

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel PAUL :
DOUCHER, *et al.* :
 :
 :
 Relators, :
 vs. : Case No. 2008-1872
 :
 :
 JENNIFER BRUNNER, SECRETARY : Original Action in Mandamus
 OF STATE OF OHIO, :
 :
 : Expedited Election Matter
 Respondent. : Under S.Ct. Prac. R.X. § 9
 :

ANSWER OF RESPONDENT
JENNIFER BRUNNER, SECRETARY OF STATE

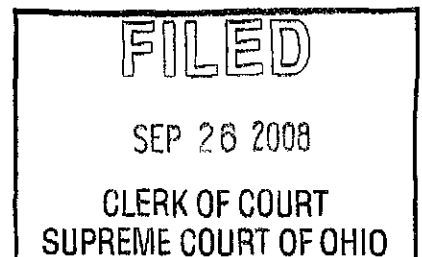
William M. Todd (0023061)
Benesch Friedlander Coplan & Aronoff LLP
Attorney of Record
2600 Huntington Center
41 South High Street
Columbus, Ohio 43215-6197
614-223-9348
614-223-3300 (fax)
wtodd@bfca.com

Attorney for Relators

NANCY H. ROGERS
Attorney General of Ohio

Richard N. Coglianese (0066830)
Attorney of Record
Damian W. Sikora (0075224)
Aaron Epstein (0063286)
Pearl M. Chin (0078810)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
614-466-2872
614-728-7592 (fax)
rcoglianese@ag.state.oh.us
dsikora@ag.state.oh.us

Attorneys for Respondent



Answer

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

1. Denies each and every allegation not specifically admitted to herein.
2. With respect to Paragraph 1 of the Complaint, the Secretary admits that Paul Doucher is a registered voter in the State of Ohio. The Secretary denies for lack of knowledge all of the other allegations contained in Paragraph 2 of the Complaint. R.C. 3501.01(N) defines "qualified elector" as "a person having the qualifications provided by law to be entitled to vote." The Secretary denies for lack of knowledge that Paul Doucher is and will remain eligible to cast a ballot in the 2008 general election.
3. With regard to Paragraph 2 of the Complaint, the Secretary admits that Deloris Eagle is a registered voter in the State of Ohio. The Secretary denies for lack of knowledge all of the other allegations contained in Paragraph 3 of the Complaint. R.C. 3501.01(N) defines "qualified elector" as "a person having the qualifications provided by law to be entitled to vote." The Secretary denies for lack of knowledge that Deloris Eagle is and will remain eligible to cast a ballot in the 2008 general election.
4. With respect to the allegations contained in Paragraph 3 of the Complaint, admits that Secretary Brunner is the duly elected Secretary of State of Ohio and that she has certain duties that are outlined predominantly, but not exclusively, in Title 35 of the Ohio Revised Code.
5. Denies the allegations contained in Paragraph 4 of the Complaint.
6. With respect to the allegations contained in Paragraph 5 of the Complaint, states that Chapter 3501 sets forth some of the law governing county boards of elections. The Secretary

further avers that Paragraph 5 is not a factual allegation but a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

7. With respect to the allegations contained in Paragraph 6 of the Complaint, states that Chapter 3509 of the Ohio Revised Code sets forth some of the law governing absent voter ballots and further states that the provision of absent voters ballots to Ohio voters is also controlled or impacted by federal statutory and constitutional provisions because the November 2008 general election is a federal election. The Secretary further admits that the Relators have properly quoted words or phrases contained in R.C. 3509.01 and R.C. 3509.02 but states that those legal provisions speak for themselves. The Secretary further avers that Paragraph 6 is not a factual allegation but a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

8. With respect to the allegations contained in Paragraph 7 of the Complaint, admits that the Relators have properly quoted words or phrases contained in R.C. 3509.03 but states that those legal provisions speak for themselves. The Secretary further avers that Paragraph 7 is not a factual allegation, but a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

9. With respect to the allegations contained in Paragraph 8 of the Complaint, admits that the Relators have properly quoted words or phrases contained in R.C. 3509.03 but states that those legal provisions speak for themselves. The Secretary further avers that Paragraph 8 is not a factual allegation but a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

10. With respect to the allegations contained in Paragraph 9 of the Complaint, admits that the Relators have properly quoted words or phrases contained in R.C. 3501.01 (not R.C.

3501.1) but states that those legal provisions speak for themselves. The Secretary further avers that Paragraph 9 is not a factual allegation but a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

11. With respect to the allegations contained in Paragraph 10 of the Complaint, admits that the Relators have properly quoted words or phrases contained in R.C. 3503.01 but states that the statute speaks for itself. The Secretary further states that R.C. 3503.21 provides that the registration of otherwise qualified electors may be cancelled under identified circumstances, including, but not limited to, death, felony incarceration, and adjudication of incompetency for purposes of voting. The Secretary denies all other allegations made in Paragraph 10 of the Complaint.

