

In the  
Supreme Court of Ohio

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

Relators,

vs.

JENNIFER BRUNNER, SECRETARY OF  
STATE OF OHIO,

Respondent.

Case No. 08-1842

Original Action in Mandamus

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

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**BRIEF OF RESPONDENT SECRETARY OF STATE JENNIFER BRUNNER**

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James E. Burke (0032731)  
Charles M. Miller (0073844)\*

*\*Counsel of Record*

KEATING MUETHING & KLEKAMP PLL  
One East Fourth Street, Suite 1400  
Cincinnati, Ohio 45202  
(513) 579-6967  
(513) 579-6457 (fax)  
jburke@kmklaw.com  
cmiller@kmklaw.com

*Attorneys for Relators*

NANCY H. ROGERS  
Attorney General of Ohio

Richard N. Coglianese (0066830)\*  
*\*Counsel of Record*

Damian W. Sikora (0075224)  
Pearl M. Chin (0078810)  
Michael J. Schuler (0082390)  
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

*Attorneys for Respondent*

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## INTRODUCTION

Revised Code Title 35 establishes the statutory framework for the administration of Ohio elections. It codifies a highly complex, technical, and sometimes ambiguous set of interrelated statutory provisions. The case at bar illustrates the General Assembly's wisdom in empowering the Secretary of State with the primary responsibility of prescribing forms to be used in the election process. R.C. 3501.05(F) and (G). As Ohio's chief elections officer, Respondent Secretary of State Jennifer Brunner, supported by a staff that includes both Republicans and Democrats with decades of experience in election administration, possesses special expertise and knowledge of Ohio elections law. Secretary of State Brunner is uniquely positioned to provide uniform election forms to voters, candidates, and the boards of elections that provide clarity both in the forms themselves and in accompanying instructions. An example of such a form is Form 11-A, an absentee ballot application that both complies with the requirements of R.C. 3509.03 and promotes the legitimate and convenient exercise of the franchise.

The creation of election forms, applications, and ballots can be tricky. While R.C. 3509.03 does not prohibit third parties from creating their own applications for absentee ballots, they do so at their own peril. Where members of the general public and individual campaign committees create and disseminate their own forms rather than using forms prescribed by the Secretary of State, they assume the risk that their forms may be defective leading to voter and board of election confusion. That risk was actualized in the case at bar.

Here, Ohioans, using an unofficial third-party form to apply for an absentee ballot, innocently and inadvertently failed to unambiguously affirm that they were qualified voters, a requirement imposed by R.C. 3509.03, and for which strict compliance is required. Thus, if various boards of elections informed Relators that their returned applications did not provide all the information required in R.C. 3509.03, that is not the fault of the Secretary of State. The fault

lies with the creators and disseminators of the unofficial absentee ballot application form now before this Court for review. Had Relators instead completed Form 11-A, the widely available and official application provided by the Secretary of State's office, their applications undoubtedly would have been promptly processed by the boards. It is fortunate that the defect in the third-party form at issue was promptly identified, leaving each Relator ample time to provide the boards with a completed absentee ballot application that fully complies with statutory requirements. Indeed, Secretary Brunner has moved quickly to ensure that these Relators, and other affected Ohio citizens, are advised of the defect in their original applications in order that their ability to vote an absentee ballot is not precluded.

Relators in this mandamus action improperly seek an order from this Court invalidating a September 5, 2008 Memorandum issued by Secretary Brunner to the county boards of elections. Memorandum of Secretary of State (Deficient Absentee Ballot Application, Sept. 5, 2008) (hereinafter "Memorandum"), attached as Exh. 2 of Relators' Complaint. However, Secretary Brunner's Memorandum does not violate any law. In fact, the Memorandum merely reminds the board of elections of existing statutory requirements for an absentee ballot application, including the provision in R.C. 3509.03(G) requiring "a statement that the person requesting the ballots is a qualified elector." R.C. 3509.03(G). An application that contains an unmarked check box next to a statement that the applicant is a qualified elector is ambiguous at best, warranting the conclusion that "the applicant has not affirmatively made the statement required under R.C. 3509.03, and the application must be rejected unless the applicant has affirmed the statement in some other way." Memorandum, p. 2. Notably, this Court has already recognized that the failure to mark a checkbox, when a checkbox appears on a form, creates a "mistaken or

confusing impression.” *State ex rel. Stevens v. Geauga Cty. Bd. of Elections* (2000), 90 Ohio St. 3d 223, 228, 2000-Ohio-66.

The Secretary’s Memorandum further reminds the boards of elections of their duty pursuant to R.C. 3509.04(A) to promptly notify applicants if their applications fail to provide all the information required by statute. And the Memorandum provided an additional service to voters not expressly required by statutory law: it recommended that the boards provide, along with the notification of deficiency, an official Form 11-A for the applicant to submit a request for an absentee ballot either by mail or in person. Therefore, by issuing the Memorandum on September 5, 2008—well before absentee ballots are made available on September 30th—Secretary Brunner has given ample opportunity for the boards of elections to promptly notify affected applicants, including Relators, and for affected voters to obtain and vote an absentee ballot. Secretary Brunner’s Memorandum not only conforms with law; it was promptly issued in order to avoid prejudice to voters later in the election season whose votes might otherwise be challenged as lacking conformance with law.

The Secretary’s Memorandum does not cut off the Relators’ right to obtain an absentee ballot or exercise their right to vote. There is still ample time and opportunity to do both. In fact, Relators have the option of submitting an application by mail until the third day before the election, i.e. November 1, 2008, or submitting an application in person at the board of election until the very day before the election. There is simply no support for Relators’ overwrought and sweeping allegations of voter disenfranchisement and irreparable harm.

Because the Secretary’s Memorandum conforms with law, and because this action is not appropriate for the exercise of this court’s original jurisdiction through the issuance of the extraordinary writ of mandamus, the Relators’ request for a writ of mandamus should be denied.

