

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel.
WILLIAM MYLES
2886 Springwood Court
Cincinnati, Ohio 45248,

and

THE STATE OF OHIO ex rel.
BETTY R. SMITH
1465 Larry Joe Drive
Cincinnati, OH 45230,

Relators,

vs.

JENNIFER BRUNNER,
SECRETARY OF STATE OF OHIO
180 East Broad Street, 16th Floor
Columbus, Ohio 43215,

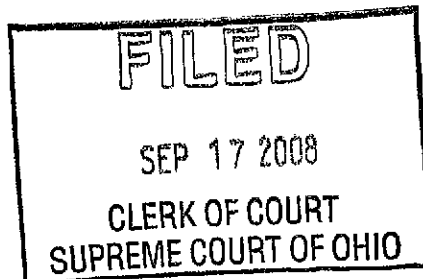
ALSO SERVE:
Nancy H. Rogers
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Respondent.

Case No. 08-1842

Original Action in Mandamus

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



VERIFIED PETITION FOR WRIT OF MANDAMUS

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

Nancy H. Rogers
OHIO ATTORNEY GENERAL
Constitutional Offices Section
Richard Coglianesse (0066830)
Damian Sikora (0075224)
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Attorneys for Respondent

This action is brought in the name of the State on the relation of William Myles and Betty R. Smith, who are requesting a writ of mandamus. Relators state for their Verified Petition and Complaint for a Writ of Mandamus:

PARTIES, JURISDICTION, AND VENUE

1. McCain-Palin 2008, Inc., distributed and is distributing absentee ballot applications to qualified electors in the State of Ohio. A true and accurate copy of the McCain Absentee Ballot Application is attached hereto as Exhibit 1 (“McCain Absentee Ballot Application”).

2. Relator William Myles (“Myles”) is a resident of the State of Ohio, County of Hamilton, and is a registered voter in the State of Ohio. Myles is a qualified elector in the State of Ohio, who submitted an application for an absentee ballot on a McCain Absentee Ballot Application without marking a box on the application near the statement that he is a qualified elector.

3. Relator Betty R. Smith (“Smith”) is a resident of the State of Ohio, County of Hamilton, and is a registered voter in the State of Ohio. Smith is a qualified elector in the State of Ohio, who submitted an application for an absentee ballot on a McCain Absentee Ballot Application without marking a box on the application near the statement that she is a qualified elector.

4. Respondent Jennifer Brunner (“Respondent”) is the duly elected Ohio Secretary of State. Pursuant to R.C. 3501.05, Respondent shall, *inter alia*, “(B) Issue instructions by directives and advisories [in accordance with section 3501.053 of the Revised Code] to members of the boards as to the proper methods of conducting elections . . . ; (C) Prepare rules and instructions for the conduct of elections; (F) Prescribe the form of registration cards, blanks and records; . . . (M) Compel the observance of election officers in the several counties of the

requirements of the election laws” R.C. 3501.05; *see also* R.C. 3501.053(A) (“The secretary of state may issue instructions as to the proper method of conducting elections to members of the boards of elections by permanent or temporary directives.”).

5. Pursuant to R.C. 3501.01(U)(1), Respondent Jennifer Brunner is an election officer and must, herself, observe the requirements of the election laws.

6. This Court possesses jurisdiction over the subject matter of this action and over Respondent pursuant to Section 2(B), Article IV, of the Ohio Constitution and Rule 10 of the Rules of Practice of the Ohio Supreme Court. *State ex rel Melvin v. Sweeney* (1950), 154 Ohio St. 223, 226, 94 N.E.2d 785 (noting that where the Secretary of State “has misdirected the members of the boards of elections as to their duties, the matter may be corrected through the remedy of mandamus”).

FACTUAL ALLEGATIONS

7. As a result of the office held by Respondent, she is required by law to advise and instruct members of the various boards of election in the State of Ohio as to the proper methods of conducting elections and to provide rules, regulations and instructions for the conduct thereof consistent with Ohio law. Thus, it is the mandatory duty of the Respondent to advise the various boards of election in the State of Ohio to disregard her September 5, 2008 Memorandum (the “Memorandum”) ordering the boards of election to reject any McCain Absentee Ballot Application that does not contain a checkmark in the box near the statement that the applicant is a qualified elector. A true and accurate copy of the Memorandum is attached hereto as Exhibit 2.

