

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. 2008-1813

Original Action in Mandamus

Expedited Election Matter
Under S.Ct. Prac.R.X. § 9

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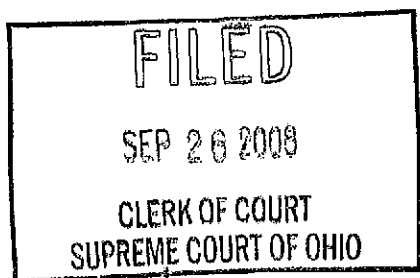
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REPLY ARGUMENT

Proposition of Law No. I

Ohio Constitution, Section 1, Article V And Ohio R.C. 3509.04(B) Require That A Person Must Be Registered To Vote For Thirty Days In Order To Be A Qualified Elector Eligible To Vote, In Person Or By Absentee Ballot.

Proposition of Law No. II

The Directives Issued By The Secretary, Which Directs Ohio's Boards Of Elections To Treat Newly Registered Voters As Fully Qualified Electors For Purposes Of Permitting Them To Immediately Obtain And Vote Absentee Ballots In Person During The Week Immediately Preceding The Voter Registration Deadline Are Contrary To Ohio Law.

A. Ohio law clearly prohibits newly registered electors from immediately obtaining and voting absentee ballots.

Respondent argues that under Ohio law a person immediately becomes a qualified elector once they register, as long as their registration is thirty or more days before the next election. Relators agree that those who register thirty or more days before an election will have the right to fully exercise their franchise once they become qualified electors. However, Ohio law clearly prohibits treating newly registered electors from immediately being treated as “qualified electors” until they have been registered for the requisite period of time.

Ohio Constitution Article V, Section 1 states that “Every citizen . . . who . . . *has been registered to vote for thirty days*, [and meets all other qualifications] has the qualifications of an elector and *is* entitled to vote at all elections.” (emphasis added). Ohio’s Constitution does not say or suggest that a person who *will be* registered for thirty days from now is entitled to vote immediately.

R.C. 3501.01(N) defines a “qualified elector” as “a person *having* the qualifications provided by law to be entitled to vote.” (emphasis added). R.C. 3501.01(N) does not define a

qualified elector as a person who *will have* the qualifications provided by law thirty days from now.

R.C. 3509.03(G) requires applicants for absentee ballots to include a “statement that the person requesting the ballots *is* a qualified elector.” (emphasis added). R.C. 3509.03(G) does not permit the application to state merely that the applicant *will be* a qualified elector.

R.C. 3509.04(B) authorizes the director of each board of elections to deliver absentee ballots to applicants only “if the director finds that the applicant *is* a qualified elector.” (emphasis added). R.C. 3509.04(B) does not authorize providing absentee ballots to persons who merely *will be* qualified electors at some future time.

Nonetheless, Respondent and amici curiae contend that these clear provisions of Ohio law are somehow ambiguous. Moreover, they suggest that R.C. 3503.06(A) changes the “has been registered” requirement to a “will have been registered” so that the thirty-day registration requirement for “qualified electors” does not need to be met as of the time that an absentee ballot is obtained and cast, as long as the registration takes place thirty days before the election. In fact, R.C. 3503.06(A) says nothing of the kind.

R.C. 3503.06(A) says nothing about who *can* vote, but only makes a general statement about who *cannot* vote. R.C. 3503.06(A) states, “No person shall be entitled to vote at any election . . . 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.” This statute does not conflict with Section 1, Article V of the Ohio Constitution, with R.C. 3503.01, or with Relators’ claims.

R.C. 3503.06(A) does not purport to be an exhaustive statement of the requirements to be a qualified elector. Wholly apart from the thirty day registration requirement, R.C. 3503.06 says

nothing about the constitutional requirements that a qualified elector must be a citizen of the United States and at least eighteen years of age. Nor does R.C. 3506.03 mention R.C. 3503.21(A)'s requirements that a convicted felon or adjudicated mentally incompetent may not be registered as a qualified voter. Failing to repeat in R.C. 3503.06 all of the qualifications set forth elsewhere in Ohio law, does not change or abolish those qualifications, including the requirement that the person "has been registered to vote for thirty days."

