**

Relators cannot be heard on their claims because they came too late to the courthouse door. The equitable defense of laches exists when a four-prong test is met: (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. *State ex rel. Craig v. Scioto County*, 117 Ohio St. 3d 158, 2008-Ohio-706, ¶ 11 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St. 3d 143, 145). Election cases, by their nature, are subject to stringent standards. As this Court has consistently recognized, “[i]f relators in election cases do not exercise the utmost diligence, laches may bar an action for extraordinary relief.” *State ex rel. Craig*, 117 Ohio St. 3d at ¶ 11 (emphasis added). In fact, a delay of only *nine days* has been sufficient to trigger laches. *See, e.g., State ex rel. Landis v. Morrow Cty. Bd. of Elections* (2000), 88 Ohio St. 3d 187, 189 (“We have held that a delay as brief as nine days

can preclude our consideration of the merits of an expedited election case”); *Carver v. Stankiewicz* (2004), 101 Ohio St. 3d 256, 2004-Ohio-812 (denying an extraordinary writ because the relators waited 19 days before filing their claim).

Regardless of when the clock is deemed to have started running, Relators allowed an unreasonable amount of time to pass before they filed, and they have provided no excuse justifying their failure to act diligently. The 5-day overlap has existed for years without arousing comment—both before and after Sub H.B. No. 234 effected “no fault” absentee voting on January 27, 2006. Relators have been on constructive notice of the 5-day overlap for decades.

Even if this issue was not ripe until the Secretary issued Directive 2008-63, Relators continued to sit on their claims. Specifically, Relators waited a full 30 days from August 13 (the date of the Directive) until September 13 to file suit. Relators have offered no explanation as to why they waited more than two years to file suit, let alone why they waited thirty days after Directive 2008-63 was issued by the Secretary of State.

Relators’ delay has caused actual harm to the citizens of Ohio. If Relators are correct and voters must be registered for thirty days before they can even receive an absentee ballot, then voters who believed they could cast an absentee ballot on the same day they submitted their registration will be denied the ability to vote in the manner they had planned. A concrete example will demonstrate why this is so: under Relators’ theory, a citizen who wished to cast an absentee ballot on the first day of the 35-day grace period, September 30, 2008, would have to be registered no later than August 31, 2008 (30 days ahead). Had Relators filed a declaratory judgment action immediately (assuming they prevailed), individuals would have been alerted to this change in Ohio law and would have registered to vote earlier than the current statutory deadline—October 5, 2008. Yet, because of the Relators’ delay in bringing this litigation, it is

possible that people who registered as early as September 2, 2008, may be told when they go to their board of elections on September 30, they are not eligible yet to receive an absentee ballot. What makes this situation even more problematic, however, is the very real possibility that this Court may not even issue an opinion prior to the beginning of the absentee balloting process. Based upon this Court's expedited elections calendar, briefing on this case will not be closed under September 29, 2008. As a result, the relators' laches will create unnecessary voter confusion because the earliest this court likely will render its decision days, if not hours, before absentee voting begins. If this Court were to issue a writ of mandamus, some people who believed they properly cast their absentee ballots on September 30 are likely to be disenfranchised. This court should not sanction the relators' attempt to infuse unnecessary confusion into the voting process so close to the time that absentee voting begins.

This case is particularly well-suited for a laches defense. Relators' action should be dismissed based on their failure to exercise any diligence, let alone "the utmost diligence."

**B. Under Federal Law, Public Policy Prohibits Any Challenge to Directive 2008-63 This Close to the Election**

Although Relators do not once mention it, the upcoming November voting is a federal election, including election for the highest federal offices in the land. And as a matter of policy and sound governance, the federal courts have repeatedly refused to grant injunctions superseding state election laws in cases brought too close to Election Day. *Purcell v. Gonzalez* (2006), 549 U.S. 1. The Sixth Circuit "require[s] that any claims against the state [election] procedure be pressed expeditiously," and has held that waiting less than a month after learning of such a claim is fatal. *Kay v. Austin* (6th Cir. 1980), 621 F.2d 809, 813. The United States Supreme Court requires similar promptness; it has rejected or affirmed rejection of requests made a little over a month out precisely because of the proximity to the elections—without

regard for the reasons for the delay. *Purcell*, 549 U.S. at 7; *Reynolds v. Sims* (1964), 377 U.S. 533.

“Interference with impending elections is extraordinary.” *Southwest Voter Registration Educ. Project v. Shelley* (9th Cir. 2003), 344 F.3d 914, 918. So extraordinary, in fact, that courts have refused to intervene even in the face of undisputed constitutional violations. *Reynolds*, 377 U.S. at 585-6; *Chisolm v. Roemer* (5th Cir. 1988), 853 F.2d 1186, 1190 (collecting cases); *French v. Boner* (M.D. Tenn. 1991), 771 F. Supp. 896, 902 (collecting additional cases).