8. Respondent further has the duty to correct her erroneous Memorandum by advising the various boards of election not to reject any McCain Absentee Ballot Application based upon the absence of a mark in any box on the application.

9. R.C. Chapter 3509 sets forth the laws governing absent voter's ballots. Pursuant to R.C. 3509.01, the "board of elections of each county shall provide absent voter's ballots for use at every primary and general election, or special election" R.C. 3509.02(A) provides that "[a]ny qualified elector may vote by absent voter's ballots at an election."

10. Pursuant to R.C. 3509.03, except in the case of circumstances not relevant here, "any 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. *The application need not be in any particular form* but shall contain all of the following: . . . (G) A statement that the person requesting the ballots is a qualified elector" (emphasis added).

11. Respondent also distributes a form application for absentee ballots, designated Form 11-A ("Form 11-A"). A true and accurate copy of Form 11-A is attached hereto as Exhibit 3.

12. In the Memorandum, Respondent stated, "if an applicant does not check the boxes at the top of [Form 11-A], he or she still affirms the statements simply by signing the form."

13. In the Memorandum, Respondent also stated that the signature required by R.C. 3509.03(B) is required for the purpose of affirming the qualified elector statement required by R.C. 3509.03(G).

14. R.C. 3509.03(B) requires a signature so that the board of election may compare the signature on the application to the applicant's signature on file with the board of election.

15. R.C. 3509.03 does not state that the purpose of the signature required by R.C. 3509.03(B) is to affirm the qualified elector statement required by R.C. 3509.03(G).

16. There is no requirement that an applicant “affirm” under oath any statement made on an absentee ballot application. Instead, R.C. 3599.21 states that anyone who “make[s] a false representation in order to obtain an absent voter’s ballot . . . is guilty of a felony of the fourth degree.”

17. The qualified elector statement on Form 11-A reads, “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.” Form 11-A further states that election falsification is a fifth degree felony. The fifth-degree felony of election falsification is set forth in R.C. 3599.36.

18. The qualified elector statement on Form 11-A is incorrect and misleading because fraudulently submitting an absentee ballot application is a fourth degree felony under R.C. 3599.21.

19. Despite the materially false language contained in the qualified elector statement on Form 11-A, Respondent has directed boards of election to accept absentee ballot applications submitted on Form 11-A.

20. R.C. 3509.03 does not require checkboxes on an absentee ballot application.

21. The qualified elector statement on the McCain Absentee Ballot Application complies with R.C. 3509.03(G). Respondent, nonetheless, has instructed boards of election not to accept McCain Absentee Ballot Applications that lack marks in the boxes.

22. Respondent 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 for Respondents and anyone who submits a McCain Absentee Ballot Application. Moreover, Respondent’s actions may result in the disenfranchisement of thousands of voters.

23. R.C. 309.09(A) provides that each county's "prosecuting attorney shall be the legal advisor of the . . . board of elections . . ., and any of them may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties." At least one Prosecuting Attorney has advised his County Board of Election that the Secretary of State's Memorandum is unlawful and should be disregarded.

24. On September 15, 2008, Joseph T. Deters, Hamilton County Prosecuting Attorney, issued an opinion to the Hamilton County Board of Elections that "Secretary Brunner's position in [the Memorandum] is not supported by the Revised Code, relevant decisions of the Supreme Court of Ohio, nor her own recently promulgated directives." A true and accurate copy of the September, 2008 Opinion Letter of the Hamilton County Prosecuting Attorney is attached hereto as Exhibit 4 (hereinafter, "Hamilton County Opinion Letter"). Prosecutor Deters concluded that "Ohio law does not require a voter to place a 'check' or other mark in any box appearing on a pre-printed absentee ballot application. An application signed by the elector containing the information and statements required by R.C. § 3509.03 is not deficient regardless of whether the information and statements are pre-printed on the form or completed by the elector." The Hamilton County Opinion Letter directed the County Board of Election, "Upon receipt, such an application must be processed by the director of the board of elections. If it is determined by the director that the applicant is a qualified elector, an absentee ballot must be sent to the applicant."