Respondent appears to confuse the petition requirements of R.C. 3501.38 with the qualified elector requirements set forth above. The fact that R.C. 3501.38(A) authorizes electors to sign *petitions* without being registered to vote for thirty days says nothing about their right to obtain and cast absentee ballots without having been registered for thirty days. R.C. 3501.38(A) expressly states that the qualifications of an elector who signs a petition "shall be determined as of the date when the petition is filed." There is no comparable "as of the date" language in Article V, Section 1 of Ohio's Constitution or in R.C. Sections 3501.01, 3509.03, or 3509.04, or in any other statutes that would state or even imply a right to immediately obtain and cast an absentee ballot. In Advisory 2008-24,¹ p.2., in another context, Respondent stated that "[t]he rules of statutory construction mandate that I presume that legislative silence or inaction is deliberate."

Respondent claims at page 25 of her brief that absentee voting does not occur until the day of the election. But at page 2 of Respondent's brief, Respondent expresses concern about "qualified residents who have already voted their absentee ballots." Ohio law requires persons to be qualified voters when they request and when they are given absentee ballots. The act of "vot[ing] their absentee ballots" will take place when the person votes those ballots – as the

¹ A copy of Advisory 2008-24 is attached to this Reply Brief. Advisory 2008-24 was issued by Respondent Secretary of State on September 23, 2008, the day *after* Relators filed their Merit Brief and Evidence. Thus, Advisory 2008-24 was not included in Relators' September 22, 2008 Appendix.

Respondent recognizes at page 2 of her brief. Since Ohio law requires the person to be a “qualified elector” at that time, the qualifications to be a “qualified elector” must be determined at that time.

Respondent and amici also make a number of arguments to the effect that if Ohio law is enforced as written, other interpretations of Ohio law might result in absurd results. For example, Respondent argues at page 26 of her brief that because a qualified elector might move or otherwise lose his or her qualifications before the election, that would prohibit anyone from receiving absentee ballots. This and the other arguments of this type are simply “straw man” arguments that refute interpretations never made by Relators. This case addresses the fact that Ohio law prohibits newly registered persons from immediately obtaining and voting an absentee ballot. However interesting speculations about other interpretations in other contexts might be academically, they have no bearing on the issue before this Court.

Ohio law is clear and Respondent’s Directives instruct Ohio boards of elections to violate Ohio law. Accordingly, Relators’ request for a writ of mandamus should be granted.

B. Federal law does not require Ohio to permit newly registered electors from immediately obtaining and voting absentee ballots.

Respondent and amici argue that regardless of what Ohio’s Constitution and statutes require, federal law requires Ohio to permit immediate in-person absentee voting by newly registered persons. In fact, none of the federal statutes discussed require immediate in person voting by newly registered voters, and Respondent has cited no case authority imposing such a requirement.

1. HAVA does not require Ohio to permit immediate absentee voting by newly registered persons.

Respondent Brunner referred in her Answer to the provisions of the Help America Vote Act (“HAVA”) as authority for her Directives. (Answer, ¶16.) But Respondent Brunner has not identified any provisions of HAVA that conflict with Ohio law or which provisions would be violated should Relators’ request for a writ of mandamus be granted. No provisions conflict and no provisions would be violated.

However, HAVA may conflict with the Secretary of State’s Directives. 42 U.S.C. § 15483(a)(1)(A) requires the Secretary of State to “implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State.” R.C. 3503.15, similarly, establishes this duty as a matter of state law and specifies that this list “shall be the official list of registered voters for all elections conducted in this state.” Permitting immediate votes to be cast by persons who have not been registered for thirty days guarantees that such persons will not be on this official registration list at the time they cast their votes, and prevents the ability to check this “official” list with respect to such voters.

Although Respondent and amici have attacked Ohio’s thirty day registration requirement, *Summit County Democratic Cent. and Executive Comm. v. Blackwell* (6th Cir. 2004), 338 F.3d 547, 551 held that Ohio’s thirty-day registration period furthers the State’s “strong interest” in the “smooth and effective administration of [voting laws].” Wholly apart from being contrary to Ohio law, Respondent’s directives frustrate the very purpose in having an accurate and timely statewide list of qualified electors available at the time persons seek to exercise their rights as qualified electors.

HAVA sets forth minimum requirements: “The requirements established by this subchapter are *minimum requirements* and *nothing* in this subchapter *shall be construed* to prevent a State from establishing election technology and *administration requirements* that are *more strict* than the requirements established under this subchapter. . . .” 42 U.S.C. § 15484 (emphasis added). Nothing in HAVA requires Ohio to count the votes of ineligible voters (that is, persons who have registered, but not yet become “qualified electors.”) Indeed, even the provisional voting requirements of HAVA do not authorize voting by ineligible persons.