The disruption to this election caused by the late filing of this case will be extraordinary. The final pleading in this case, Relators’ Reply Brief, is not due until Monday, September 29, 2008—36 days before the election. Assuming that Relators ultimately prevail (a worst case scenario) and that this Court were to issue its decision that very day (a best case scenario), there would be a mere five weeks remaining in which to identify the defective absentee ballots, contact those voters, and arrange to provide them a new, valid, beyond-the-30-day-window absentee ballot. Realistically, of course, this Court may not issue a decision next Monday. And every day that passes is one less day in which a voter may cure the supposed defect in an already-submitted absentee ballot.

Judicial action so close to the thirty-five day deadline and Election Day will have real, adverse effects. On a general level, changing the rules this close to the election process will undermine public confidence and will likely confuse the electorate. As the Supreme Court recently observed, “Court orders affecting elections...can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Purcell*, 546 U.S. at 6. Public confidence, already weakened by the problems of 2000 and 2004, will be further undermined by changing the rules at the last minute. That,

together with today's generally corrosive political atmosphere, will further undermine public confidence. Those very real consequences combine with Relators' considerable delay to bar their request for equitable relief.

### **III. Relators' Proposal To Create A 30-Day Waiting Period For Absentee Ballots Would Violate Multiple Federal Laws**

Federal law, in addition to Ohio law, governs this Presidential election. States may have broad powers to regulate the "time, place, and manner" of regulating elections, *See, e.g.*, U.S. Const. Art. I, Sec. 4, cl. 1. This State power, however, is specifically constrained by the United States Constitution, which gives Congress the power to "by law make or alter such regulations." U.S. Const. Art. I, Sec. 2, cl.1. Thus, for example, the United States Supreme Court has recognized that States are powerless to alter or amend the requirements to serve in the United States Congress. *US Term Limits, Inc. v. Hill* (1995), 514 U.S. 779. Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. *Northwest Central Pipeline Corporation v. State Corporation, Commission of Kansas* (1989), 489 U.S. 493, 509. Congressional power to alter or preempt state law is particularly broad in the context of regulating federal elections. *Association of Community Orgs. for Reform Now v. Miller* (6th Cir. 1997), 129 F.3d 833, 836.

State law may be pre-empted in a number of ways, including where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-143, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. *Washington Serv. Contractors Coalition v. District of Columbia* (D.C. Cir. 1995), 54 F.3d 811, 815 (quoting *Hines v. Davidowitz* (1941), 312 U.S. 52, 67). Here, the proposed state law – the 30-day absentee

waiting period – squarely conflicts with multiple federal statutes, as well as the Fourteenth Amendment to the United States Constitution.

Congress has specifically chosen to exercise its constitutional authority to alter or amend by federal law the ability of the states to set certain qualifications for voter registration and absentee voting in federal elections generally and Presidential elections specifically. Because Congress has ordered that persons must be given an absentee ballot in any Presidential election at least seven days before the election, Ohio law must be read in such a manner as to comply with this requirement. Furthermore, several other federal enactments make it clear that absentee voters must be treated equally regardless of where they reside.

A. **Adopting Relators' Position Would Result in Ohio Violating The Voting Rights Act of 1970**

The United States Congress made very specific findings when it passed the Voting Rights Act. For example, Congress found that durational residency requirements as a precondition to voting for President and Vice President and a lack of absentee voting opportunities deny and abridge the constitutional right to vote, to travel, and to equally access the franchise regardless of the method of voting. 42 U.S.C. § 1973aa-1(a). Congress further found that a durational residency requirement “does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.” 42 U.S.C. § 1973aa-1(a). Because of these findings, the Voting Rights Act, pursuant to Congress’ power to make regulations for federal elections, set minimum standards for, among other things, absentee registration and absentee voting in Presidential elections. 42 U.S.C. § 1973aa-1(b).

The Voting Rights Act mandates that voters be permitted to vote in a Presidential election as long as they are registered “not later than thirty days immediately prior to a presidential election.” 42 U.S.C. § 1973aa-1(d). Congress went on to completely abolish any other

durational residency requirement.<sup>2</sup> 42 U.S.C. § 1973aa-1(b), (c). After abolishing extensive durational residency requirements, Congress further demanded that any voter be permitted to cast an absentee ballot for President and Vice President if he or she requests an absentee ballot at least seven days before the presidential election and returns the ballot by the time the polls close on election night. 42 U.S.C. § 1973aa-1(d).

If Ohio law were read in such a way as to mandate that a person be a registered voter for at least 30 days before obtaining an absentee ballot, Ohio law would violate the Voting Rights Act. A newly registered voter who provided her application to the board of elections thirty-three days before a presidential election would be prohibited from obtaining an absentee ballot until three days before the election. Yet, federal law mandates that such a person be given an absentee ballot so long as she requests one at least seven days before the election. Some voters may not know that they will be unable to vote in-person until close to that seven-day deadline for requesting an absentee ballot. Yet mail delivery and return by mail of an absentee ballot not issued until three days before the election may complicate or eliminate the ability of the voter to cast a countable vote. The promise of the Voting Rights Act – to expand the ability to request and cast absentee ballots in Presidential elections – would ring hollow for such a voter.