## STATEMENT OF FACTS

### Statutory Requirements for Absentee Ballot Applications

With the exception of circumstances not relevant here, R.C. 3509.03 sets forth the following requirements for applying to obtain an absentee ballot: “[A]ny qualified elector desiring to vote absent voter's ballots at an election shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located.” R.C. 3509.03. While the statute provides that, “the application need not be in any particular form,” the following information must be provided:

- (A) The elector's name;
- (B) The elector's signature;
- (C) The address at which the elector is registered to vote;
- (D) The elector's date of birth;
- (E) One of the following:
  - (1) The elector's driver's license number,
  - (2) The last four digits of the elector's social security number
  - (3) A copy of the elector's current and valid photo identification, a copy of a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document...that shows the name and address of the elector.
- (F) A statement identifying the election for which absent voter's ballots are requested;
- (G) ***A statement that the person requesting the ballots is a qualified elector;***
- (H) If the request is for primary election ballots, the elector's party affiliation;
- (I) If the elector desires ballots to be mailed to the elector, the address to which those ballots shall be mailed. (Emphasis added.)

R.C. 3509.03 (emphasis added). This case concerns R.C. 3509.03(G), which requires a statement that the applicant is a qualified elector.

## The Absentee Ballot Application Issued by the Secretary of State (Form 11-A)

Although there is no mandatory application form, the Secretary of State's office has prescribed an application form that may be used (Form 11-A).<sup>1</sup> This form is created pursuant to R.C. 3501.05, which states that the Secretary "shall determine and prescribe the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees, and boards." Form 11-A is attached to Relator's Complaint as Exh. 3. An elector may request this form from a board of elections or find it online at [http://www.sos.state.oh.us/SOS/absentee\\_avoidLine.aspx?page=9365](http://www.sos.state.oh.us/SOS/absentee_avoidLine.aspx?page=9365). Form 11-A asks the applicant to provide the information required in R.C. 3509.03(A) through (F). Furthermore, in accordance with R.C. 3509.03(G), which requires "a statement that the person requesting the ballots is a qualified elector," Form 11-A contains a qualified elector statement. Directly under this statement is a line for the applicant's signature and the date, as follows:

I hereby declare, under penalty of election falsification, I am a qualified voter and the statements above are true to the best of my knowledge and belief. I understand that if I do not provide the requested information, my application cannot be processed.

X

\_\_\_\_\_  
Signature of Voter

\_\_\_\_\_  
Date Signed

<sup>1</sup> Relators make much ado about the warning on Form 11-A, which is required in R.C. 3599.36, that, "Whoever commits election falsification is guilty of a felony of the fifth degree." See Relators' Brief, p. 9. Relators allege that Form 11-A contradicts the provision in R.C. 3599.21 that knowingly making a false representation in order to obtain an absent voter's ballot is a fourth degree felony. See R.C. 3599.21(A)(1) and (C). However, this issue is a red herring that has nothing to do with Relators' claims regarding the validity of the Secretary's Memorandum. R.C. 3599.36 provides that "Every paper, card, or other document relating to any election matter that 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.'" R.C. 3509.03 does not, however, require an absent voter's ballot application to contain a statement of the criminal penalty for fraudulently submitting an absentee ballot application.

### **The McCain Absentee Ballot Application**

McCain-Palin, Inc., the official campaign committee for presidential candidate John McCain, distributed its own absentee ballot applications in the State of Ohio. The McCain-Palin, Inc. absentee ballot application is attached to Relators' Complaint as Exh. 1 ("McCain absentee ballot application"). At the top of the McCain absentee ballot application appears a check box next to a statement, as follows:

- I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election.

Positioned beneath this check box and statement is a bold, distinctive line separating this portion of the form from the remainder of the form. Thus, the qualified elector text is overtly separated from the remainder of the form, which includes spaces for the applicant's name, voter registration and mailing address, date of birth, and signature. The signature line does not appear directly below or adjacent to the qualified elector statement. The bottom of the application also contains spaces for the applicant to provide the identification information required by R.C. 3509.03(E), e.g., the elector's driver's license number or the last four digits of the elector's social security number.

Sometime after the issuance of this application, the McCain campaign distributed a revised application that removes the check box and moves the representation concerning qualified voter status directly below the applicant's signature, as follows: "To my county Boards of Elections: by signing this form, I am notifying you that I am a qualified elector and am officially requesting an absentee ballot for the November 4, 2008 General Election." Revised McCain Absentee Ballot Application, Respondent's Submission of Evidence, Exh. A.

## **Processing of Absentee Ballot Applications by the Boards of Elections**

Regardless of the form used, Ohio law provides two ways to return an absentee ballot application – by mail or by in-person delivery. R.C. 3509.03. If an absentee ballot application is delivered by mail, it must be received by the board of elections no later than noon of the third day before the election, i.e., by twelve noon on November 1, 2008. *Id.* Alternatively, if an absentee ballot application is returned in-person to the board of elections office, it must be received no later than the close of regular business hours on the day before the election. *Id.*

Once an absentee ballot application is received by a board of elections, the board must review the application for completeness. R.C. 3509.04. It is not unusual for the boards to receive incomplete applications in each election. See Jacqueline Rothschuh Aff., ¶ 10, Respondent's Submission of Evidence, Exh. B. It has been the practice of the boards, as required by R.C. 3509.04(A), to notify the applicant of the additional information required to be provided to complete the application. Rothschuh Aff., ¶¶ 6, 8. Secretary of State Directive 2008-82 (Guidelines for Absentee Voting, Sept. 5, 2008), further advises the boards of elections that the notification "must be made as soon as is practicable under the circumstances, but in no case more than 48 hours after receiving the absentee ballot application." Directive 2008-82, at 3, attached as Appendix to Relators' Brief. The Directive also contains the following instructions in upper case lettering:

**ELECTION OFFICIALS MAY NOT COMPLETE MISSING INFORMATION  
ON INSUFFICIENT ABSENTEE BALLOT APPLICATIONS FOR VOTERS.**

*Id.* If the application is complete, the board of elections must deliver to the applicant an absentee ballot, either in person or by mailing it directly to applicant by special delivery mail, air mail, or regular mail. R.C. 3509.04(B).