25. The Secretary of State's issuance of the Memorandum has precipitated a situation in which some County Boards of Election may follow the instructions of the Secretary of State and other County Boards of Election will follow the advice of their County Prosecuting Attorneys that it would be illegal to follow the Memorandum. Wholly apart from the fact that

the Memorandum is contrary to Ohio's statutes, the Secretary of State has failed to initiate any legal action to ensure statewide uniformity in how absentee ballots are counted.

26. In *Bush v. Gore* (2000), 531 U.S. 98, the U.S. Supreme Court found that permitting different methods of determining voter intent that varied from county to county failed to satisfy "the rudimentary requirements of equal treatment and fundamental fairness" and thus violated the equal protection clause of the U.S. Constitution.

27. Respondent has created a system that perm its different methods of determining whether a voter intends to request an absentee ballot.

28. A writ of mandamus is necessary to ensure that there is statewide uniformity in permitting all qualified electors to cast ballots, as provided in the Ohio Revised Code.

29. Relator Myles is a qualified, registered voter in Hamilton County in the State of Ohio. He is impacted by the Memorandum because he is a qualified elector who requested an absentee ballot using the McCain Absentee Ballot Application, and is concerned that his application will be rejected because he did not mark the box next to the qualified elector statement. Myles requested that this absentee ballot be sent to his voter registration address.

30. Relator Smith is a qualified, registered voter in Hamilton County in the State of Ohio. She is impacted by the Memorandum because she is a qualified elector who requested an absentee ballot using the McCain Absentee Ballot Application, but had her application rejected because she did not mark the box next to the qualified elector statement. A true and accurate copy of Smith's application is attached hereto as Exhibit 5. Smith requested that her absentee ballot be sent to her voter registration address.

CLAIM FOR RELIEF

31. The Ohio Revised Code requires boards of election to issue an absentee ballot to a qualified elector upon written request. The Secretary of State'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.

32. Sections 3509.02 and 3509.03 of the Revised Code govern the qualifications to request and vote via absent voter's ballot. The Revised Code provides that "any *qualified elector* may vote by absent voter's ballots at an election." R.C. 3509.02(A) (emphasis added). Thus, unless a board of election determines that an applicant is not a qualified elector, the board must issue an applicant upon written request.

33. Additionally, R.C. 3509.04 requires a citizen who submits an absent voter's ballot to attest to the voter's voting address, ward and precinct on the envelop in which an absentee ballot is returned. It is through R.C. 3509.04 that a citizen attests to his or her qualification to vote absentee.

34. Relator Myles, a qualified and registered voter in the State of Ohio who properly submitted an application for an absentee ballot believes that his application might be rejected on the sole basis that he did not mark the box next to the qualified elector statement. Relator Myles further believes that if his application is rejected, it will be because of Respondent's acts with regard to the Memorandum, which are contrary to established Ohio law, and have caused and will continue to cause irreparable harm to him and others similarly situated and for which there exists no adequate remedy at law. Relator Myles also believes that Respondent's acts will result in boards of election refusing to issue a ballot to Myles and to thousands of qualified electors.

35. Relator Smith, a qualified and registered voter in the State of Ohio, properly submitted an application for an absentee ballot. Her application was rejected on the sole basis that she did not mark the box next to the qualified elector statement. Relator Smith believes that her application was rejected because of Respondent's acts with regard to the Memorandum,

which are contrary to established Ohio law, and have caused and will continue to cause irreparable harm to her and others similarly situated and for which there exists no adequate remedy at law. Relator Smith also believes that Respondent's acts will result in boards of election refusing to issue ballots to thousands of qualified electors.

36. Relators are therefore entitled to a writ of mandamus compelling the Secretary of State to issue a directive clarifying that no box must be checked on the McCain Absentee Ballot Application in order for the application to be accepted by the election official.