**B. Adopting Relators' Position Would Result in Ohio Violating The National Voter Registration Act of 1993**

Congress passed the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. §1973gg *et seq.*, with the express purpose of “establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” 42 U.S.C. § 1973gg(b)(1). To that end, Congress created new avenues for voter registration in federal elections, such as requiring states to permit voter registration at the same time one applies for (or

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<sup>2</sup> Prior to the passage of the Voting Rights Act, Ohio’s constitution had required a six month durational residency in order to vote. Article V, Sec. 1 was amended in order to comply with the requirements of federal law.

renews) a state driver's license. 42 U.S.C. § 1973gg-3. What these registration procedures have in common is that they set a single deadline for voter registration: so long as the voter properly registers at least 30 days before the federal election, he or she is entitled to participate in the election. 42 U.S.C. § 1973gg-6. "[I]n adopting the National Voter Registration Act of 1993, Congress provided that applicants who submit a 'valid voter registration form' no later than the thirtieth day before any federal election **must be permitted to vote.**" *Diaz v. Cobb* (S.D. Fla. 2008), 541 F. Supp. 2d 1319, 1331, n.10 (emphasis added). The NVRA does not distinguish between voting at a polling place and voting by absentee ballot.

Relators' position conflicts with the NVRA because it effectively requires some voters to register 31 days before Election Day. Under Relators' theory, a qualified voter who registers on the last permissible day—30 days before the election—would not be eligible to request or receive an absentee ballot until Election Day. However, R.C. 3509.03(I) provides that an application for an absent voter's ballot must be delivered no later than the day *before* the election (and three days before the election unless delivered in person). Thus, a person who registers 30 days before the election would be ineligible to vote absentee. This becomes problematic for the individual who timely registers to vote but then finds out that because of an emergency situation, he will be out of the county on election day. Such a result is plainly unfair to the voter and serves no rational or reasonable governmental purpose. The Relators' argument casts a much wider net and will impact a greater number of people than just persons who vote in-person absentee during the 5-day gap period. As with the Voting Rights Act, the NVRA is binding on state officials by virtue of the Supremacy Clause, and any inconsistent state voter registration laws or state procedures for federal elections are preempted and superseded. *ACORN v. Miller* (W.D. Mich. 1995), 912 F. Supp. 976, 984.

**C. Adopting Relators' Position Would Result in Ohio Violating The Equal Protection Clause**

There are potentially two equal protection problems raised by the Relators' interpretation of Ohio law and their invocation of opinions provided by local prosecutors to support their incorrect legal interpretation. First, if the Relators are correct and a person must be registered for at least 30 days before obtaining an absentee ballot, such durational residency requirement violates the Fourteenth Amendment and prior United States Supreme Court precedent. Second, the Secretary of State, by issuing directives to county boards of elections, guarantees a uniform application of Ohio law. It is only if county boards of elections ignore her directives and "shop" for legal opinions from county prosecutors that a situation arises in which similarly situated individuals will be treated differently in violation of *Bush v. Gore* (2000), 531 U.S. 98.

**1. Durational Residency Requirements of longer than 30 days violate the Equal Protection Clause of the Fourteenth Amendment.**

The proposed 30-day absentee waiting period violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by effectively creating a durational residency requirement for new voters who vote absentee that is greater than the requirement imposed on other Ohio citizens for voting absentee.

State and federal law extend the franchise to citizens who register 30 or more days before the election. However, as previously noted, in order to qualify for an absentee ballot under Relators' theory, one must register—and be qualified to register—no later than 31 days before the election. Thus, a new registrant seeking to vote absentee must reside in the State longer than a new registrant who plans to go to the polls in person. But the difference in treatment, in practical terms, is far more than a single day. Ohio opens the window for absentee voting 35 days prior to Election Day. Under Relators' theory, for a new voter to avail herself of her full statutory rights—that is, to vote absentee anytime during the 35 day window—she would have to

register a full 65 days before the election, thus requiring her to prove residency a full five weeks earlier than other new voters. This operates as a durational residency requirement.

Durational residence requirements, when they represent a separate voting qualification imposed on bona fide residents, “must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.” *Dunn v. Blumstein* (1971), 405 U.S. 330, 342 (quoting *Shapiro v. Thompson* (1969), 394 U.S. 618, 634). Relators cannot meet this heavy burden; there is no compelling reason why an individual who wants to vote absentee should be subject to a longer residency requirement than applies to the rest of the population.