### **The September 5, 2008 Memorandum of Secretary of State Brunner**

In the Memorandum of September 5, 2008, Secretary of State Brunner provided clarification to the Boards of Elections in response to questions regarding the sufficiency of absentee ballot applications received by the boards. The Memorandum clarifies existing statutory law regarding the absentee ballot applications, including the requirement in R.C. 3509.03(G) that every absentee ballot application must contain a statement that the applicant is, in fact, a qualified elector. The Secretary advises that an applicant who provides a signature below the qualified elector statement on Form 11-A “affirms that he or she is, in fact, a qualified voter or elector seeking to vote an absentee ballot at the election indicated on the form.” Memorandum, p. 1. However, if the applicant does not sign the form, “he or she has not made the statement required by R.C. 3509.03(G) that he or she is a qualified elector or voter.” *Id.*

The Secretary also advises boards that, if they receive an absentee ballot application “with a checkbox related directly to a required statement, and the statement is not directly related to a signature line such as appears on the Secretary of State prescribed voter registration Form 11-A, the check box must be marked in some manner by the applicant in order to affirm the required statement.” Memorandum, p. 2. Many boards received such forms where some voters checked the box, but others did not. Therefore, “[f]ailure to check the box leaves both the applicant and the boards of elections without verification that the applicant is a ‘qualified elector.’” *Id.* As such, “If the box is not checked, the applicant has not affirmatively made the statement required under R.C. 3509.03, and the application must be rejected unless the applicant has affirmed the statement in some other way.” *Id.*

The Memorandum also reiterates the instruction from Directive 2008-82 that the boards “cannot, under any circumstances, complete a deficient application of an applicant.” *Id.* Rather, when a board receives a deficient absentee ballot application, the board “must promptly contact

the applicant and must notify him or her of the additional information that must be provided to complete the application.” *Id.*, citing R.C. 3509.04(A). The Secretary thus recommended that the boards send such applicants a letter describing the deficiency, along with a new Form 11-A for the applicant to complete. *Id.* The Memorandum also recommended that the boards’ letter inform the applicant that he or she may vote by absentee ballot in person. *Id.*

## ARGUMENT

### I. Relators Have Not Brought A Proper Action In Mandamus.

In order to be entitled to a writ of mandamus, Relators must establish a clear legal right to the relief requested, a corresponding clear legal duty on the part of Secretary Brunner to perform the requested action, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 3. If no duty exists in law, the Court cannot create a legal duty enforceable in mandamus. *Id.*; *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St. 3d 172, 182, 2007-Ohio-5838, ¶ 46. However, even before reaching the merits of whether Relators meet the required elements for mandamus, this action should be dismissed at the outset because Relators have brought the wrong suit in the wrong court against the wrong party.

#### A. This Court lacks subject matter jurisdiction where the real remedy sought is declaratory or injunctive relief.

Though styled as a “writ of mandamus,” Relators actually seek a declaration from this Court that the Secretary’s September 5, 2008 Memorandum is contrary to law, a declaration that the McCain “Vote-By-Mail Request Card” conforms with the law governing absent voter’s ballot applications, whether the checkbox on that form is checked or not, and an injunction preventing the Boards of Elections from following the contents of the Secretary’s Memorandum. Because the Court does not have subject matter jurisdiction over these claims, Relators’ complaint should be dismissed.

This Court has long recognized that if the allegations in a complaint indicate that the real object sought in a complaint for an extraordinary writ are declaratory judgment and a prohibitory injunction, the complaint must be dismissed for lack of jurisdiction. *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006-Ohio-4334, ¶ 19; *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St. 3d 629, 634; *Hodges*, 64 Ohio St. 3d at 4; *State ex rel. Pressley v. Indus. Comm'n* (1967), 11 Ohio St. 2d 141, 150. When a petition is styled as an “action in mandamus” but its allegations, in effect, seek an injunctive remedy to restrain and enjoin the respondents rather than to compel respondents to perform a clear legal duty, “such a petition does not state a cause of action in mandamus.” *Pressley*, 11 Ohio St. 2d at 150. Since the Court does not have original jurisdiction over actions for declaratory or injunctive relief, such a petition must be dismissed for lack of jurisdiction. *Id.*

Accordingly, in *Evans*, this Court refused to grant a writ of mandamus barring then-Secretary Blackwell from transmitting an initiated statute to the Ohio General Assembly before all protests were completed. The Court recognized that what Relator really sought was a declaration that the Secretary’s actions violated Ohio law and a prohibitory injunction against the clerks in the General Assembly from keeping the initiated statute on their rolls. *Evans*, 2006 Ohio 4334 at ¶¶ 17-19. In *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, this Court also denied a writ of mandamus seeking to compel the Secretary of State to retract his certification of an initiative petition and to refrain from transmitting it when the Relators should have sought declaratory judgment. 64 Ohio St. 3d at 8. Relators in that case asked for the writ on the basis that the Secretary’s directive to the board of election regarding circulator statements was contrary to law. *Id.* That being the case, the Court stated that the proper remedy was not a writ of mandamus, but an action for declaratory judgment. *Id.*

Relators here have couched their prayer for relief as a request for writ of mandamus directing Secretary Brunner: (1) “to issue a Directive to the county boards of elections that they may not reject an absentee ballot application on the basis of a checkbox not being marked to signify the applicant’s affirmation of being a qualified elector,” and (2) “to issue a clarifying memorandum to the county board of elections reiterating that the county boards of elections must issue an absentee ballot to any qualified elector who submits an application that contains all the information required by R.C. 3509.03.” Complaint, Prayer for Relief. However, the substance of the allegations in Relators’ complaint as a whole demonstrates that Relators are actually seeking a declaration invalidating Secretary Brunner’s Memorandum as contrary to law, or conversely, a declaration that the McCain absentee ballot application conforms with R.C. 3509.03. The specific allegations in the Complaint pointing to Relators’ underlying purpose include the following:

- “The qualified elector statement on the McCain Absentee Ballot Application complies with R.C. 3509.03(G).” Complaint, ¶ 21.
- The Secretary’s Memorandum has “arbitrarily created different standards for the acceptance of Form 11-A and the McCain Absentee Ballot Application, which creates an additional, unnecessary and illegal hurdle” to anyone who submits a McCain Absentee Ballot Application. *Id.*, ¶ 22
- The Memorandum is “contrary to Ohio’s statute” and “contrary to established Ohio law.” *Id.*, ¶¶ 25, 34, 35,
- The Secretary has “created a system that [permits] different methods of determining whether a voter intends to request an absentee ballot” and therefore allegedly violates the equal protection clause of the U.S. Constitution” pursuant to *Bush v. Gore* (2000), 531 U.S. 98. *Id.*, ¶¶ 26, 27.
- The Secretary’s Memorandum “prescribes violations of Ohio election law because it requires election officials to not issue an absent voter’s ballot to applicants who have complied with R.C. 3509.03.” *Id.*, ¶ 31.