While HAVA permits an individual who declares to be registered *and eligible* to vote to cast a provisional ballot when that person’s eligibility is contested at the polling place, HAVA does not require that person’s vote to be counted if it is determined that the person was not eligible to vote. 42 U.S.C. §15482(a) and (a)(4). HAVA specifically states, “If the appropriate State or local election official to whom the ballot or voter information is transmitted . . . determines that the individual *is eligible under State law to vote*, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.” 42 U.S.C. § 15482(a)(4).

Relators are not requesting relief that would violate federal or state law. Rather, Relators seek enforcement of the law.

2. Neither the Voting Rights Act, nor the National Voter Registration Act require or permit same-day registration and voting.

The U.S. Supreme Court has recognized “that a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot. States have valid and sufficient interests in providing for some period of time – prior to an election – in order to prepare adequate voter records and protect its electoral processes from possible frauds.” *Marston v. Lewis* (1973), 410 U.S. 679, 680. Nevertheless, when Respondent Brunner issued

Directive 2008-63, she threw out Ohio's mechanism to protect its valid and sufficient interests in providing a period of time before election day to prepare adequate voter records and protect its electoral process from possible fraud. Respondent Brunner attempts to hide under the cover of the Voting Rights Act ("VRA") and National Voter Registration Act ("NVRA") as her basis in issuing Directive 2008-63, but neither the VRA nor the NVRA require or permit same-day registration and voting. In fact, both the VRA and NVRA grant some flexibility to states to determine who "eligible voters" are.

The VRA prohibits citizens from being denied the right to vote for failure to comply with durational residency requirements or failure to be physically present in the State on election day, "if such citizen *shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots* in such election." 42 U.S.C. § 1973aa-1(c) (emphasis added). But when a citizen has failed to comply with the State's law regarding the casting of absentee ballot, then the right to vote has not been infringed upon.

Furthermore, the NVRA deals purely with voter *registration*, not voter qualifications. *Assoc. of Community Organizations for Reform Now v. Miller* (W.D.Mich. 1995), 912 F. Supp. 976, 985 ("Every court that has considered whether the NVRA alters voter qualifications fixed by a state has found that it does not.").

VRA and NVRA neither require or expressly permit same-day voting by new registrants. Directives 2008-63 and 2008-91 provide no time to ensure that new registrants are not attempting to commit voter fraud, nor do they provide any time for voter rolls to be updated. *No one* has cited *any* provisions of federal law that require Ohio to permit immediate voting by previously unregistered persons.

Respondent and amici have argued that there are provisions of federal law that would require absentee ballots to be issued to some voters after they have been registered for a period of time less than thirty days, but none has suggested that any federal law requires Ohio to permit immediate in-person voting of an absentee ballot the same day as the person registers for the first time. Even assuming, for the sake of argument, that there were a federal law requiring Ohio to reduce the thirty day registration requirement in some instances to twenty or twenty-nine days (which there is not), there is clearly no authority under federal or state law for Respondent's unilateral act of purporting to reduce Ohio's registration requirement to *zero* days.

Contrary to Respondent and amici curiae's assertions, Relators do not seek to disenfranchise voters. Relators seek to uphold the electoral process protections that the legislature established. The contention that voters will be disenfranchised is incorrect. Persons registering to vote during the "overlap period" will be able to vote – on election day *at the polls*.

In *Friedman v. Snipes* (S.D.Fla. 2004), 345 F. Supp. 2d 1356, 1377, the court found that the imposition of a deadline by which voters must return votes does *not* disenfranchise voters. The court explained that the Plaintiffs were "still able to cast a ballot, however, they must either return their absentee ballots in sufficient time so that votes are received by the 7 p.m. deadline or they must vote in person." *Id.* Similarly, here, voters have a choice: register in time to qualify as an elector before requesting an absentee ballot or vote in person.

Respondents Directives violate Ohio law and are unsupported by federal law. Accordingly, Relators' request for a writ of mandamus should be granted.