12. With respect to the allegations contained in Paragraph 11 of the Complaint, states that she is without knowledge as to whether mailers were sent to Ohio electors in August of 2008 by a third-party vendor on behalf of John McCain 2008, and therefore denies the allegation. The Secretary further states that the application attached as Exhibit 1, the accuracy of which the Secretary does not know, speaks for itself.

13. With respect to the allegations contained in Paragraph 12 of the Complaint, states that R.C. 3509.03 is a statute that speaks for itself. The Secretary further avers that Exhibit 1 speaks for itself. The Secretary denies all other allegations made in Paragraph 12 of the Complaint.

14. With respect to the allegations contained in Paragraph 13 of the Complaint, the Secretary states that Exhibit 1 speaks for itself. The Secretary denies all other allegations made in Paragraph 13 of the Complaint.

15. With respect to the allegations contained in Paragraph 14 of the Complaint, admits that she issued the September 5, 2008 Memorandum attached to the Complaint as Exhibit 2, and states that the Memorandum speaks for itself.

16. With respect to the allegations contained in Paragraph 15 of the Complaint, states that the Affidavit of Mr. Kammerdiener speaks for itself. The Secretary denies the averments made in Paragraph 15 of the Complaint.

17. With respect to the allegations contained in Paragraph 16 of the Complaint, the Secretary states that the Affidavit of Paul Michael Doucher speaks for itself. The Secretary denies the averments made in Paragraph 16 of the Complaint for lack of knowledge.

18. With respect to the allegations contained in Paragraph 17 of the Complaint, the Secretary states that the Affidavit of Deloris Eagle speaks for itself. The Secretary denies the averments made in Paragraph 17 of the Complaint for lack of knowledge.

19. With respect to the allegations contained in Paragraph 18 of the Complaint, the Secretary denies the averments made in Paragraph 18 of the Complaint for lack of knowledge. The Secretary further states that Exhibit 5 speaks for itself.

20. With respect to the allegations contained in Paragraph 19 of the Complaint, admits that the office of the Hamilton County Prosecuting Attorney issued a legal opinion, which speaks for itself. The Secretary further states that she is not bound by the legal opinion of county prosecutors and that under R.C. 3501.11(P) a county board of elections is statutorily obligated to follow her directives and advisories concerning the administration of elections regardless of the opinion of a county prosecutor, a statutory scheme which mandates and ensures uniform application of the law.

21. With respect to the allegations contained in Paragraph 20 of the Complaint, admits that she held a press conference and issued a press release. The Secretary further states that the press release speaks for itself. The Secretary further avers that she issued her press release and Directive in order to ensure uniform application of the manner in which absentee ballot applications are processed. The Secretary denies the remaining allegations set forth in Paragraph 20 of the Complaint.

22. With respect to the allegations contained in Paragraph 21 of the Complaint, admits the averments set forth therein to the extent that she admits having offered boards of elections assistance and support in processing deficient absent voter's applications.

23. With respect to the allegations contained in Paragraph 22 of the Complaint, admits that the office of the Allen County Prosecuting Attorney issued a legal opinion. The Secretary further states that she is not bound by the legal opinion of county prosecutors and that under R.C. 3501.11(P), a county board of elections is statutorily obligated to follow her directives and advisories concerning the administration of elections regardless of the opinion of a county prosecutor, a statutory scheme which mandates and ensures uniform application of the law. All other allegations in Paragraph 22 are denied for lack of knowledge.

24. With respect to Paragraph 23 of the Complaint, denies that the September 5, 2008 Memorandum provides advice contrary to Ohio statutory law, and states that the Memorandum repeats the statutory requirements for the issuance of an absentee ballot and advises the boards of elections to ensure absentee ballot applications meet all of the requirements. The Secretary further states that by ensuring correct applications, the Secretary reduces the possibility of future challenges to inclusion of votes cast on an absent voter's ballot based on the claim that the absent voter's ballot was deficient. The Secretary admits that disqualifying absentee ballots for that

reason *after* voters have returned executed absent voter's ballots would disenfranchise those voters. Finally, the Secretary denies the remaining allegations set forth in Paragraph 23 of the Complaint.

