

SUPREME COURT FOR THE STATE OF OHIO

State ex rel. Ohio Citizen Action)
614 West Superior Avenue, Suite 1200)
Cleveland, Ohio 44113)

Case No. _____

Relator,)
v.)

J. Kenneth Blackwell)
Ohio Secretary of State)
180 East Broad Street, 16th Floor)
Columbus, Ohio 43215)

Summit County Board of Elections)
470 Grant Street)
Akron, OH 44311-1157)

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Respondents.)

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)

**RELATOR'S MEMORANDUM IN SUPPORT OF
COMPLAINT FOR AN ORIGINAL WRIT OF MANDAMUS**

I. INTRODUCTION

Relator, Ohio Citizen Action, (“OCA”) is the state's largest environmental organization. Relator has an interest in having all votes cast by registered voters properly counted, accounted for and made public in a timely and consistent manner. Relator is concerned that its members as well as other registered voters in Ohio may face a legitimate risk of vote manipulation and outright fraud during the vote tallying process administered by the Secretary of State’s office. Relator brings its Petition for Writ of Mandamus on behalf itself and the members of OCA .

Respondents, Summit County Board of Elections and Cuyahoga County Board of Elections (the “Boards”), are responsible for ensuring compliance with Ohio’s election laws in Cuyahoga county. Respondent, J. Kenneth Blackwell, is the Ohio Secretary of State and in this capacity, he is Ohio’s Chief Elections Officer. As the Chief Elections Officer, he is responsible for the administration of election laws and each board of elections for Ohio’s 88 counties looks to him for guidance.

Respondents have a clear legal duty to follow the Ohio Revised Code. Unfortunately, Respondents have decided to ignore their clear legal duty to post election summaries outside of polling places. Relator now must rely on the Ohio Supreme Court to require Respondents to uphold the integrity of Ohio’s elections process. To that end, Relator respectfully asks the Court to issue a Writ of Mandamus

requiring Respondents to post election summaries outside of polling places, as required by R.C. § 3505.30.

II. **THE FACTUAL BACKGROUND NECESSITATING RELATOR’S PETITION FOR WRIT OF MANDAMUS**

When the General Assembly decided it was sound public policy to require the posting of election summaries outside of polling places, the distinguished members chose extremely straightforward language. Specifically, R.C. § 3505.30, entitled “Summaries of results; transmission to board; certification to secretary of state” states in part:

When the results of the ballots have been ascertained, such results shall be embodied in a summary statement to be prepared by the judges in duplicate, on forms provided by the board of elections. ***One copy shall be certified by the judges and posted on the front of the polling place, and one copy, similarly certified, shall be transmitted without delay to the board in a sealed envelope along with the other returns of the election.***

(Emphasis added.)

The plain meaning of R.C. 3505.30 is unambiguous and imposes a clear legal duty to post ballot results. The General Assembly used clear and concise wording to convey that a copy of the summary of the election results must be posted outside of each polling place. By requiring the posting of the results immediately outside of polling places, the General Assembly sought to guarantee the integrity of the elections process. No one can challenge that a precinct’s vote tally has been tampered with after it has been transported if the results received by the board of elections match the results that

were posted outside the precinct's polling place. The General Assembly wisely included this safeguard in Ohio's election laws and it is essential that this safeguard is followed.

There are several reasons why Relator's legal right to the statutorily required posting safeguard is in jeopardy. First, Relator has demonstrated that the Respondent Boards do not intend to direct polling places to post the summaries of election results in compliance with the law. See Affidavit of David A. Kopech, Esq. attached as Exhibit A. Second, the affidavit also affirms that the elections officials have received informal guidance from Respondent Blackwell stating that they do not need to comply with the posting requirements of R.C. § 3505.30. Third, Respondent Blackwell's office sent out a "Special Notice" on October 4, 2005, to all of Ohio's boards of elections instructing them that they are not required to comply with the law (R.C. § 3505.30) and post a certified copy of the summary election results on the front of the polling places. This "Special Notice" is attached as Exhibit B to Relator's Petition. These facts show that without the remedy requested by Relator, there is no guarantee that Respondents will meet their legal duty of posting election summaries.