Proposition of Law No. III

A Writ Of Mandamus Must Be Issued Where The Secretary Has Misdirected Members Of Boards Of Elections As To Their Duties, And The Secretary Has Created A Situation Where (i) Some Boards Of Elections Will Disregard Portions Of Directive 2008-63 And Will Follow The Advice Of Their County Prosecuting Attorneys, And (ii) A “Large Volume” Of Citizens And Members Of Boards Of Elections May Commit Felonies Simply By Complying With The Mandates Of Directive 2008-63.

A. A Writ of Mandamus provides the only appropriate relief to ensure that votes are counted properly.

For a writ of mandamus to issue, the Relators must demonstrate that (1) they have a clear legal right to the relief prayed for; (2) Respondent has a clear legal duty to perform the act requested; and (3) the Relators have no plain and adequate remedy in the ordinary course of law. *State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d 589, ¶11. Each of these elements is met here.

1. The Relators have a clear legal right to a Writ requiring Secretary of State Brunner to issue a legal directive.

First, the Relators have a clear legal right to the relief prayed for. They have a right to have their elected public officials (here, the Secretary of State) obey the law. See, e.g., R.C. 3.07 (stating that a public officer who refuses to enforce the law is guilty of misconduct and must forfeit the public office). Furthermore, Relators have a clear legal right not to have their votes diluted by illegal votes. *Reynolds v. Sims* (1964), 377 U.S. 533, 554-555 (stating that qualified voters have a constitutionally protected right to vote that cannot be diluted by ballot-box stuffing).

Respondent takes umbrage at Relators’ concern about massive voter fraud. Yet, Respondent’s Directives have undermined the ability to use the Statewide voter registry to prevent fraud. Further, by encouraging persons who are not qualified electors (due to their

failure to be registered for thirty days) to represent that they are qualified electors encourages fraudulent statements. Directing boards of elections to permit such unqualified electors to obtain absentee ballots that they are not entitled to receive and to immediately cast absentee votes that they are not entitled to vote further directs illegal voting. Relators have the right to vote without having the weight of their legal votes diluted by fraudulent or illegal votes.

Relators also have a clear legal right to have votes counted uniformly in each of Ohio's counties. *Bush v. Gore* (2000), 531 U.S. 98 (finding that methods of determining voter intent that varied from county to county violated the equal protection clause of the U.S. Constitution).

Respondent asserts (at page 22 of her Merit Brief) that her directives must be followed by boards of elections even if the board of elections' statutory legal counsel advised them that it would be illegal to do so. R.C. 3501.05(B) gives Respondent authority to "[i]ssue instructions by directives and advisories to members of the boards as to the proper *methods* of conducting elections," and R.C. 3501.05(M) gives Respondent authority to "[c]ompel the observance by election officers in the several counties of the requirements of the election laws." However, nothing in R.C. 3501.05 gives Respondent authority to act as legal counsel to the county boards of elections or to compel the *disobedience* by elections officers of the legal advice given them by their statutory legal counsel. R.C. 309.09 states that "[t]he prosecuting attorney" – and not the Secretary of State – "shall be the legal adviser of the . . . board of elections."

R.C. § 309.09 . . . makes the Prosecuting Attorney the legal advisor of the Board of Elections and nothing in the Revised Code § 3501.05 . . . derogates from this power and duty of the Prosecuting Attorney. All questions as to the interpretation or construction of election laws should be presented to the Prosecuting Attorney, and it is *his duty* to give an opinion to the Board of Elections, or to secure an opinion from the Attorney General."

In re Election of Council of Village of Oak Harbor (1953), 118 N.E.2d 692, 695, 68 Ohio Law Abs. 242, 57 O.O. 426 (emphasis in original).

Respondent appears to have a very different understanding of her proper role and of the separation of powers than Relators do. It appears that however the legislature drafts Ohio's laws and however the statutory legal counsel advise boards of elections regarding their legal duties under those laws, Respondent believes that boards of election have a superior duty to obey her Directives rather than a "literal" reading of Ohio's statutes or the advise of the boards' own legal counsel. This violates Relators' right to have a lawfully conducted election.

2. Secretary of State of Brunner has a clear legal duty to issue directives that comply with election law.

Respondent, the Ohio Secretary of State, has a clear legal duty (1) to "[i]ssue instructions by directives . . . to members of the boards *as to the proper methods of conducting elections*"; and (2) to "[c]ompel the observance by election officers in the several counties *of the requirements of the election laws*[" R.C. 3501.05(B) and (M) (emphasis added). Respondent has no right to compel the *disobedience* by elections officials of the requirements of the election laws and, in fact, has the duty not to do so.