Relators attempt to argue that same-day absentee voting will somehow lead to fraud, specifically fraudulent voting by homeless people and college students. Ohio law expressly extends the franchise to both these populations. R.C. 3503.02(A) defines the rules for determining residency for voting qualifications. A place is considered a person’s residence “in which the person’s habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.” Clearly, a college student, homeless person, or any other person in this State who has the intention of fixing a specific habitation within the State and returning to that habitation when he is absent, has qualified as a resident for purposes of voting. Ohio law precludes, however, residency to one who comes into the state only for temporary purposes “without the intention of making such county the permanent place of abode.” R.C. 3503.02(C). If the college student, homeless veteran, or any other person comes into the State and possesses the intention of returning to a habitation within the State, such person is a resident.

The Relators make a confusing and disjointed argument that this Court should rule in their favor because a homeless coalition has stated that it plans to assist homeless persons in

registering and voting.<sup>3</sup> Ohio law was recently amended to make it crystal clear that “[i]f a person does not have a fixed place of habitation, but has a shelter or other location at which the person has the intention of returning, that shelter or other location shall be deemed the person’s residence for the purposes of registering to vote.” R.C. 3503.02(I). Relators apparently would simply write this requirement out of Ohio law because they fear that homeless individuals might exercise their constitutional and statutory rights under Ohio and federal law.

In addition, the Relators’ interpretation of Ohio law is erroneous because if this Court were to adopt the interpretation, this durational residency requirement would violate the Fourteenth Amendment in the same manner that the State of Tennessee had in *Dunn, supra*. Simply put, the Relators cannot explain how the requirement that somebody be registered for 30 days adds anything to the fraud prevention system already in place. Patricia Wolfe, the Elections Administrator and 15-year employee of the Secretary of State’s office, has testified that boards of elections are prohibited from “processing” absentee ballots until ten days before the election. Wolfe Aff., ¶ 24. Processing an absentee ballot includes examining the validity and sufficiency of the absentee ballot envelope. Wolfe Aff., ¶ 25. Thus, any absentee ballots voted in person prior to the close of registration remain securely in the board of election office for at least 25 days. During that period of time, the eligibility of the electors who cast those absentee ballots are subject to challenge as allowed under R.C. 3503.24 and 3509.06(D). Boards of elections may set aside an absentee ballot “due to a challenge or [for] any other reason” during which time the board “shall investigate whether the ballot may be counted during the time before the official canvass.” Wolfe Aff., ¶ 32. The official canvass cannot begin until at least 11 days *after* the general election. R.C. 3505.32(A). Thus, any unsupported claim that fraud might occur is not

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<sup>3</sup> Such statements are hearsay and not evidence. Thus, they should be ignored by this Court under Ohio R. Evid. 801 and 802.

only completely unsupported by admissible evidence, it is also contradicted by Ohio's statutory scheme which provides for checks and challenges against an absentee ballot in particular situations.

Because Ohio's statutory scheme has substantive and real protections against the possibility of fraud in absentee balloting, the reasoning in *Dunn* prevents the State from having an articulable interest in requiring durational residency. Tennessee (and Ohio) have determined that 30 days is adequate time to verify a new registrant's *bona fides*. The additional time imposed on absentee voters contributes no greater protection against fraud. *Dunn*, 405 U.S. at 346-347.

Indeed, there is no evidence or any reason to believe that Ohio election officials need the extra time to scrutinize absentee ballot applications, or would use the time if they had it. In *Hinnant v. Sebesta* (D.Fl. 1973), 363 F. Supp. 398, 400-401, a three-judge panel declared Florida's sixty day durational residency requirement unconstitutional, in large measure because there was no evidence that Florida officials actually used the extra time to investigate residency claims. Thus, the durational requirement served no fraud prevention function.

**2. When counties follow directives issued by the Secretary of State, they are acting in such a manner as to assure uniform application of Ohio law in compliance with *Bush v. Gore* (2000), 531 U.S. 98.**

Relators claim that an equal protection violation may arise because certain county prosecutors have issued legal opinions that contradict the Secretary of State's directive. In *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 8, this Court stated that "[i]t would be unrealistic to contend that the boards of elections could ignore the secretary's advice; there is authority that the boards were required to follow it." Thus, the court recognized that, even though then-Secretary Taft may have erred when he advised county boards of elections concerning the legal

requirements of certain petitions, those boards were not permitted to reject the Secretary's directives.

This Court favorably cited an Ohio Attorney General opinion in reaching this conclusion. 1930 Ohio Atty. Gen. Ops. No. 1423. In that opinion, the Attorney General found that the Secretary of State is charged with preparing rules on the conduct of elections and that county boards of elections must carry out those instructions: "so long as [the directives are] in force and effect and not superseded by higher authority, [they] are binding upon such subordinates in the sense that violations thereof would probably constitute grounds for removal." *Id.* at 123. Prosecutors do not have the authority to usurp either the role of the Secretary or of courts of law. Although it is true that a county prosecutor is the legal counsel to the board of elections, his legal advice alone does not serve as a legitimate basis for a board of elections to act in a manner inconsistent with a directive issued by the Secretary of State. Moreover, the Secretary of State possesses a comprehensive familiarity with the entirety of Chapter 35, which governs election law, which few, if any, county prosecutors share.