WHEREFORE, Relators request relief from this Court as follows:

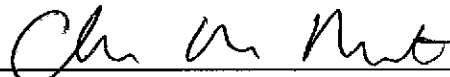
(A) An alternative writ directing Respondent to show cause why a permanent writ of mandamus should not enter;

(B) A writ of mandamus to direct Respondent Secretary of State Jennifer Brunner to issue a Directive to the County Boards of Election that they may not reject an absentee ballot application on the basis of a box not being marked;

(C) A writ of mandamus to direct Respondent Secretary of State Jennifer Brunner to issue a clarifying memorandum to the County Board of Elections reiterating that the County Board 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; and

(D) Such further and additional relief as is necessary and appropriate.

Respectfully submitted:



James E. Burke (0032731)
Charles M. Miller (0073844)
KEATING MUETHING & KLEKAMP PLL
One East Fourth St., Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 579-6400
Fax: (513) 579-6457
jburke@kmklaw.com
cmiller@kmklaw.com
Attorneys for Relators

CERTIFICATE OF SERVICE

A copy of the foregoing Complaint has been served by hand-delivery upon the following
this 17th day of September, 2008:

JENNIFER BRUNNER,
SECRETARY OF STATE OF OHIO
180 East Broad Street, 16th Floor
Columbus, Ohio 43215

RICHARD COGLIANESE
DAMIAN SIKORA
Ohio Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215



Charles M. Miller

VERIFICATION & AFFIDAVIT OF WILLIAM MYLES

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

BEFORE ME, the undersigned Notary, personally came and appeared William Myles, who, after being duly sworn, deposes and says as follows:

1. I am a resident and qualified elector of the State of Ohio.
2. I have reviewed the foregoing Verified Petition and Complaint for Writ of Mandamus.
3. I have personal knowledge of the matters forth in the Verified Petition and Complaint. The facts in the Verified Petition and Complaint are based on my personal knowledge.

FURTHER AFFIANT SAYETH NAUGHT.

William Myles

WILLIAM MYLES

Sworn and subscribed before me this 16th day of September, 2008.

Robin B. Hinton

Notary Public



ROBIN B. HINTON
Notary Public, State of Ohio
My Commission Expires 09-21-11


VERIFICATION & AFFIDAVIT OF BETTY R. SMITH

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

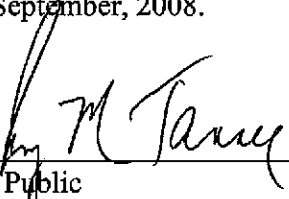
BEFORE ME, the undersigned Notary, personally came and appeared Betty R. Smith, who, after being duly sworn, deposes and says as follows:

- 37. I am a resident and qualified elector of the State of Ohio.
- 38. I have reviewed the foregoing Verified Petition and Complaint for Writ of Mandamus.
- 39. I have personal knowledge of the matters forth in the Verified Petition and Complaint. The facts in the Verified Petition and Complaint are based on my personal knowledge.

FURTHER AFFIANT SAYETH NAUGHT.


BETTY R. SMITH

Sworn and subscribed before me this 16th day of September, 2008.


Notary Public



AMY M. TANNER
Notary Public, State of Ohio
My Commission Expires
November 5, 2008

VERIFICATION & AFFIDAVIT OF CHARLES M. MILLER

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

BEFORE ME, the undersigned Notary, personally came and appeared Charles M. Miller, who, after being duly sworn, deposes and says as follows:

1. I am an attorney in good standing in the State of Ohio and am counsel for Relators. I am a litigator with Keating Muething & Klekamp PLL

2. I participated in the drafting of the foregoing Verified Petition and Complaint for Writ of Mandamus, which action is brought in the name of the State on the relation of Smith and Myles.

3. I have personal knowledge of the matters set forth in the Verified Petition. The facts in the Verified Petition are based on my personal knowledge.

4. Exhibit 1 to the Petition is a true and accurate copy of the McCain Absentee Ballot Application.


5. Exhibit 2 to the Petition is a true and accurate copy of the Memorandum.

6. Exhibit 3 to the Petition is a true and accurate copy of Form 11-A.

7. Exhibit 4 to the Petition is a true and accurate copy of the Hamilton County Opinion Letter.

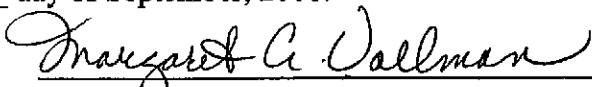
8. Exhibit 5 to the Petition is a true and accurate copy of Relator Smith's application for an absentee ballot.