Respondent Brunner claims that the issuance of a directive is discretionary, and therefore, she has no clear legal duty that can be enforced through a writ of mandamus. (Answer, ¶46.) Respondent's assertion, however, conflicts with this Court's decision in *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, 225, 94 N.E.2d 785, where this Court held that 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." See also *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923 (noting that the standard to be applied in extraordinary writ actions against the Secretary of State or boards of elections is

whether there was fraud, corruption, abuse of discretion, or clear disregard of applicable legal provisions), citing *State ex rel. Kelly v. Cuyahoga Cty. Bd. of Elections* (1994), 70 Ohio St.3d 413, 414, 639 N.E.2d 78 (mandamus and prohibition action) and *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 651 N.E.2d 995 (quo warranto action).

Respondent acknowledges at page 29 of her Merit Brief that under *State ex rel. Melvin v. Sweeney* (1950), 153 Ohio St. 223, 226, “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.” Respondent argues, however, that *Sweeney* has been implicitly overruled by *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1. In fact, *Hodges* made no reference to *Sweeney*, but merely found in the facts of the *Hodges* case that there was no clear duty of then Secretary of State Taft to command obedience with certain statutes regarding circulator statements that “may . . . be an unwarranted restriction or limitation on the right of initiative prohibited by Section 1g, Article II [of Ohio’s Constitution.]” *Hodges*, 64 Ohio St.3d at 8. Where, as here, the statutory duty is clear, *Sweeney* supports Relators’ right to a writ of mandamus against the Secretary.

Respondent has no discretion to issue a directive that compels election officers to ignore, violate, or encourage the violation of election law. See R.C. 3501.05. Since Respondent Brunner has issued false directives to the county boards of elections, she has a legal duty to issue directives that comply with election laws. *Id.*

3. Relators have no other plain or adequate remedy for relief.

Relators have no plain and adequate remedy in the ordinary course of law. There is no other method available for Relators to compel Respondent Brunner to exercise her legal duties to advise county boards of elections as to the proper conduct of elections and to compel the

observance of election laws as the date draws near when persons will be able to register to vote and receive an absentee ballot on the same day – especially in light of the fact that Respondent Brunner issued Advisory 2008-24 *this week* that essentially prohibits challengers to illegally-cast absentee votes during the so-called overlap period.

Although Directive 2008-91, issued on September 11, 2008, suggests that challenges may be filed in regard to a voter who votes an absentee ballot, Advisory 2008-24, issued on September 23, 2008, effectively strips away that right to have election observers make challenges during the 5-day “overlap” period for in-person absentee voting.

Respondent argues at pages 9 and 10 of her Merit Brief that the protest procedure of R.C. 3509.06 and 3509.07 provide an adequate remedy at law. However, Respondents’ Directives instruct the boards of elections to reject any protest that is based on the failure of newly registered voters to be registered for thirty days at the time they cast their absentee votes. Far from being an adequate remedy at law, such a sham protest procedure would merely create potentially numerous separate mandamus actions relating to all such voters in Ohio’s 88 counties at a later time far closer to the election. This, plainly, is not an adequate remedy at law.

Therefore, a writ of mandamus is the proper remedy to correct Respondent’s illegal act.

B. Relators’ claims are not barred by laches.

For laches to apply, there must be (1) an unreasonable delay or lapse of time in asserting a right; (2) no excuse for the delay; (3) constructive or actual knowledge of the injury or wrong; and (4) prejudice to the other party. *State ex rel. Craig v. Scioto Cty. Bd. of Elections*, 117 Ohio St.3d 158, 2008-Ohio-706, 882 N.E.2d 435, ¶11. None of these elements apply here.

Relators have exercised their utmost diligence in this election matter, and therefore, Relators’ claims are not barred by laches. Respondent Brunner did not issue Directive 2008-63

until August 13, 2008, within the 90-day timeframe that triggers the expedited election case schedule under S.Ct.Prac.R. X(9). And Directive 2008-63 could arguably have been construed as applying only to “qualified electors,” who had been registered for thirty days. On September 11, 2008, however, Respondent Brunner clarified that such construction would not be permitted – that boards of elections must allow same-day registration and absentee ballot voting. Furthermore, any opinions issued by county prosecuting attorneys that might have restored compliance with the law were undermined when, on September 11, 2008, Respondent Brunner issued Directive 2008-92, which reiterated the effectiveness of Directive 2008-63. Relators filed their Complaint the very next day, on September 12, 2008. Even during the course of this litigation, on September 23, 2008, the day *after* Relators filed their Merit Brief and submitted their evidence, Respondent Brunner issued Advisory 2008-24, which bars challengers during the in-person absentee voting period.