The reason that both this Court and the Ohio Attorney General have previously determined that a board of elections must act in conformity with instruction from the Secretary of State is the importance of assuring uniform application of the State's elections law. *Id.* at 124. Thus, so long as Ohio boards of elections follow their legal obligation to follow the directives of the Secretary of State, there will simply be no possibility of unequal application of the law.<sup>4</sup>

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<sup>4</sup> Recognizing both the violation of federal law and the possibility that a county prosecutor's advice to disregard a Secretary of State directive, a lawsuit has already been filed against the Secretary of State and Madison County's board of elections. In the United States District Court, Northern District, Eastern Division, Case No. 08-CV-02266, the boards of elections in Holmes County and Miami County, whose prosecutors have issued opinions challenging the legality of Directive 2008-63, have informed the Plaintiffs in this lawsuit that they will follow the directive of the Secretary of State.

**D. Adopting Relators' Position Would Cause Ohio To Violate The Uniformed and Overseas Citizens Absentee Voting Act**

Relators' "30-day waiting period" for absentee voting violates the plain language of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff *et seq.*, and would disenfranchise Ohio servicemen and women serving in uniform overseas. That statute **requires** states to:

accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election.

42 U.S.C. §§ 1973ff-1(a)(2). Under Relators' theory, election officials would have to reject military absentee applications submitted alongside registration applications, even though the federal statute specifically authorizes simultaneous submission.

**IV. Relators Have Misconstrued Ohio Law**

Even if Relators' complaint could somehow survive the jurisdictional defects, the federal law conflicts, the equitable flaws, the federal Constitutional objections, and the evidentiary deficiencies, one more insurmountable obstacle remains: Relators are wrong about Ohio law. The notion that a newly-registered voter must wait an additional 30 days to procure an absentee ballot is not merely unsupported by the Revised Code, it is contradicted by the plain language of the Code.

At the heart of this mandamus petition is a flawed exercise in statutory construction. Various provisions of the Revised Code speak of absentee voting by "qualified electors." *See, e.g.,* R.C. 3509.02(A), R.C. 3509.03(G), and R.C. 3509.04(B). Since (according to Relators), one cannot be a "qualified elector" under R.C. 3503.01 until he or she has been registered to vote for 30 days, a new registrant by definition cannot be a "qualified elector" on the date of

registration. Thus (again according to Relators), on the date of registration, the applicant is not a “qualified elector” under R.C. 3509.02(A), cannot make the statement of qualification required by R.C. 3509.02(A), and cannot be given a ballot because of R.C. 3509.04(B). Thus, reading only these provisions, Relators conclude that a voter cannot even obtain an absentee ballot until the voter meets the definition of a “qualified elector,” which can only occur 30 days after registration.

The flaw in the analysis is that it reads words into the statute. Article V of the Ohio Constitution and R.C. 3503.01 both say that a voter has the qualification of an elector if he or she has been registered to vote for 30 days, but Article V and R.C. 3503.01 do **not** say one must be registered for 30 days *at the time one receives one’s ballot*. Relators are simply adding words to the law. The best Relators can claim is that R.C. 3503.01 is ambiguous as to whether the prospective voter must be a “qualified elector” by the time he receives the absentee ballot (as Relators would have it) or by the date of the election, as the Secretary has chosen to interpret the law. And if the law is ambiguous, it is well-established that the Courts must give deference to the interpretation of the Secretary, who is by statute the chief elections official in the state. *State ex rel. Herman v. Klopffleisch* (1995), 72 Ohio St. 3d 581, 586.

But the Revised Code is not ambiguous on this point. Relators have failed to account for R.C. 3503.06(A), which provides that:

No person shall be entitled to vote at any election, or to sign or circulate any declaration of candidacy or any nominating, or recall petition, unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days *at the time of the next election*.

R.C. 3503.06(A) confirms the Secretary’s position as stated both in Directive 2008-63 and before this court, that the relevant date for testing the qualifications of an elector is Election Day. This

is consistent with other election practices. For example, the relevant date for testing the qualifications of persons signing referendum petitions is the date the petition is filed, not the date the petition is signed. *State ex rel. Oster v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St. 3d 480.

R.C. 3509.02(A), which Relators cite as supporting authority, is instead consistent with the Secretary's position. The precise language of R.C. 3509.02(A) is as follows: "Any qualified elector may **vote** by absent voter's ballots at any election." "Voting" does not occur when the County Board distributes the absentee ballot, nor when the voter returns the ballot. The act of voting occurs only on Election Day, irrespective of when the voter mails or hands in the ballot. *Millseps v. Thompson* (6th Cir. 2001), 259 F.3d 535, 545, 546. Thus, it matters not whether the applicant is a "qualified elector" on the date of registration when she receives the ballot; what counts is that she will be a qualified elector by Election Day, and thus able to vote absentee. (We know the hypothetical voter will be qualified because she has met the 30-day advance registration requirement; if she fails to meet some other requirement, her ballot will be disallowed, just as any other improperly registered voter will be denied a ballot upon arrival at the polls).