FURTHER AFFIANT SAYETH NAUGHT.



CHARLES M. MILLER

Sworn and subscribed before me this 17th day of September, 2008.



Notary Public

VOTE-BY-MAIL REQUEST CARD

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

NAME _____

VOTER REGISTRATION ADDRESS _____

CITY/STATE/ZIP _____

Address to mail ballot:
(if different from voter registration address):

VOTER MAILING ADDRESS _____

CITY/STATE/ZIP _____

Date of birth: _____

Signature: _____

One of the following:

Ohio driver's license number _____

Last four digits of Social Security number _____

A copy of your current and valid photo identification, military identification, current utility bill, bank statement, government check, paycheck, or other government document that shows your name and current address. (Note: You cannot use as proof of identification a notice that the board of elections mailed to you.)






JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 EAST BROAD STREET, 16TH FLOOR
COLUMBUS, OHIO 43215 USA
TEL: 1-877-767-6446 FAX: 1-614-644-0649
WWW.SOS.STATE.OH.US

MEMORANDUM

To: All Counties; BOE Contacts
CC: Field Staff; Elections Attorneys; Elections
From: Jennifer Brunner, Secretary of State 
Date: September 5, 2008
Re: Deficient Absentee Ballot Applications

Many of Ohio's boards of elections have posed questions to this office regarding the sufficiency of various absentee ballot applications they have received. This memorandum is intended to provide some clarification on this issue.

While applications for absentee ballots "need not be in any particular form" they are required to contain all requirements or statements set forth in R.C. 3509.03. That section specifically requires in division (G) that every absentee ballot application contain a statement made by the person submitting it ("the applicant") that the person is in fact a qualified elector. An "elector" or "qualified elector" is a person having the qualifications provided by law to be entitled to vote. R.C. 3501.01(N) A "voter" is an "elector." R.C. 3501.01(O) The term "voter" may be substituted for "elector" or "qualified elector" to simplify technical election terms for the public.

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 indication must be made. For example, on the Secretary of State prescribed Application for Absent Voter's Ballot (Form 11-A), the statement required by R.C. 3509.03(G) is made under penalty of election falsification and appears immediately above the signature and date lines. By signing the form, the voter applying for an absentee ballot affirms that he or she is, in fact, a qualified voter or elector seeking to vote an absentee ballot at the election in indicated on the form. 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.

Likewise, if an application has on it a check box related directly to the statement that the applicant is a qualified elector or voter, the applicant must take the affirmative action of checking the box to incorporate the statement into the form that the applicant signs. This is especially important if the statement and check box are not located on the form near the signature of the applicant.

By way of example, the Secretary of State prescribed voter registration form has check boxes related to 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 related directly 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.



In the case of an absentee ballot application that contains only a check box to affirm the statement required under R.C. 3509.03(G), this box must be checked. Many boards have received such forms where some voters check the box and other voters do not. Because it is possible for a voter to have moved from his or her residence address appearing in the board of elections' records but still request an absentee ballot, the failure to check the box could indicate that the voter is no longer a "qualified elector." As that is defined in R.C. 3503.01, a qualified elector is a resident of the county and precinct in which the citizen offers to vote. Ballots are prepared according to election precincts, and electors are entitled to vote at all elections "in the precinct in which the citizen resides." R.C. 3503.01 Failure to check the box, leaves both the applicant and the board of elections without verification that the applicant is a "qualified elector."

If your board of election receives an absentee ballot application with a check box 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. 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.

As noted in Directive 2008-82 (Guidelines for Absentee Voting), R.C. 3509.04(A) requires the following when a board of elections 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. Boards must contact such applicants pursuant to an established board policy. Boards may contact such applicants in any manner provided for in board policy (e.g., by telephone, email or letter).