In addition, over the course of the last few weeks other county boards of elections have been contacted to determine whether or not they plan on posting the election summaries outside of their polling places. As of the filing of this Memorandum, approximately half of the boards of elections in Ohio have stated that they do not plan to post the summaries as required by R.C. § 3505.30. Exhibit A. The counties in which their boards of elections do not plan to comply with R.C. § 3505.30 are: Adams, Ashland, Auglaize, Brown, Butler, Carroll, Clermont, Coshocton, Crawford, Cuyahoga,

Darke, Defiance, Delaware, Erie, Fairfield, Fulton, Gallia, Geauga, Greene, Hamilton, Henry, Holmes, Huron, Licking, Lorain, Marion, Medina, Meigs, Miami, Montgomery, Morgan, Morrow, Muskingum, Ottawa, Perry, Pike, Portage, Richland, Scioto, Stark, Summit, Trumbull, Washington, Wayne, and Williams. *Id.* This outrageously high number of non-complying boards of elections is a cause of great concern for Relator, especially when the relative ease of abiding by the statute is weighed against the potential loss of confidence in the security of the elections process.

Although Respondent Blackwell's office issued an Advisory on April 21, 2006 regarding Election Day procedures for the May 2006 primary, the Advisory did not address the posting of election summaries outside of polling places. The lack of any guidance by Respondent Blackwell on the posting requirement has caused confusion with some boards of elections and complete non-compliance by others, as witnessed by the litany of counties above.

Although over five months have passed, Respondent Blackwell still has not issued a Directive or Advisory on the posting of election summaries although nearly half of Ohio's boards of elections, such as the Respondent Boards, do not plan on adhering to the law. Relator's representative did contact the Secretary of State's representative to determine if the Secretary of State would issue an advisory, special notice or directive advising the boards of election to comply with the provisions of R.C. § 3505.30, but the Secretary of State has thus far declined to issue an advisory, directive or special notice. (Exhibit A. In order for the integrity of Ohio's elections process to be upheld, it is

necessary for the Court to issue a Writ of Mandamus compelling Respondents to post the election summaries pursuant to R.C. § 3505.30.

III. **WRIT OF MANDAMUS IS APPROPRIATE TO ENSURE THAT THE INTEGRITY OF THE ELECTION PROCESS IS UPHELD**

When it comes to doing the job of Ohio Secretary of State or that of the Boards, nothing should be easier than making sure the results are posted outside the polling places as required by R.C. § 3505.30. The Ohio General Assembly sought to ensure fair elections by including this double-accounting standard in law, although the General Assembly could not anticipate the current lack of diligence by Respondents. As elections officials, it is part and parcel of their duties to adhere to Ohio's election laws. Due to the fact that Respondents are not properly administering the Ohio election laws, it is proper for the Court to grant Relator's request and issue a Writ of Mandamus.

The right to a Writ of Mandamus involves meeting three requirements. In *State ex rel. Manson v. Morris*, 66 Ohio St.3d 440 (1993), the Court stated: "Three requirements must be met to establish a right to a Writ of Mandamus: that relator have a clear legal right to the relief prayed for, that respondent have a clear legal duty to perform the acts, and that relator have no plain and adequate remedy in the ordinary course of law." In addition, a Writ may be issued to compel the performance of a ministerial act, to compel the exercise of discretion, or to correct a gross abuse of discretion. *Truman v. Village of Clay Center*, 160 Ohio App. 3d 78 (2005). Through the following analysis, the Court will recognize that Relator meets the three requirements and a Writ of Mandamus is essential for the proper administration of Ohio's upcoming general election.

- a. Relator has a clear legal right to the relief prayed for because the boards of elections' failure to comply with the statutory requirements of R.C. § 3505.30.