Relators correctly observe that R.C. 3509.03(G) requires an applicant to certify he is a "qualified elector" when requesting an absent voter's ballot, and someone who has just that day registered to vote cannot make such an attestation: he has not been registered for 30 days and so is not a "qualified elector" by definition. And the same logic undoubtedly applies to R.C. 3509.04(B): an election official cannot confirm that a same-day registrant is a "qualified elector." Relators argue that the statute prohibits the election official from handing out the absentee ballot to the new registrant. But that same strict reading proves too much.

Interpreting the Revised Code in this fashion would make it impossible for *anyone* to obtain an absent voter's ballot. For example, in addition to being registered for 30 days, a "qualified elector" must "[have] been a resident of the state thirty days immediately preceding the election." Assume that a registered voter, who has voted at the same address for 20 years, requests an absentee ballot in person 35 days before the coming election. Even though the applicant is properly registered and otherwise entitled to vote absentee, under Relators' analysis, the election official would have to refuse to hand out the ballot because it would be impossible to confirm, 35 days out, that the voter will continue to reside in the state during the 30 days immediately preceding the election. The voter might move to Oklahoma two days after returning her absentee ballot. By strict definition, the voter is not—and cannot—be a "qualified elector" until Election Day, when we can confirm his residency over the past 30 days. Therefore, the only time one could obtain an absent voter ballot would be on Election Day itself. Of course, the last day to obtain an absentee ballot is the day before Election Day.

"There is no surer way to misread a document than to read it literally." *Guisseppi v. Walling* (2nd Cir. 1944), 144 F.2d 608, 624 (Learned Hand, J.). Overly strict readings yield absurd results, especially in election cases, and the permanent elimination of all absentee balloting, as discussed above, is only one of the absurd consequences that would follow were this Court to adopt Relators' argument. R.C. 3509.02(A) provides that, "Any qualified elector may vote by absent voter's ballot at an election." Use of the phrase "at an election" must mean, for purposes of the 2008 presidential election, November 4, 2008—the date of the general election. The statement required by R.C. 3509.03(G) in an application for an absent voter's ballot that the person requesting the ballot is a qualified elector" must mean "is a qualified elector at the November 4 election." An application for absentee ballot may be submitted as early as January

1 of the relevant election year. R.C. 3509.03(I). Apparently, in this year of unprecedented new voter registration, Relators believe that every person who has requested an absentee ballot since the first of the year has committed a felony if the request was made within 30 days of registration.

Moreover, the relief sought in the Complaint is so overbroad that it would disenfranchise qualified electors even if Relators are correct in their legal argument. Specifically, Relators ask for a writ compelling the Secretary to order county election boards to void any applications for absentee ballots they “accepted” within 30 days of the date the voter registered. In other words, they want relief not just prospectively but retroactively. Such an order would “void” applications even if the county board waited 30 days before handing out the absentee ballot. Indeed, it would require the county boards to undertake the massive job of examining *every* absentee ballot application to compare the date of the request with the date of registration. Presumably, the county boards would then have to notify the prospective voters that their absentee ballot requests had been voided, so that they could return to the Board and try to start the process over. Such a result would impose tremendous burdens on local boards, deprive citizens who acted in good faith (and who at the eleventh hour may no longer be available to come submit another request), and do absolutely nothing to detect election fraud or promote confidence in the integrity of the system.

Other provisions of the Revised Code cited by Relators provide even less support for their contention that a voter must be registered 30 days before laying hands on an absentee ballot. For example, they refer the Court to R.C. 3509.07, which provides that if election officials find that an applicant is not a “qualified elector” in the precinct, “**the vote shall not be accepted or counted.**” No one would contend otherwise. But R.C. 3509.07 clearly governs what

happens post-election, when the ballots are counted and the qualifications of the absentee elector are tested, not whether the applicant can receive the absentee ballot in the first place.

Similarly, Relators cite R.C. 3509.03(C), which requires an applicant to disclose the address at which the elector is registered to vote. The Secretary's Directive 2008-63 clearly instructs that the County Boards of Elections must *first* complete the registration process before accepting absent voter ballot applications. Since this is a two-step process, the applicant will have an address at which she is registered. Therefore, R.C. 3509.03(C) offers no support to Relators.<sup>5</sup>

It makes no sense to say that qualified elector status should be measured on the day the voter picks up the ballot. Being a qualified elector the day a person picks up the ballot does not guarantee he will be a qualified elector on Election Day. Qualified elector status must be measured on Election Day. Measuring electoral status on this earlier date, as Relators suggest, is a fruitless exercise that adds no protection to the voting process and simply creates a needless obstacle to exercising the fundamental right to vote.