In effect, Relators have disguised their prayer for relief as a petition for mandamus, when the real object of this action is an order from this Court that the Secretary's Memorandum violates law. Therefore, because declaratory relief does not lie within this Court's original jurisdiction, Relators' complaint should be dismissed in its entirety.

**B. Relators have failed to name the proper party as respondent because it is the Boards of Elections, not the Secretary of State, who carry out the statutory duties imposed by R.C. 3509.03.**

Relators' request for mandamus is improper on its face because Relators have failed to name the proper party as Respondent. It is the Director of the Boards of Elections, not the Secretary of State, who carries out the statutory provisions in R.C. 3909.03 regarding the processing of absentee ballot applications. R.C. 3509.04(B). Therefore, because no clear duty exists in law with the Secretary, the Court cannot create a legal duty enforceable in mandamus. *State ex rel. Heffelfinger*, 2007-Ohio-5838 at ¶ 46.

This Court has previously dismissed an action in mandamus where Relators improperly named the Secretary of State when it was the boards of elections who had the clear legal duty to perform the requested relief. In *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, which dealt with the verification of initiative petitions, the relator sought a writ of mandamus directing the Secretary of State to refrain from certifying the petitions until the next legislative biennium. *Id.* at 2. However, the Court held that, “[a]s the General Assembly has, pursuant to its authority in Section 1g, Article II, specifically placed the duty to ascertain whether initiative petitions are properly verified *on the boards of elections*, we cannot find that the Secretary of State has a clear legal duty to perform it himself. Mandamus will not issue to compel him to do so in the absence of a duty.” *Id.* at 7 (emphasis added). Therefore, the Court concluded, “[h]aving found that respondent Taft had no clear legal duty to perform the acts which relators would compel by writ of mandamus, their petition seeking that relief must be denied.” *Id.* at 11. See also *State ex*

*rel. Nesbitt v. Ohio Adult Parole Authority* (5th Dist. No. 07-CA-88), 2008-Ohio-192, ¶¶ 6-7 (denying writ of mandamus because relators sought relief against improper party Adult Parole Authority where “the ultimate duty is placed on the Department of Rehabilitation and Correction . . . to fulfill the mandate of [R.C. 2967.193]”).

Much like the *Hodges* and *Nesbitt* cases, Relators have failed to bring an action against the proper party because there is no clear legal duty of the Secretary of State to perform the actions requested by Relators. As set forth in the following provisions, it is the director of the board of elections or the board, not the Secretary of State, who receives absentee ballot applications, determines whether they comply with the requirements in R.C. 3509.03, and then sends out absentee ballots or notification of an incomplete application:

- “Any qualified elector shall make written application for those ballots *to the director of elections* of the county in which the elector’s voting residency is located.” R.C. 3509.03.
- “Each application for absent voter’s ballots shall be delivered to the *director*” not earlier than January 1st of an elections year or ninety days before election day, and not later than twelve noon of the third day before the day of the election at which the ballots are to be voted. *Id.*
- Absentee ballot applications may be delivered in person to the *board* no later than the close of regular business hours the day before the election. *Id.*
- “If a *director of a board of elections* receives an application for absent voter’s ballots that does not contain all of the required information, the *director* promptly shall notify the applicant of the additional information required to be provided by the applicant to complete that application.” R.C. 3509.04(A).
- “Upon receipt by the *director* of elections of an application for absent voter’s ballots that contain all of the required information, as provided by R.C. 3509.03... the *director*, if the *director* finds that the applicant is a qualified elector, shall deliver to the applicant in person or mail directly to the applicant by special delivery mail, air mail, or regular mail, postage prepaid, proper absent voter’s ballots.” R.C. 3509.04(B).

The statutory duties in R.C. 3509.03 forming the basis of Relators' mandamus claim all lie with the boards of elections. The Secretary merely reminded the boards, by way of memorandum, of their preexisting statutory duties. If the Relators seek to have the McCain absentee application deemed sufficient under R.C. 3509.03, and absentee ballots issued to voters who returned that application without checking the box on the form, responsibility for those acts lies with the director of the board of elections—not the Secretary. As such, the Secretary of State owes no legal duty to the Relators and is not a proper respondent who can provide the relief requested by Relators (further illustrating the fact that Relators true goal in this action is to receive a declaratory judgment as to the legality of the legal conclusions contained in the Secretary's Memorandum). Therefore, Relators' claim for a writ of mandamus should be dismissed.

## **II. Relators Are Not Entitled To A Writ of Mandamus.**

Even if this Court were to exercise jurisdiction over this matter and find that Relators have properly named the Secretary of State, Relators are still not entitled to a writ of mandamus because they have not established the required elements for such a writ.

Relators request a writ of mandamus directing Secretary Brunner: (1) to issue a Directive to the county boards of elections that they may not reject an absentee ballot application on the basis of a checkbox not being marked to signify the applicant's affirmation of being a qualified elector, and (2) to issue a clarifying memorandum to the county board of elections stating that the boards must issue an absentee ballot to any qualified elector who submits an application that contains all the information required by R.C. 3509.03. Complaint, Prayer for Relief. Stated another way, Relators want Secretary Brunner to direct the Boards or Elections to accept McCain absentee ballot applications, even where the applicant has not marked the checkbox affirming that she is a qualified elector.

However, Relators' action in mandamus fails for several reasons. First, Relators are not entitled to the extraordinary remedy of mandamus because the issuance and content of directives and advisories issued by the Secretary of State to the boards of elections are discretionary matters, and there is no legal duty to issue them. Mandamus will not issue to compel a matter of the Secretary's discretion.