Furthermore, Respondent Brunner has not been prejudiced in any way by the conduct of Relators. This Court generally requires a showing of prejudice before it applies laches to bar a consideration of the merits of an election case. *State ex rel. Craig*, supra, at ¶14. The prejudice to which this Court has referred is when, *due to a relator’s delay*, the case becomes an expedited election case under S.Ct.Prac.R. X(9). *Id.* But, no matter when this case had been filed, it would have been within the 90-day timeframe because Directive 2008-63 was not issued until August 13, 2008.

Relators also have acted with utmost diligence in prosecuting this case. Relators filed their initial merit briefs and submitted their evidence the same afternoon that Respondent Brunner filed her Answer. Relators filed this Reply Brief the day after Respondent Brunner filed her Merit Brief. Even if this Court does not render a decision before September 30, 2008, when

in-person absentee voting begins, votes illegally cast by persons who are not “qualified electors” remain at issue on Election Day (November 4, 2008) when they are counted. Respondent cannot argue (as she does) that Relators’ claims are barred by laches and yet are premature. Accordingly, Relators’ claims are not barred by laches, and Relators are entitled to a writ of mandamus.

CONCLUSION

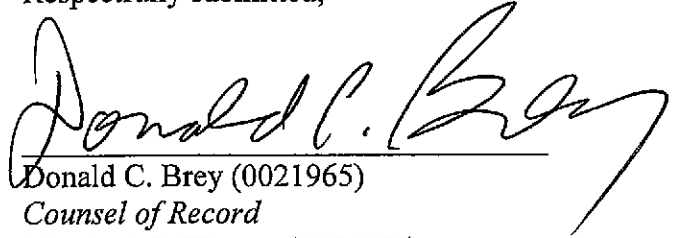
Relators have a clear legal right to the writ requested and no plain and adequate remedy in the ordinary course of the law. Respondent has a clear legal duty not to instruct boards of elections to violate Ohio’s election laws by permitting immediate in person absentee voting by newly registered voters.

WHEREFORE, Relators request that this Court:

- (i) issue a writ of mandamus directing Respondent Secretary of State Jennifer Brunner to issue a Directive to the County Boards of Election 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; and
- (ii) issue a writ of mandamus directing Respondent Secretary of State Jennifer Brunner to issue a clarifying Directive to the County Board of Elections reiterating that thirty (30) days must elapse, consistent with the Ohio Revised Code, before an application for absent voter’s ballot may be accepted by the election official following the registration of a voter, and clarifying that Directive 2008-63 should be construed consistent with Ohio law and does not change or modify the requirement under Ohio law that thirty (30) days must elapse before

an application for an absent voter's ballot may be accepted by the election official following the registration of a voter.

Respectfully submitted,

A handwritten signature in black ink that reads "Donald C. Brey". The signature is written in a cursive style with a long, sweeping tail that extends to the right.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Reply Brief of Relators* was served by electronic mail on this 26th day of September, 2008 upon the following:

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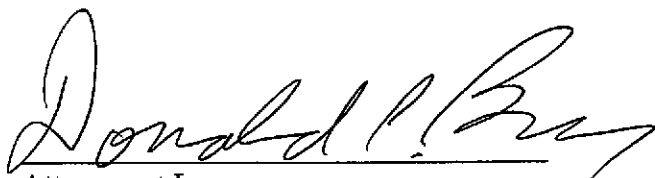
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ADVISORY 2008-24

September 23, 2008

To: ALL COUNTY BOARDS OF ELECTIONS

Re: Observers During In-Person Absentee Voting

This office has received requests from boards of elections, political parties, advocacy groups and advocates seeking clarification on whether Ohio law provides for election observers during the 35-day period for in-person absentee voting at board of elections offices or other designated sites.