#### **VI. A Writ Of Mandamus Cannot Be Used To Compel A Discretionary Act Of The Secretary Of State**

At the outset of this Memorandum, the Secretary suggested that, among many reasons, the petition of a writ of mandamus must be denied because the writ cannot be used to compel the performance of a discretionary act. Having now shown the degree to which Relators are relying upon ambiguous statutory language, it is now appropriate to revisit this argument in more depth.

The Supreme Court of Ohio has consistently recognized that “[m]andamus cannot be used to compel the performance of a permissive act.” *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 4 (citing *State, ex rel. Niles, v. Bernard* (1978), 53 Ohio St.2d 31). In other words,

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<sup>5</sup> The Relators spend a good portion of their brief arguing Form 11-A contradicts Directive 2008-63. Form 11-A, Title 35 and Directive 2008-63 are all consistent.

“[a] writ cannot [be] issue[d] to control an officer’s exercise of discretion, but it can be issued to compel him to exercise it when he has a clear legal duty to do so.” *Taft*, 64 Ohio St. 3d at 4. However, “[t]he duty to be enforced by a writ of mandamus must be *specific, definite, clear, and unequivocal*.” *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App. 3d 199, 205 (emphasis added). Conversely, “a writ of mandamus may not be employed to compel the performance of general duties.” *State ex rel. Struble v. Davis* (1939), 135 Ohio St. 593, 595; *State ex rel. Tillmon v. Weiher* (1992), 65 Ohio St. 3d 468, 470 (“we will not issue a writ of mandamus to compel the observance of laws generally”).

Relators rely on *State ex rel. Melvin v. Sweeney* for the notion that the Secretary of State’s duty to advise and direct members of boards of elections “‘as to the proper methods of conducting elections’ and ‘to compel the observance, by election officers in the several counties, of the requirements of the election laws’ . . . are ministerial and clearly required by law.” *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, 225 (citing General Code Section 4785-7). In *Sweeney*, the Secretary of State had issued a release to the boards of elections informing them to act in a way that was at odds with the Revised Code. Therefore, the Court ruled that the action was appropriate for a writ of mandamus because “if the [Secretary of State] has, under the law, misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of mandamus.” *Id.* at 226. In other words, the Supreme Court held that the Secretary’s duty to issue directives and advisories was a specific ministerial duty and thus appropriate for a writ of mandamus.

Although Relators have accurately stated the *Sweeney* decision, they have overlooked the fact that the Supreme Court has subsequently overruled itself. Identical to the *Sweeney* case, the Secretary of State had issued a directive to the boards of elections pursuant to the powers and

duties granted to the Secretary of State under Chapter 35 of the Revised Code. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 8. However, directly converse to its ruling in 1950, the Supreme Court found that even though the Secretary's directive was contrary to the commands of the Revised Code, it was not appropriate for a writ of mandamus. *Id.* at 8. The *Taft* Court went on to state "[t]hough he is required to advise the boards, the content of his advice is discretionary. Mandamus will not issue to govern how discretion is exercised." *Id.* at 8 (emphasis added); see also, *State ex rel. Sinay v. Soddors* (1997), 80 Ohio St. 3d 224, 232 ("a writ of mandamus cannot be used to control the exercise of discretion").

Although Relators have cited *Sweeney*, *Taft* is controlling on this issue. This is because where there is a conflict between Supreme Court decisions, as is the case between *Melvin* and *Taft*, the more recent decision controls. *Board of Education v. Wellston* (1932), 43 Ohio App. 552, 554 (stating "[t]he duty of the Court of Appeals is to follow the last word of the Supreme Court"); *Brooks v. Murphy* (May 5, 1993), 2nd Dist. App No. 92-CA-0032, 1993 Ohio App. LEXIS 2554, \*16 (stating "[*Cincinnati Ins. Co. v. Phillips* (1990), 52 Ohio St. 3d 162] does not control our decision because it is not the most recent articulation of law on this issue by the Ohio Supreme Court").

As established in Relators' brief, R.C. 3501.04 provides in pertinent part that "[t]he secretary of state is the chief election officer of the State, with such powers and duties relating to . . . the conduct of elections as are prescribed in Title XXXV of the Revised Code." The general duties of the Secretary are established in R.C. 3501.05, and include the general duties to "[i]ssue instructions by directives and advisories to members of the board [of election] as to the proper methods of conducting elections" and to "[p]repare rules and instructions for the conduct of elections." R.C. 3501.05(B). In light of the *Taft* decision, it is evident that these provisions of

the Revised Code do not establish a “specific, definite, clear and unequivocal” duty that may be subject to a mandamus action. Instead, these duties are very broad and general, and serve simply as a basis or means to aid the Secretary in the implementation of other *specific* duties contained elsewhere in the Revised Code.