Second, Secretary Brunner has no clear legal duty to issue any clarifying memoranda or directives to the Boards of Elections because her September 5, 2008 Memorandum properly reminds the Boards of Elections of the statutory requirements regarding applications for absentee ballots and the process for notifying applicants of deficiencies in their applications. Accordingly, Relators have no clear legal right to a writ directing the Secretary to issue instructions to the Boards in accordance with Relators' request.

Third, federal law does not afford Relators any clear legal right to the relief requested because the Secretary's Memorandum does not violate the National Voting Rights Act or the equal protection clause, as alleged by Relators.

Finally, Relators have an adequate remedy at law such that resort to the extraordinary remedy of mandamus is unwarranted. As set forth above, Relators should have sought declaratory judgment or a prohibitory injunction in common pleas court to invalidate the Secretary's Memorandum—the real object of Relators' action here. And Relators are not precluded from obtaining an absentee ballot, even if the McCain absentee ballot applications purportedly submitted by Relators were incomplete or deficient. Ohio law provides other alternatives for qualified electors to obtain and cast an absentee ballot, right up until the day before the election.

**A. Mandamus will not issue to compel the Secretary of State to perform a discretionary act in the absence of an abuse of that discretion.**

Relators' request for mandamus is improper because the contents of directives and instructions from the Secretary of State to the boards of elections is a discretionary matter that cannot be compelled in mandamus. This Court has clarified that, "Mandamus will not lie to require the performance of a permissive act because the actor has no duty to perform it." *Hodges*, 64 Ohio St. 3d at 7. The Court further explained that though the Secretary of State is required to advise the boards, "the *content* of his advice is discretionary. Mandamus will not issue to govern how discretion is exercised." *Id.* at 8 (emphasis added). Thus, in *Hodges*, even though this Court acknowledged that the content of a directive issued by the Secretary of State was contrary to law, the proper remedy was not a writ of mandamus, but an action for declaratory judgment. *Id.*

Relators may cite *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, to argue that mandamus is the proper remedy to correct any advice issued by the Secretary to the boards of elections. See Complaint, ¶ 6. However, to the extent that the two decisions conflict, *Hodges* controls as the more recent decision on the specific issue, i.e., whether the content of directives issued by the Secretary of State is a discretionary matter. See, e.g., *Board of Education v. Wellston* (1932), 43 Ohio App. 552, 554 (stating that "[t]he duty of the Court of Appeals is to follow the last word of the Supreme Court"); *McFadden v. Cleveland State Univ.* (2007), 170 Ohio App. 3d 142, 146 (the more recent decision on a specific issue is the controlling precedent).

Furthermore, in an extraordinary action challenging a decision of the Secretary of State, the Court cannot issue a writ of mandamus to control or override the Secretary's decision unless there is an abuse of discretion. *State ex rel. Democratic Executive Committee v. Brown* (1974), 39 Ohio St. 2d 157, 160. When the standard of review is abuse of discretion, mandamus will not

lie when the Court might have reached a different conclusion reviewing the same evidence before the Secretary. *State ex rel. Insurance Co. v. Moore* (1884), 42 Ohio St. 103, 108. The standard is whether the Secretary “engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions. *State ex rel. Herman v. Klopffleisch* (1995), 72 Ohio St. 3d 581. Or stated differently, “an abuse of discretion in such a case must be more than an error of law or an error of judgment. It means discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.” *Brown*, 39 Ohio St. 2d at 161.

Relators’ complaint contains no allegations that the Secretary abused her discretion. Rather, this dispute amounts to a difference in opinion over the interpretation of the absentee ballot application requirements in R.C. 3509.03. The fact that Relators or the county prosecutors arrive at conclusions different from the Secretary’s does not illustrate that the Secretary abused her discretion. Relators make much ado about the advice given by the Hamilton and Allen County prosecutors, who both opine that R.C. 3509.03 does not require the check box next to the qualified elector statement in the McCain application to be marked. See Relators’ Brief, pp. 11-12. However, “when an election statute is subject to two different, but equally reasonable interpretations, the interpretation of the Secretary of State, the state’s chief election officer, is entitled to more weight.” *Herman*, 72 Ohio St. 3d at 586; *Whitman v. Hamilton Cty. Bd. of Elections* (2002), 97 Ohio St. 3d 216, 2002-Ohio-5923, ¶ 22. Simply put, when there is an interpretative “tie” over an elections statute, it is the duty of the Court to apply the Secretary’s interpretation. The contrary opinions of various county prosecutors cannot form the basis for compelling the content of directives, instructions, or memoranda issued by the Secretary of State.

Moreover, as set forth in detail below, the Secretary's Memorandum correctly advises the Boards of Elections of the statutory requirements regarding applications for absentee ballots. Therefore, a writ of mandamus is not appropriate here.

**B. Secretary Brunner's Memorandum properly informs the Boards of Elections as to the statutory requirements of R.C. 3509.03 and R.C. 3509.04.**

In accordance with Ohio law, Secretary Brunner's Memorandum properly clarifies existing statutory law regarding absentee ballot applications, including the requirement in R.C. 3509.03(G) that every absentee ballot application must contain a statement that the applicant is, in fact, a qualified elector.

**1. Absentee ballot applications must strictly comply with the requirements of R.C. 3509.03.**

The Secretary's interpretation of R.C. 3509.03 is supported by the plain language of the statute. As a general rule, election statutes in Ohio are mandatory and require strict compliance unless the statute specifically permits substantial compliance. *State ex rel. Wilson v. Hisrich* (1994), 69 Ohio St. 3d 13, 16. Relators argue that R.C. 3509.03 is "expressly permissive" based on the language in R.C. 3509.03 that "the application need not be in any particular form." Relators' Brief, p. 4. However, Relators neglect to quote the entire sentence from R.C. 3509.03, which reads: "The application need not be in any particular form *but shall contain all of the following.*" R.C. 3509.03. (Emphasis added.) The requirements in R.C. 3509.03(A) through (I) follow, including the requirement in R.C. 3509.03(G) of "a statement that the person requesting the ballots is a qualified elector." Therefore, while the statute does not mandate the form of an absentee ballot application, it still requires an unambiguous statement that the applicant is a qualified elector. See also *Hisrich*, 69 Ohio St. 3d at 16 (finding that while the statute for candidacy petitions allows for substantial compliance as to form, the statutory provisions as to content of petitions and the attachment of affidavits require strict compliance).

