

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel WILLIAM :
MYLES, *et al.* :

Relators, :

vs. :

Case No. 08-1842

JENNIFER BRUNNER, SECRETARY :
OF STATE OF OHIO, :

Original Action in Mandamus

Respondent. :

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

ANSWER OF RESPONDENT
JENNIFER BRUNNER, SECRETARY OF STATE

James E. Burke (0032731)
Charles M. Miller (0073844)
Attorney of Record
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, OH 45202

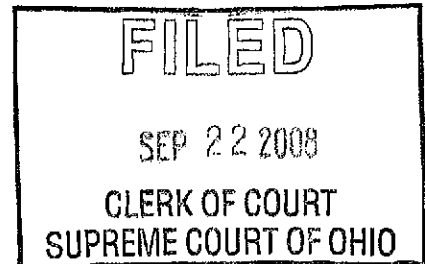
Attorneys for Relators

NANCY H. ROGERS
Attorney General of Ohio

Richard N. Coglianese (0066830)

Attorney of Record
Damian W. Sikora (0075224)
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. Denies for lack of knowledge the allegations contained in Paragraph 1 of the Complaint.
3. With respect to Paragraph 2 of the Complaint, Respondent admits that William Myles is a registered voter in the State of Ohio. Respondent 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 William Myles is and will remain eligible to cast a ballot in the 2008 general election.
4. With regard to Paragraph 3 of the Complaint, Respondent admits that Betty R. Smith is a registered voter in the State of Ohio. Respondent 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 Betty R. Smith is and will remain eligible to cast a ballot in the 2008 general election.
5. With respect to the allegations contained in Paragraph 4 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 Rev. Code.

6. With respect to the allegations contained in Paragraph 5 of the Complaint, the Respondent states that she is an “election officer” or “election official” as that term is defined in R.C. 3501.01(U)(1). She further states that under R.C. 3501.04 she is “the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV [35] of the Revised Code.” Respondent Brunner further states that this Court has long recognized the Secretary of State’s power to advise county boards of elections on the proper manner of conducting elections, to compel the observation of elections laws, and to perform other duties as required by law. *State ex rel. Cleveland City Council v. Bd. of Elec.* (1974), 40 Ohio App.2d 299. In addition, this Court has held that this Court must defer to the Secretary’s interpretation of Ohio law if a statute is ambiguous and subject to two or more reasonable interpretations. *Whitman v Hamilton County Bd. of Elect.* (2002), 97 Ohio St.3d 216.
7. Denies the allegations contained in Paragraph 6 of the Complaint.
8. With respect to the allegations contained in Paragraph 7 of the Complaint, admits that R.C. 3501.05 (B) requires the Secretary of State is to issue directives and advisories to the members of the boards as to the proper methods of conducting elections, and that the Relators have correctly quoted a portion of R.C. 3505.20. The Respondent further admits that the Memorandum attached to the Complaint as Exhibit 2 is a true and accurate copy of the Memorandum issued by the Secretary of State on September 5, 2008. This Memorandum reiterated to board members Ohio’s statutory

requirements for what must be included on an application for an absentee ballot and reminded board members of their obligations and responsibilities under R.C. 3509.04 (A) and Directive 2008-82. Those obligations and responsibilities as set forth in Directive 2008-82 include promptly contacting any applicant who has submitted a deficient absentee ballot and the Secretary's strong "recommendation that boards of elections send such applicants a letter describing the deficiency, along with a new Secretary of State prescribed Application for Absentee Voter's Ballot (Form 11-A) for the applicant to complete if he or she still wishes to vote by absentee ballot." The Respondent denies that her September 5, 2008 Memorandum mentions a "McCain Absentee Ballot Application" or any specific absentee ballot application. Further, Respondent denies all the remaining allegations contained in Paragraph 7 of the Complaint.

9. Respondent denies all of the allegations contained in Paragraph 8 of the Complaint because her September 5, 2008 Memorandum fully complies with both federal and state law; is not erroneous, and does not advise the boards of elections to reject "McCain Absentee Ballot Applications."
10. With respect to the allegations contained in Paragraph 9 of the Complaint, states that Chapter 3509 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 3509.02 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, states that the Relators have properly quoted words or phrases contained in R.C. 3509.03 and that the statute speaks for itself. The Secretary further avers that Paragraph 10 is not a factual allegation but merely a legal conclusion and that no response to the allegation is required. To the extent a response is required, it is denied.
12. With respect to the allegations contained in Paragraph 11 of the Complaint, Respondent admits that R.C. 3501.05(G) provides that the Secretary of State shall “determine and prescribe . . . forms and blanks required by law for use by . . . boards.” The Respondent further admits that Form 11-A is the Secretary of State’s prescribed Application for Absent Voter’s Ballot and that Exhibit 3 of the Complaint is a true and accurate copy of Form 11-A.
13. Respondent denies the allegation made in Paragraph 12 of the Complaint based on the incomplete and misleading partial excerpt quoted by Relators from Respondent’s September 5, 2008 Memorandum. That Memorandum speaks for itself and states: “By way of example, the Secretary of State prescribed **voter registration form** has check boxes related to the questions on whether the applicant is a U.S. citizen and whether the applicant will be 18 on or before the next election. However those questions have also been incorporated into the statement directly related to the signature of the applicant. As a result, if an applicant does not check the boxes at the top of the form, he or she still affirms the statements simply by signing the form.”