Upon review of the relevant provisions of the Ohio Revised Code, it appears that the Ohio General Assembly has not provided for election observers during the 35-day period for in-person absentee voting at boards of elections' offices or other designated sites. As indicated in Directive 2008-29, there are five distinct points during an election at which the General Assembly has provided for the presence of election observers in the Revised Code:

- During the **processing and counting** of absent voters' ballots, and military and overseas ballots (R.C. 3509.022, R.C. 3509.06, R.C. 3505.21, and R.C. 3511.11);
- On Election Day at precincts or at the boards of elections (R.C. 3505.21);
- During the processing of provisional ballots (R.C. 3505.183(D) and R.C. 3505.21);
- During the official canvass (R.C. 3505.32(B) and R.C. 3505.21; and
- During any recount (R.C. 3515.03).

The principal statute on election observers, R.C. 3505.21, appears only to address observers on Election Day. This limitation is reinforced by its placement in Chapter 3505, a chapter devoted to Election Day issues, as well as the fact that the General Assembly saw it necessary to include separate provisions for observers with respect to the processing and counting of absentee and provisional ballots, the official canvass, and recounts. Additionally, R.C. 3509.06(E), the most specific statute for observers relating to absentee voting, provides:

Observers may be appointed under section 3505.21 of the Revised Code to witness the *examination and opening of identification envelopes and the counting of absent voters' ballots* under this section.

The rules of statutory construction mandate that I presume that legislative silence or inaction is deliberate; if the General Assembly had intended to allow for observers during in-person absentee voting, it could have included such a provision in R.C. §§ 3509.04 and/or 3509.05, the statutes governing the delivery of absentee ballots to electors and the procedures for voting absentee ballots. Alternatively, when the General Assembly amended R.C. 3505.21 as part of Am. Sub H.B. 3 in 2006 – at the same time it first allowed for “no fault” in-person absentee voting during the 35-day period prior to Election Day – it could have amended 3505.21 to clearly apply to the in-person absentee voting period as well as Election Day. However, it did not. Instead, the General Assembly amended the provisions of R.C. 3505.21 (principal statute on election observers) and R.C. 3509.06 (counting of absent voters’ ballots), without providing for the presence of observers during the 35-day period of in-person absentee voting before an election (other than during the processing and counting of absentee ballots).

In sum, the General Assembly has not specifically provided for election observers during the 35-day in-person absentee voting period immediately preceding Election Day. Additionally, the General Assembly appears to have intended to foreclose such observers during that time by limiting the expressly provided-for presence of observers, with respect to absentee voting, to the processing and counting of absentee ballots. For all of these reasons, I am advising Ohio’s boards of elections that they are not required to allow election observers during the 35-day in-person absentee voting period immediately preceding Election Day.¹

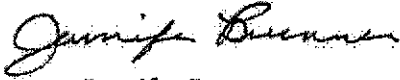
Individual boards may receive requests that they exercise their discretion to allow opportunities for observers to be present at board offices or satellite locations during hours when in-person absentee voting takes place. The allowance of these requests may result in court challenges based on disparate treatment between counties. If all boards operate consistently in following the advice contained in this advisory, which is issued pursuant to R.C. 3501.05(B), any litigation regarding this advisory would necessarily be centered on the secretary of state rather than individual boards, allowing boards to proceed with election preparation unhindered by litigation. In addition, no statute provides deadlines for filing requests to be observers or conduct of observers during periods of in-person absentee voting, leaving a board open to challenge on rules established for such observers by that individual board.

Finally, boards are advised and reminded that the Ohio Supreme Court has held that when a statute is open to two equally reasonable but differing interpretations, it is the court’s duty to defer to the secretary of state’s interpretation. Therefore, an opinion of a county prosecutor contrary to this advisory is subordinate to the advice and interpretation of law contained in this advisory or any other interpretation by the Secretary. *See, Whitman v. Hamilton County Bd. Of Elections*, 97 Ohio St. 3d 216, 2002-Ohio-5923.

¹ Please remember that Directive 2008-67, allowing for the processing of absentee ballots prior to election day in some cases, and R.C. 3509.06(E), quoted above, do require that boards of elections must allow duly appointed observers to observe the processing of absentee ballots, even when that occurs prior to election day. However, such observers shall, according to law, be limited to observing the *processing* of absentee ballots, and are not specifically authorized to observe in-person absentee voting unless those processes occur in the same area.

If you have any questions, please feel free to contact your assigned elections counsel by email or at (614) 466-2585.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Brunner".

Jennifer Brunner