Furthermore, the statute contains no provision allowing either the Secretary of State or boards of elections to complete an incomplete application or to guess at the intent of the voter. As such, the Secretary properly advises the boards, as she did in Directive 2008-82, that “Election officials may not complete missing information on insufficient absentee ballot applications for voters.” Directive 2008-82; Memorandum p. 2. The Secretary’s interpretation of the statute is further supported by the fact that R.C. 3509.04 gives clear instruction to the boards that if an application is not complete, the boards “promptly shall notify the applicant of the additional information required to be provided *by the applicant* to complete that application.” R.C. 3509.04(A) (emphasis added). Once again, the statute says nothing allowing the boards to guess or presume the intent of the voter. Thus, the Secretary’s Memorandum properly concludes that, “If the box is not checked, the applicant has not affirmatively made the statement required under R.C. 3509.03.”

The case of *State ex rel. Stevens v. Geauga Cty. Bd. of Elections* (2000), 90 Ohio St. 3d 223, 2000-Ohio-66, further demonstrates that the Secretary’s interpretation of R.C. 3509.03 is consistent with Ohio law. The relator in that case brought an action in mandamus to compel the Geauga County Board of Elections to certify a local option question for placement on the ballot. The board of elections rejected the relator’s petition because there was no “X” marked in the box next to the question that the relator wanted to put on the ballot. 90 Ohio St. 3d at 227. By statute, a qualified petition must contain notice and must designate which questions are to be submitted to the electors. *Id.* at 227, citing R.C. 4301.333(B)(1) and R.C. 4301.355(B). The Court denied the writ of mandamus, finding that relator’s failure to place an “X” in the box failed to give proper notice of the question he wanted to submit. *Id.* at 227. In fact, even though the relator argued that an attached affidavit evidenced the relator’s intent that he sought to submit the

question to the electorate, the failure to mark the “X” on the first page “conveyed a mistaken or confusing impression.” *Id.* at 228. The Court thus ruled that the board fully complied with statute, and that the relator contravened the requirements of statute by creating ambiguity. *Id.*

In the same way, the Secretary’s Memorandum properly advises the boards of elections that the failure to check the box next to the elector statement “leaves both the applicant and the board of elections without verification that the applicant is a ‘qualified elector,’” and thus does not comply with R.C. 3509.03(G). Memorandum, p. 2. Just as the failure to mark an “X” in the *Stevens* case was found to create confusion and thus contravened the requirements of statute, the failure to check boxes next to a statutorily-required statement on an absentee ballot application has the same effect. Indeed, the Secretary’s Memorandum directly responds to questions posed by boards of elections who received forms where some voters checked the box, while others did not.

The *Stevens* case also demonstrates that the signature on the McCain application does not cure the statutory defect of failing to provide an affirmative statement of being a qualified elector. The signature line on the McCain application appears nowhere near the statement at the top of the application reading, “I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election.” and the statement is separated from the remainder of the form by a bold distinctive line. See McCain Application, Exh. 1 of Relators’ Complaint. In fact, the signature line appears after the portion of the application requesting the applicant’s name, address, and date of birth. On its face, the McCain application is ambiguous, and gives no clear affirmation that the applicant is a qualified elector. What the McCain campaign should have done initially is demonstrated by its subsequent revision of its application, which removes the check box and moves the qualified elector statement directly above the

applicant's signature. See Revised McCain Absentee Ballot Application, Respondent's Submission of Evidence, Exh. A. Of course, the McCain campaign also could have avoided this problem altogether by using the Secretary of State's Form 11-A.

Relators furthermore contort the Secretary's instructions to the boards of elections in Directive 2008-82 in an attempt to support their reading of R.C. 3509.03. See Relators' Brief, pp. 18-19. They argue that since the Secretary has already applied substantial compliance to the requirement in R.C. 3509.04 for absentee ballot envelopes, a liberal construction should also be given to R.C. 3509.03. Relators falsely characterize the Directive as "instructing boards of elections to ignore the statutory requirement that a voter supply a date of birth on an absentee voter ID envelope." Relators' Brief, p. 19. That is simply not what the Directive says. But Relators not only misstate the Secretary's instructions in the Directive; they also ignore the statutory text that formed the basis of the Directive 2008-82 and ignore the differences between R.C. 3509.03 and R.C. 3509.04.

R.C. 3509.04 provides in part that, "The director shall deliver or mail with the ballots an unsealed identification envelope upon the face of which shall be printed a *form substantially* as follows" (emphasis added). R.C. 3509.04 therefore expressly provides for substantial compliance as to the form of the envelope. However, R.C. 3509.05 sets forth the requirements for the proper identification that must appear on absentee ballot envelopes. Date of birth is not one of the requirements in R.C. 3509.05. Accordingly, the Secretary properly advises the boards as follows:

Ohio law requires boards of elections to provide with absentee ballots identification envelopes that have a form printed on their face that "substantially" contains the information listed in R.C. 3509.04.... An absentee voter must necessarily provide on an absentee ballot ID envelope for it to be counted **his or her name, signature and proper ID**. Other information set forth in R.C.

3509.04 may be necessary for a board of elections to properly identify the voter in order to count his or her ballot.

Directive 2008-82, at 5, attached as Appendix to Relators' Brief (emphasis in original). In contrast, R.C. 3509.03 states that, "The application [for an absentee ballot] need not be in any particular form *but shall contain all of the following.*" Therefore, R.C. 3509.03 contains substantive requirements that must be met to complete an absentee ballot application, including a qualified elector statement. R.C. 3509.03(G).