Relators have added brackets that incorrectly identify the form discussed in the quotation as being Form 11-A, Ohio's Application for Absent Voter's Ballot. The form referenced is not the Absentee Ballot Form; it is Ohio's Voter Registration Form. Additionally, the phrase quoted by Relators in Paragraph 12 is out of context without the two sentences immediately preceding it.

14. With respect to the allegations contained in Paragraph 13 of the Complaint, states that the Secretary of State's September 5, 2008 Memorandum speaks for itself.

Respondent admits that her September 5, 2008 Memorandum advises boards that when an application has on it a check box, signature line, or some other requirement for the voter to affirmatively indicate or make the statement required by R.C. 3509.03(G), such affirmative action must be made. Respondent denies all other allegations made in Paragraph 13 of the Complaint.

15. With regard to Paragraph 14, respondent admits that, pursuant to R.C. 3509.03(B), a voter desiring to vote an absentee ballot must include his or her signature with to warrant issuance of an absentee ballot. Respondent denies that R.C. 3509.03(B) provides any explanation as to why a signature is required or requires that boards of elections take any prescribed action concerning the signature. All other allegations contained in the paragraph are denied.

16. With regard to Paragraph 15, Respondent states that R.C. 3509.03 is a statute that speaks for itself. The Secretary further admits that R.C. 3509.03 does not state a purpose for requiring an elector's signature on an absent voter's ballot application nor for any other requirement of an absent voter's ballot application. The Secretary further avers that Paragraph 15 is not a factual allegation but merely a legal

conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.

17. With regard to Paragraph 16, Respondent admits that R.C. 3509.03 states the requirements necessary to receive an absentee ballot. Respondent avers that R.C. 3599.21 and R.C. 3509.03 speak for themselves. Respondent further states that R.C. 3599.36 provides that “Every paper, card, or other document relating to any election matter than calls for a statement to be made under penalty of election falsification shall be accompanied by the following statement in bold face capital letters:

‘Whoever commits election falsification is guilty of a felony of the fifth degree.’”
Further Relators’ allegations relating to R.C. 3599.36 contain legal conclusions, not factual allegations, and thus do not require a response. All other allegations in Paragraph 16 are denied.
18. With regard to Paragraph 17, Respondent admits that Relators have accurately quoted words or phrases contained in Form 11-A. Respondent Further admits that Form 11-A states: “Whoever commits election falsification is guilty of a felony in the fifth degree.” Respondent avers that R.C. 3599.36 speaks for itself. Relators’ allegations relating to R.C. 3599.36 contain legal conclusions, not factual allegations, and thus do not require a response. All other allegations in Paragraph 17 are denied.
19. With regard to Paragraph 18, Respondent denies that the qualified elector statement on Form 11-A is incorrect or misleading. Respondent further states that R.C. 3509.03 does not require an absent voter’s ballot application to contain a statement of the criminal penalty for fraudulently submitting an absentee ballot application. Respondent further avers that R.C. 3599.21 is a legal provision that speaks for itself.

Further, the remaining allegations in Paragraph 18 are not factual allegations, but merely a legal conclusions and that no response to the allegations are required. To the extent a response is required, it is denied.

20. With regard to Paragraph 19, Respondent denies that there is any false information contained in the qualified elector statement on Form 11-A. Respondent admits she has directed boards of elections to accept any voter's written request for an absentee ballot so long as it contains the requirements mandated under R.C. 3509.03 (Directive 2008-82). Respondent denies all other allegations contained in Paragraph 19.
21. With regard to Paragraph 20, Respondent states that R.C. 3509.03 is a statute that speaks for itself. The Secretary further avers that Paragraph 20 is not a factual allegation but merely a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.
22. As to Paragraph 21, Respondent states that R.C. 3509.03 is a statute that speaks for itself. The Secretary further avers that Paragraph 21 is not a factual allegation but merely a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied. Respondent admits that her September 5, 2008 Memorandum instructs boards that when an application has on it a check box, signature line, or some other requirement for the voter affirmatively to indicate or make the statement required by R.C. 3509.03(G), such affirmative action must be made. Respondent denies all other allegations made in Paragraph 21 of the Complaint.
23. Respondent denies all of the allegations made in Paragraph 22 of the Complaint. The requirements for an absentee ballot application are statutory, and the Secretary has

advised the boards of elections, through her Memorandum, to make sure that these applications contain 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. Finally, the Secretary admits that disqualifying absentee ballots for that reason after voters have returned executed absent voter's ballots would disenfranchise those voters.