25. With respect to Paragraph 24 of the Complaint, admits that Ohio has a strong public interest in both allowing every eligible elector to vote and to ensure the smooth and effective administration of election procedures, and admits that the Secretary's Directive satisfies both of those interests in a manner that is consistent with the requirements of the Ohio Revised Code. The Secretary avers that the cases cited by the Relators speak for themselves. The Secretary further avers that Paragraph 24 is not a factual allegation but a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

26. With respect to the allegations contained in Paragraph 25 of the Complaint, admits that Ohio recently enacted legislation to allow greater use of absent voter's ballots. The Secretary further answers that R.C. 3509.02 and R.C. 3509.03 speak for themselves. The Secretary further avers that Paragraph 26 contains legal conclusions, not factual allegations, and that no response to those allegations is required. To the extent a response is required, they are denied. Finally, the Secretary states that she is not bound by the legal opinion of county prosecutors and that under R.C. 3501.11(P), a county board of elections is statutorily obligated to follow her directives and advisories concerning the administration of elections regardless of the opinion of a county prosecutor, a statutory scheme which mandates and ensures uniform application of the law.

27. With respect to Paragraph 26 of the Complaint, denies that the absent voter ballot application contains all the information and declarations required by law, and denies that her

Directive has no statutory basis. The Secretary denies for lack of knowledge all of the other allegations contained in Paragraph 26 of the Complaint.

28. Denies the allegations set forth in Paragraph 27 of the Complaint.

29. In response to Paragraph 28 of the Complaint, Respondent avers that the Memorandum speaks for itself. Respondent denies all other allegations set forth in Paragraph 28.

30. In response to Paragraph 29 of the Complaint, Respondent denies that the Memorandum was “partisan,” and denies the remaining allegations set forth in Paragraph 29 of the Complaint.

31. With respect to the allegations contained in Paragraph 30 of the Complaint, denies that the Memorandum will impose immense administrative burdens. The Secretary further answers that any administrative effort required to identify and notify qualified electors who submitted defective absentee voter’s ballot applications is warranted because required by Ohio law and because notification prevents the disenfranchisement of voters. All other allegations in Paragraph 30 are denied.

32. With respect to the allegations contained in Paragraph 31 of the Complaint, denies that the Memorandum creates a violation of the Equal Protection clauses, and avers to the contrary that the Memorandum will ensure uniformity of absent voter ballot application processing throughout the State. All other allegations in Paragraph 31 are denied.

33. With respect to the allegations contained in Paragraph 32 of the Complaint, denies that the Memorandum creates an undue burden on electors, and avers to the contrary that the Memorandum will protect the franchise of qualified electors who submitted ambiguous,

incomplete or defective absent voter's ballot applications. All other allegations in Paragraph 32 are denied.

34. Denies the allegations set forth in Paragraph 33 of the Complaint and notes that its content includes legal arguments and conclusions to which no response is required.

35. With respect to Paragraph 34 of the Complaint, the Secretary states that Relators will not be injured in any manner because they can properly complete an absent voter ballot application and receive the absentee ballot. The Secretary further states that the time period for casting absentee ballots, September 30, has not yet arrived. R.C. 3501.01(N) defines "qualified elector" as "a person having the qualifications provided by law to be entitled to vote." The Secretary denies for lack of knowledge that Relators Doucher and Eagle are and will remain eligible to cast a ballot in the 2008 general election. Respondent denies all of the other allegations contained in Paragraph 34 of the Complaint.

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

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

First Defense

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

Second Defense

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

Third Defense

39. The Secretary of State's September 5, 2008 Memorandum simply follows the long-standing method of allowing electors to apply for an absentee ballot that has been recognized by other Secretaries of States and boards of elections.

Fourth Defense

40. The Secretary's issuance of a memorandum is a discretionary act that cannot be reviewed by this Court in mandamus.

Fifth Defense

41. The Relators' claims are barred by the doctrine of laches.

Sixth Defense

42. The Secretary of State's September 5, 2008 Memorandum is fully consistent with both state and federal law including the National Voter Registration Act, 42 USC 1973gg.

Seventh Defense

43. The Relators do not have a clear legal right to the relief request.

Eighth Defense

44. The Respondent does not owe a clear legal duty to the Relators.

Ninth Defense

45. The Relators have an adequate remedy at law.

Tenth Defense

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

Eleventh Defense

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

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

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio



Richard N. Coglianese (0066830)

Attorney of Record
Damian W. Sikora (0075224)
Aaron Epstein (0063286)
Pearl M. Chin (0078810)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
614-466-2872
614-728-7592 (fax)
rcoglianese@ag.state.oh.us
dsikora@ag.state.oh.us


Attorneys for Respondent

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing *Answer of Respondent Jennifer Brunner, Secretary of State* was served on this 26th day of September, 2008, by electronic mail, facsimile transmission and ordinary, postage prepaid U.S. mail to:

William M. Todd (0023061)
Benesch Friedlander Coplan & Aronoff LLP
Attorney of Record
2600 Huntington Center
41 South High Street
Columbus, Ohio 43215-6197
614-223-9348
614-223-3300 (fax)
wtodd@bfca.com

Attorney for Relators


Richard N. Coglianese (0066830)