The Ohio Revised Code, in § 3501.15, mandates that Respondent Blackwell provide guidance to the boards of elections, stating that Respondent “shall do all of the following,” specifically including Directives on how to properly conduct elections and compelling the observance of the election laws by the local officials. Moreover, Respondent Boards are plainly required by Ohio law to post the summary of certified election results pursuant to R.C. § 3505.30. This requirement is not discretionary. Clearly, Relator has a legal right to the relief sought. Without a Mandamus issued by this Court, Respondents will fail to comply with R.C. § 3505.30 as the Boards are not planning on posting the election summaries. Viewing the postings of the election summaries at the several polling places will provide Relator an opportunity to verify the results against the results delivered to the Boards as provided by R.C. § 3505.30. Respondent Blackwell, as Ohio's Chief Elections Officer, and the Boards as the officials conducting the election should be compelled to dutifully abide by the law.

- b. Respondent has a clear legal duty to perform the act because it is a statutory requirement to post the summaries of election results outside of polling places pursuant to R.C. § 3505.30.

The legal duty of the Respondent Boards to post the election summaries, as required by R.C. § 3505.30, could not be any clearer. In no uncertain terms, the Ohio General Assembly stated that one copy of a precinct's election summary “shall be certified by the judges and posted on the front of the polling place, and one copy,

similarly certified, shall be transmitted without delay to the board in a sealed envelope along with the other returns of the election.” Respondent Boards have a clear legal duty to compel the posting of the election summaries outside the polling places of their counties.

The Secretary of State, as Ohio's highest ranking authority in election matters, is not limited to voting and breaking two-to-two ties of county boards of elections. *State ex rel. Cleveland City Council v. Cuyahoga County Bd. of Elections*, 40 Ohio App.2d 299 (1974). He also has authority to compel observance by county election officers of the requirements of election laws through the issuance of Directives, and he performs such other duties as are required by law. *Id.*

It has been held that where the Secretary of State has misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of Mandamus. *State ex rel. Melvin v. Sweeney*, 154 Ohio St. 223 (1950). Respondent Blackwell, in his “Special Notice,” clearly misdirected Ohio’s boards of elections as to their responsibilities under R.C. § 3505.30 and a Mandamus is the proper remedy to correct the error. Also, the Court in *State ex rel. Brookpark Entertainment v. Cuyahoga County Bd. of Elections*, 60 Ohio St.3d 44 (1991), found that, as a general matter, Ohio’s Secretary of State and boards of elections “have statutory duties, not discretion, to determine and act on election results, see, e.g., . . . [R.C.] 3505.30.” Because of his misdirection as to the responsibilities of the boards of elections, his inaction to provide guidance and properly administer Ohio’s election laws,

the majority of Ohio's boards of elections are not complying with the law. Respondent Blackwell has a clear legal duty to issue a Directive offering the proper guidance on the necessity of posting election summaries at polling places. Respondents have a clear legal duty pursuant to R.C. § 3505.30 and the Court should issue the Writ of Mandamus to compel Respondents to abide by their duty.

- c. Relator has no plain and adequate remedy in the ordinary course of law because the 2006 general election is imminent.

Because the November 2006 election is less than five days away, the Relator lacks an adequate remedy in the ordinary course of law. *State ex rel. Brown v. Butler Cty. Bd. of Elections*, 109 Ohio St. 3d 63 (2006); *Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St. 3d 289 (1995); *State ex rel. Smart v. McKinley*, 64 Ohio St. 2d 5 (1980). Relator sought to encourage Respondents to fulfill their respective statutory and constitutional obligations through informal means, however, Relator cannot wait any longer due to time constraints. For Ohio's voters to feel confident that their votes will count on Election Day, it is essential that the safeguards affirmatively and clearly provided in R.C. § 3505.30 be followed by the Respondents.

IV. CONCLUSION

This Court should not permit the Respondents to clearly violate the statutory requirement of posting election summaries at polling places. For the above reasons, this Court should issue the relief sought by Relator and ensure that Secretary of State Blackwell and all of Ohio's boards of elections are fully abiding by R.C. § 3505.30.

Respectfully submitted,

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