The writ of mandamus cannot be used to dictate the manner in which discretion is exercised, although it may be used to compel an officer to exercise his or her discretion in the face of an abuse of discretion. *State ex rel. Coen v. Industrial Commission of Ohio* (1933), 126 Ohio St. 550, 554; *State ex rel. Cash v. Rose* (1939), 136 Ohio St. 143, 146. The only time mandamus will lie to control the exercise of discretion is if there is an abuse of discretion. *State ex rel. Mullen v. Industrial Commission* (1939), 136 Ohio St. 45, 46. However, Relators cannot show, nor have they alleged, facts that will amount to an abuse of discretion on the part of the Secretary. “An ‘abuse of discretion’ reflects an ‘unreasonable, arbitrary, or unconscionable decision.’” *State ex rel. Van Dyke v. Public Employees Retirement Bd.*, 99 Ohio St. 3d 430, 2003-Ohio-4123, ¶ 21 (quoting *State ex rel. Pipoly v. State Teachers Retirement System*, 95 Ohio St. 3d 327, 2002-Ohio-2219, ¶14). The decision not to issue the specific directives demanded by Relators does not constitute an abuse of discretion. Therefore, a writ of mandamus is not the appropriate form of action.

In the event this Court does not accept that *Taft* implicitly overruled *Sweeney*, the Court should find that *Taft* builds upon and clarifies the *Sweeney* decision, establishing that the content of a Secretary of State’s directive is discretionary. As stated above, *Sweeney* stands for the notion that the duty to issue directives and advisories is ministerial and not discretionary. See *Sweeney*, 154 Ohio St. at 225. However, *Taft* essentially refined the *Sweeney* case to find that requesting the Secretary of State to issue a **specific** directive is not appropriate for a writ of

mandamus “[t]hough he is required to advise the boards, **the content of his advice is discretionary**. Mandamus will not issue to govern how discretion is exercised.” *Taft*, 64 Ohio St. at 8 (emphasis added). In fact, the Supreme Court of Ohio in *Taft* even recognized that the Secretary of State’s directive was contrary to the demands of the Revised Code, yet the Court still found that the case was not appropriate for a writ of mandamus. *Taft*, 64 Ohio St. 3d at 8. Rather, “the prohibitive relief requested by relators is more suited to declaratory judgment or injunction than to mandamus, which is a command to perform the affirmative act.” *Taft*, 64 Ohio St. 3d at 8. Therefore, the only way to read these two cases in conjunction with each other, without finding that *Taft* overrules *Sweeney*, is to find that *Taft* is clarifying the broad *Sweeney* decision.

In the case at bar, Relators have filed a Verified Petition for Writ of Mandamus requesting:

A writ of mandamus to direct Respondent Secretary of State Jennifer Brunner to issue a Directive to the County Boards of elections that they must void any applications for absent voters’ ballots that were accepted by the election official following the registration of voters and prior to the lapsing of the thirty (30) day required period under Ohio law.

Relators’ Petition for Writ of Mandamus, p. 12. In their prayer for relief, Relators have also requested:

A writ of mandamus to direct Respondent Secretary of State Jennifer Brunner to issue a clarifying Directive to the County Boards of Elections reiterating that thirty (30) days must elapse, consistent with the Revised Code, before an application for absent voter’s ballot may be accepted by the election official following the registration of the voter.

Relators’ Petition for Writ of Mandamus, p. 13. It is clear from this language that Relators are requesting the issuance of a new directive with specific content to implement their personal plan for remedying a perceived gap within the Revised Code as it pertains to casting absentee ballots. Yet, as indicated by *Taft*, the specific language of a directive is discretionary and thus not

appropriate for a writ of mandamus. In essence, Relators are trying to use a writ of mandamus to get into the Supreme Court by requesting that the Secretary of State be compelled to issue a directive, as opposed to requesting declaratory judgment that Directive 2008-63 is invalid, which would be appropriate in a court of common pleas. Therefore, a writ of mandamus is not the appropriate avenue for requesting relief.

### **CONCLUSION**

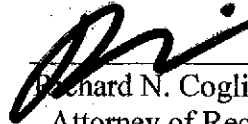
The Relators have suggested that the duly-elected Secretary of State issued Directives 2008-63, 2008-91 and 2008-92 to encourage voter fraud. Unsubstantiated and untrue allegations of this nature have, unfortunately become increasingly common in our daily discourse.

However, unsubstantiated allegations of voter fraud, which serve to decrease confidence in the

electoral system, have no place in a court of law, and particularly in this court. For the foregoing reasons, this Court should dismiss the Relators' complaint and deny their request for a writ of mandamus.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Brief of Secretary of State Jennifer Brunner* was served upon the following, on this 25th day of September, via electronic mail, facsimile transmission and ordinary, postage prepaid U.S. mail to:

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