Nor does the case of *In re Election Contest of Dec. 14, 1999* (2001), 91 Ohio St. 3d 302, 2001-Ohio-45, support Relators' reading of R.C. 3509.03. Relators' Brief, p. 16. That case involved an election contest under R.C. 3515.08 challenging the validity of two absentee ballots on the grounds that the applications for those absentee ballots were allegedly signed by someone other than the applicants. *Id.* at 304. The Court did not hold, as proposed by Relators, that "signing the absentee ballot application is not necessarily required." Relators' Brief, p. 16. Rather, the Court found that the challenger, who relied only on the testimony of a handwriting expert and failed to introduce the testimony of the applicants themselves, "did not introduce clear and convincing evidence of fraud in [the applicants'] alleged failure to comply with the application-signature requirement of R.C. 3509.03." The challenger's failure to meet this evidentiary burden, taken together with the fact that the absentee ballot envelopes were properly signed in compliance with the requirements of R.C. 3509.04, led the Court to uphold the validity of the ballots cast. Thus, *In re Election Contest of Dec. 14, 1999* does not support Relators' broadly stated and erroneous proposition that applicants need not comply with the requirements of R.C. 3509.03.

Relators have cited no authority showing that the Secretary's Memorandum is contrary to law. Rather, the plain text of R.C. 3509.03 and the weight of authority demonstrate that the

Memorandum properly advised the boards of elections that the qualified elector statement in R.C. 3509.03 is a mandatory requirement.

**2. Requiring an applicant to provide an affirmative statement of qualified elector status ensures that the applicant will receive the proper absentee ballot.**

While Relators diminish the importance of the qualified elector statement on absentee ballot applications, there are important reasons for the statutory requirement, as advised by the Secretary in her Memorandum. Without an affirmative statement that an applicant is a qualified elector at the time of applying for a ballot, the boards of elections have no way of ensuring that the applicant lives in the county and precinct where she is requesting to vote an absentee ballot. As a result, the applicant may not receive the proper absentee ballot from the board of elections.

R.C. 3503.01 defines a “qualified elector” as “a resident of the county and precinct in which the citizen offers to vote.” However, the absentee ballot application statute only requires “the address at which the elector *is registered to vote*,” not the address where the voter is currently living and *should* be registered to vote. R.C. 3509.03(C) (emphasis added). Thus, when there is a discrepancy between the address at which the applicant is registered to vote, and the current address at which the applicant resides, an affirmative statement that the applicant is a qualified elector resolves that discrepancy.

For example, if an applicant registered to vote in Columbus precinct 19-G, had moved from Columbus to Dublin at the time she requests an absentee ballot, she is no longer an elector qualified to cast a ballot in Columbus 19-G. While the applicant may provide the address where she wants the ballot mailed, pursuant to R.C. 3509.03(I), that is not the same as affirmatively stating her current address or affirmatively stating that she is a qualified elector. Since ballots are processed at the precinct level, the applicant may receive a Columbus 19-G ballot when, technically, she should have received a Dublin ballot for the precinct in which she lives. While

the applicant is still entitled to vote, because she cast the wrong ballot, her vote will be subject to challenge.

Therefore, by clarifying the qualified elector requirement in R.C. 3509.03, the Secretary's Memorandum not only provides much-needed clarity to the boards of elections. The Secretary is also protecting votes against future challenges by ensuring that absentee ballots are properly requested and cast.

**C. Relators have no clear legal right to the relief requested based on federal law or the deprivation of any constitutional right.**

**1. The Secretary's Memorandum does not deprive Relators of any constitutional right in violation of the equal protection clause.**

Relators assert that the Secretary's "arbitrary and capricious" treatment of voters who submitted the McCain application violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Relators' Prop. of Law No. 3. However, Relators' equal protection claim fails for several reasons.

First, Relators have not been deprived of any constitutional right as a result of the Secretary's actions. Any purported deprivation is the result of the application of R.C. 3509.03. Second, the U.S. Supreme Court has made it clear that a constitutional challenge based on a claimed right to receive absentee ballots does not implicate a fundamental right. *McDonald v. Bd. of Election Commsrs. of Chicago* (1969), 394 U.S. 802, 897-808. See also *Griffin v. Roupas* (7th Cir. 2004), 385 F.3d 1128, 1130 (stating that there is no "blanket right of registered voters to vote by absentee ballot.").

In *McDonald*, the U.S. Supreme Court held that an Illinois statute that made absentee ballots available to some, but not to unsentenced inmates, did not deny plaintiffs the exercise of the franchise: "it is not the right to vote that is at stake here but a claimed right to receive absentee ballots." 394 U.S. at 903. Because "there was nothing in the record to indicate that the

Illinois statutory scheme has an impact on [the] ability to exercise the fundamental right to vote,” *id.* at 807, the Court applied rational basis review and upheld the statutory classification as rationally related to the State’s legislative purposes. *Id.* at 809. Under rational basis review, “legislatures are presumed to have acted constitutionally” and “their statutory classifications will be set aside only if no grounds can be conceived to justify them.” *Id.* As stated above, the qualified elector statement in R.C. 3509.03 is crucial to ensuring that an applicant lives in the county and precinct where she is requesting to vote an absentee ballot, and thus receives the correct absentee ballot. See *supra*, Part II.B.2.

Neither does *Bush v. Gore* (2000), 531 U.S. 98, support the Relators’ proposition that the Secretary’s Memorandum leads to “differing treatment of similarly situated voters” resulting in a violation of the Equal Protection clause. Relators’ Brief, p. 22. Unequal application of the law will not occur so long as Ohio boards of elections follow the directives and advice of the Secretary of State, the state’s chief elections official. Rather, it is the Relators’ unjustified reliance on contrary opinions from county prosecutors that could potentially give rise to disparate treatment of voters. Prosecutors do not have the authority to usurp either the role of the Secretary in initially interpreting the law or of courts of law in reviewing that interpretation. Although it is true that a county prosecutor is the legal counsel to the board of elections, his or her legal advice alone does not serve as a legitimate basis for a board of elections to act in a manner inconsistent with advice issued by the Secretary of State. Moreover, by virtue of her office, the Secretary of State possesses a comprehensive familiarity with the entirety of Chapter 35, which governs election law, and its complexities, which few, if any, county prosecutors share.

Therefore, because issuance of the Secretary's Memorandum does not violate the Relators' equal protection rights, Relators are not entitled to a writ of mandamus based on this theory.