24. As to Paragraph 23 of the Complaint, Respondent admits that Relators have correctly quoted words and phrases contained in R.C. 309.09(A). The Secretary further asserts that she is not bound by the legal opinion of county prosecutors. Respondent states that boards of elections are required to follow her directives and advisories concerning the administration of elections pursuant to R.C. 3501.11(P) regardless of the opinion of a prosecutor. Respondent denies for lack of knowledge all other allegations contained in the paragraph.
25. Respondent denies the averments made in Paragraph 24 of the Complaint for lack of knowledge. 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.
26. With respect to Paragraph 25, Respondent admits that she has not initiated any litigation regarding how absentee ballots are counted. Furthermore, the Secretary states that she has ensured uniform application of the manner in which absentee ballot applications are processed by issuing the Memorandum dated September 5, 2008

concerning deficient absentee ballot applications. The Secretary also states that under Ohio law, county boards of elections are statutorily obligated to follow her directives and advisories concerning the administration of elections, not contrary opinions of county prosecutors. This statutory scheme mandates uniform application of the law. Respondent denies all other allegations set forth in Paragraph 25.

27. With regard to Paragraph 26, the United States Supreme Court case cited by Relators, *Moss v. Bush*, speaks for itself. The Secretary further avers that Paragraph 26 is not a factual allegation but merely a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.
28. Respondent denies the allegation in Paragraph 27 of the Complaint.
29. Respondent denies the allegation in Paragraph 28 of the Complaint.
30. With respect to Paragraph 29 of the Complaint, Respondent admits that Relator Myles is a registered voter in the State of Ohio. Respondent denies for lack of knowledge all of the other allegations contained in Paragraph 29 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 Respondent denies for lack of knowledge that Relator Myles is and will remain eligible to cast a ballot in the 2008 general election.
31. With respect to Paragraph 30 of the Complaint, Respondent admits that Relator Smith is a registered voter in the State of Ohio. Respondent denies for lack of knowledge all of the other allegations contained in Paragraph 30 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 Respondent denies for lack of

knowledge that Relator Smith is and will remain eligible to cast a ballot in the 2008 general election.

32. With respect to Paragraph 31 of the Complaint, Respondent admits that boards of elections are required to issue an absentee ballot to a qualified elector so long as that request meets the requirements R.C. 3509.03 and other statutory provisions. The Respondent denies that her September 5, 2008 Memorandum provides advice contrary to Ohio statutory law and states that the Memorandum merely repeats the statutory requirements for the issuance of an absentee ballot. The Respondent denies all other allegations in the paragraph.
33. As to Paragraph 32, Respondent states that R.C. 3509.02 and R.C. 3509.03 are statutes that speak for themselves. The Secretary further avers that Paragraph 32 is not a factual allegation but merely a legal conclusion and that no response to the allegations is required. To the extent a response is required, it is denied.
34. As to Paragraph 33, Respondent states that R.C. 3509.04 speaks for itself. The Secretary further avers that Paragraph 33 is not a factual allegation but merely a legal conclusion and that no response to the allegations is required. In addition, the Relators' complaint involves claims about what is required in order to obtain an absentee voter ballot. The Secretary states when the Relators reference R.C. 3509.04, they are speaking about an absentee ballot envelope for a completed and returned absentee ballot and not an application to obtain an absent voter's ballot. To the extent a response is required, it is denied.
35. With respect to Paragraph 34 of the Complaint, Respondent admits that Relator Myles is a registered voter in the State of Ohio. Respondent further states that

Relator Myles will not be injured in any manner because he can properly complete an absentee ballot application and receive the absentee ballot. Respondent 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 Relator Myles is 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 Paragraph 35 of the Complaint, Respondent admits that Relator Smith is a registered voter in the State of Ohio. Respondent further states that Relator Smith will not be injured in any manner because she can properly complete an absentee ballot application and receive the absentee ballot. Respondent further states that the time period for casting absentee ballots, September 30, has not yet arrived.

Respondent denies all of the other allegations contained in Paragraph 35 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.” Respondent denies for lack of knowledge that Relator Smith is and will remain eligible to cast a ballot in the 2008 general election. Respondent denies all of the other allegations contained in Paragraph 35 of the Complaint.

37. Respondent denies the allegations in Paragraph 36 of the Complaint.

38. 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

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

Second Defense

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

Third Defense

41. 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

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

Fifth Defense

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

Sixth Defense

44. 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

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

Eighth Defense

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

Ninth Defense

47. The Relators have an adequate remedy at law.

Tenth Defense

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

Eleventh Defense

49. 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)

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

pchin@ag.state.oh.us

Attorneys for Respondent

Certificate of Service

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

Charles M. Miller
James E. Burke
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, OH 45202

Attorneys for Relators


Richard M. Cognanese (0066830)