As instructed in Directive 2008-82, **boards cannot, under any circumstances, complete a deficient application for an applicant.** For this reason, the Secretary of State's office strongly recommends that boards of elections send such applicants a letter describing the deficiency, along with a new Secretary of State prescribed Application for Absent Voter's Ballot (Form 11-A) for the applicant to complete if he or she still wishes to vote by absentee ballot. You may also wish to inform the applicant that he or she may vote by absentee ballot in person, providing relevant information related to in person absentee voting in your county. The prescribed Form 11-A¹ is attached to this memorandum for your reference and is available on the BOE Extranet.

Please feel free to contact your assigned elections counsel at 614-466-2585 if you have further questions.

¹ R.C. 3501.05(G) provides that the Secretary of State shall: "(G) Determine and prescribe . . . forms and blanks required by law for use by . . . boards;"

APPLICATION FOR ABSENT VOTER'S BALLOT

PLEASE PRINT OR TYPE (See Instructions at Bottom of Page)

Send Ballot to:
(if different from home address)
Name _____
care of/PO Box _____
Address _____
City _____ State _____ Zip Code _____

Voter's Name _____
Home Address _____
City, Village, Office _____
County _____ **Zip Code** _____

You must provide your birthdate: ____/____/____ and one of the following:
(month) (day) (year)

- Your Ohio driver's license number _____, or
- The last four digits of your social security number _____, or
- Copy of a current and valid photo identification, a military identification, or a current (within the last 12 months) utility bill, bank statement, government check, paycheck or other government document (other than a voter registration notification mailed by a board of elections) that shows your name and current address.

I wish to vote in the following election to be held on _____.
(month-date-year of election)

Check ONLY one (A separate application must be completed for each election):

- 1. Primary Election:**
- Democratic
 - Republican
 - Nonpartisan or issues only
- 2. General Election**
- 3. Special Election**

I wish to have a ballot mailed to me at the address listed above. I understand that if a ballot is mailed to me and I change my mind and appear at my polling place to vote on Election Day, I will be required to vote a provisional ballot that can not be counted until at least 10 days after the election.

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

Voluntary: To assist the board of elections in contacting you in a timely manner if your application is incomplete:
Your daytime telephone number (____) _____ Your e-mail address _____

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE

INSTRUCTIONS
Chapter 3509. of the Revised Code of Ohio

1. Use of this form is optional. To be valid, your application must include your name, voting residence address, date of birth, and signature; the election for which the ballot is requested and, if a partisan primary election, your political party affiliation; statement you are a qualified elector in the county; and one of the following: your Ohio drivers license number, the last four digits of your social security number, or a copy of your current and valid photo identification, a military identification, or a current (within the last 12 months) utility bill, bank statement, government check, paycheck or other government document (other than a voter registration notification mailed by a board of elections) that shows your name and address.
2. An application by mail must be received by your county board of elections by noon on the third day before the election. An application by you in person must be received by the close of regular board office hours the day before the election. Applications for persons who are hospitalized or for persons whose minor child is hospitalized due to an accident or unforeseeable medical emergency will be accepted until 3 p.m. on Election Day.
3. When you receive your ballot: If you return your ballot by mail, it must be postmarked* no later than the **day before** Election Day and received by your county board of elections no later than 10 days after the election. If you return your ballot in person or if a near relative delivers it to the board for you, it must be delivered to your county board of elections no later than the close of polls on Election Day. If you are a voter outside of the United States on Election Day, the ballot envelope must be signed or postmarked before the close of polls and received by the board no later than 10 days after Election Day or 20 days after a presidential primary election.

*Postmarked does not include a date marked by a postage evidence system such as a postage meter.