**2. The Secretary's Memorandum complies with the Voting Rights Act.**

The Secretary's Memorandum does not violate the Voting Rights Act because her Memorandum merely requires boards of elections to comply with Ohio law by assuring that the box is checked next to the qualified elector affirmation statement, the omission of which is a material defect. As the Relators have accurately conveyed, the Voting Rights Act is violated when a person acting under color of law denies "the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, *if such a error or omission is not material* in determining whether such individual is qualified under State law to vote in such election." 42 U.S.C. 4 1971(a)(2)(B) (emphasis added).

An applicant's failure to provide an affirmative statement that he or she is a qualified elector on an absentee ballot constitutes a material omission. As expressly set forth in R.C. 3509.03(G), a statement that the applicant is a qualified elector is a mandatory requirement. While an applicant does provide the address at which she is registered, without an affirmative statement that an applicant is a qualified elector at the time of applying for a ballot, the boards of elections have no way of ensuring that the applicant actually lives in the county and precinct where she is registered to vote. Therefore, an affirmative statement that the applicant is a qualified elector resolves any discrepancy on whether the applicant is qualified to vote absentee.

Relators have cited *Schwier v. Cox* (N.D. Ga. 2005), 412 F. Supp. 2d 1266, 1276, for the proposition that failing to check the box next to the qualified elector affirmation statement on an absentee ballot application is a non-material omission, thus violating the Voting Rights Act.

However, aside from the fact that *Schwier* is not binding case law, the facts of that case are separate and distinct from those present in the case at bar. In *Schwier*, the Georgia Secretary of State, in an effort to prevent voter fraud, required disclosure of a registrant's social security number upon registering to vote. The court held that the Secretary of State violated the Voting Rights Act because failure to disclose social security numbers was not a material omission. *Schwier*, 412 F. Supp. 2d at 1276. The court opined that "disclosing one's SSN cannot be material in determining whether that person is qualified to vote under Georgia law, if Georgia is not permitted to require this disclosure." The court further explained that failure to disclose a social security number on a voter registration application could not be a material omission because such a requirement is a violation of the Privacy Act. Because "Georgia cannot, consistent with the Privacy Act, mandate that one registering to vote disclose his SSN...Georgia, therefore, cannot deny a voter applicant the right to vote because that person declined to disclose information—his SSN—the State cannot require." *Id.* Unlike *Schwier*, Relators in this case are not required to submit personal information such as a social security number, the disclosure of which would contravene federal or state law. Nor has the requirement at issue caused a violation of any other statute that would render the omission immaterial.

Thus, because the failure to provide an affirmative qualified elector statement constitutes a material omission, Relators are not entitled to any relief under the Voting Rights Act.

**D. Relators have an adequate remedy at law.**

Finally, Relators' are not entitled to a writ of mandamus because they have adequate remedies at law. As set forth above, Relators effectively seek a declaration that the Secretary's Memorandum is unlawful, a declaration that the McCain application conforms with R.C. 3509.03, and an order enjoining the boards from following the Secretary's memorandum. Thus, in seeking relief, Relators should have brought a declaratory judgment and injunction in the

common pleas court. As this Court has explained, when the object of a mandamus action is to control the content of advice given by the Secretary to the boards, “mandamus will not issue to govern how discretion is exercised” and the proper remedy is an action for declaratory judgment. *State ex rel. Hodges v. Taft*, 64 Ohio St. 3d at 7-8.

Furthermore, Ohio law gives Relators ample time and opportunity to apply for an absentee application. By statutory mandate, applicants who submit deficient applications are notified and given a chance to submit another application. See R.C. 3509.04; *Rothschuh Aff.*, ¶ 8. Relators may complete Form 11-A and send it by mail to the Boards of Elections for an absentee ballot using Form 11-A, as long as the application is delivered three days before the election, i.e. by twelve noon on November 1, 2008. Alternatively, Relators can go in person to the Boards of Elections to get an application. R.C. 3509.04(B). In fact, pursuant to R.C. 3509.03, and assuming that Relators are, in fact, qualified electors, they may walk right into the board of elections’ office the day before the election and apply for, receive, and cast absentee ballots. *In re Election of Member of Rock Hill Local Sch. Dist. Bd. of Educ.* (1996), 76 Ohio St. 3d 601, 609-610 (citing R.C. 3509.03).

Therefore, because Ohio law provides Relators with the opportunity to obtain an absentee ballot, resort to the extraordinary remedy of mandamus is unwarranted.

### **III. The Affidavit Testimony of Charles M. Miller Should Be Stricken.**

A good portion of Relators’ Brief relies on the affidavit testimony of Charles M. Miller, counsel of record for Relators, to set forth purported facts arising from the processing of McCain absentee ballot applications by the boards of elections of Butler, Clermont, Delaware, Franklin, Hamilton, Montgomery, and Warren counties. See Relators’ Brief, pp. 10-11. However, as counsel for Relators, Mr. Miller cannot testify as a witness on Relators’ behalf. See Ohio R.


Prof. Conduct 3.7(A). Therefore, both Mr. Miller's affidavit and those portions of Relators' Brief relying on his affidavit should be stricken, or at least disregarded, by the Court.

In the alternative, if Mr. Miller continues to testify as a fact witness, Respondent requests an opportunity for cross-examination.

### CONCLUSION

For the reasons set forth above, Respondent Secretary of State Jennifer Brunner respectfully requests this Court to deny Relators' petition for writ of mandamus.

Respectfully submitted,



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NANCY H. ROGERS  
Attorney General of Ohio

Richard N. Coglianese (0066830)\*

*\*Counsel of Record*

Damian W. Sikora (0075224)

Pearl M. Chin (0078810)

Michael J. Schuler (0082390)

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


*Attorneys for Respondent*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Brief of Respondent Secretary of State Jennifer Brunner* was served on this 29th day of September, 2008, by electronic mail, facsimile transmission and ordinary, postage prepaid U.S. mail to:

James E. Burke (0032731)  
Charles M. Miller (0073844)\*  
*\*Counsel of Record*  
KEATING MUETHING & KLEKAMP PLL  
One East Fourth Street, Suite 1400  
Cincinnati, Ohio 45202  
(513) 579-6967  
(513) 579-6457 (fax)  
jburke@kmklaw.com  
cmiller@kmklaw.com

*Attorneys for Relators*

  
\_\_\_\_\_  
Pearl M. Chin (0078810)