Bumberg No. 3206 EXHIBIT 3

JOSEPH T. DETERS
HAMILTON COUNTY PROSECUTING ATTORNEY

CIVIL DIVISION
230 EAST NINTH STREET, SUITE 4000
CINCINNATI, OH 45202-2151
PHONE: 513 946-3040
FAX: 513 946-3018
WWW.HCPROS.ORG
WRITER'S DIRECT DIAL NUMBER
946-3120

September 15, 2008

Sally J. Krisel, Director
John M. Williams, Deputy Director
Hamilton County Board of Elections
824 Broadway, 3d Floor
Cincinnati, Ohio 45202

Re: *Absentee Applications*

Dear Ms. Krisel and Mr. Williams:

We have received your request for an opinion regarding the above matter which provides in pertinent part:

We are writing to request the assistance of your office to clarify our Board's legal responsibility as to the processing of voter absentee ballot application forms sent to this office pursuant to Ohio Revised Code Section 3509.03. The Secretary of State has recently offered a Memorandum dated September 5th, 2008 (see attached Exhibit A) indicating that absentee application forms are to be considered deficient where the voter failed to mark a "Box" that was placed on the form (see attached Exhibit B). The Memorandum recommends that the Board give notice to the voter and have the voter reapply for an absentee ballot on the State form 11-A. To date we have received approximately 6,000 absentee applications more than 750 are affected by this issue. We expect overall absentee application numbers to exceed 100,000 in Hamilton County.

We have discussed this issue in a bipartisan manner and would like an opinion from your office on whether applications submitted under 3509.03 should be rejected as deficient when an applicant fails to make a mark in the "Box" next to the statement, "I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election."

Included with your request were two exhibits – a Memorandum dated September 5, 2008 purportedly authored by the Secretary of State and an application for an absentee ballot which appears to be a direct mail piece issued by the McCain campaign.



Any analysis of your immediate question begins with several basic and well-known propositions. First, the right to vote is a fundamental right that is preservative of all other basic civil and political rights. *Reynolds v. Sims* 377 U.S. 533, 561-562 (1964). While states are free to permit electors to vote absentee for such reasons as the states may feel appropriate, there is no generally recognized fundamental right to cast an absentee ballot in either state or federal elections. *Goosby v. Osser*, 409 U.S. 512 (1973). Second, there is a strong public interest in allowing every registered voter to vote freely and in the smooth and effective administration of the voting. *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). And third, election laws are mandatory and must be strictly complied with unless the statute in question permits substantial compliance. *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 476, 764 N.E.2d 971, 976 (2002).

Ohio has enacted a comprehensive statutory scheme for the conduct of elections. The Secretary of State is the chief election, *R.C. § 3501.04*, while the day to day administration is handled by the several county boards of elections and officers appointed by the boards. *R.C. §§ 3501.11, 3501.13*. The Secretary of State may issue instructions to the county boards on the conduct of elections through “directives and advisories.” *R.C. 3501.05(B)*. While not specifically defined, a directive is precisely that; an order that boards of election shall perform its duties in a particular manner. Historically, advisories have been used to announce changes in election law and to report matters and answer questions of a general concern to all elections officials in the State. Section *3501.05* contains no mention of “memorandums.” The Secretary is without authority to make decisions on behalf of boards of election and other election officials in matters in which the responsibility for exercising and making decisions had been bestowed by statute upon those boards or other officials. *See, OAG 2005-006, citing State ex rel Hodges v. Taft*, 64 Ohio St.3d 1 (1992).

Pertinent to the present question, Ohio recently enacted legislation to encourage the use of absent voter ballots by removing restrictions previously placed on such ballots. Ohio now permits any qualified elector to vote by absentee ballot at any election. *R.C. § 3509.02*. A qualified elector is a person who has been “a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days.” *R.C. § 3503.01*. To vote absentee, a qualified elector need only apply in writing to the board of elections. *R.C. § 3509.03*.¹ The application is not required to be on a prescribed form and the necessary information need not be phrased in a particular way or appear in a certain order. *Id.* The application may even be a hand or type-written letter from the elector. It is not required to be sworn or executed under the penalty of election falsification. *Id.* It is affirmed simply by the signature of the voter. An absentee application for a General Election must contain the information listed in *R.C. §3509.03 (A) - (G)*.² An

¹ The time limits mentioned in this section are not at issue in your request for an opinion and are therefore not discussed.

² The required information includes: (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

application which meets these requirements is not deficient and must be processed by the director of the board. *R.C. § 3509.04*. If the director of the board of elections finds that the applicant is a qualified elector, the director “shall deliver to the applicant in person or mail directly to the applicant . . . proper absent voter’s ballots.” *Id.* This is a mandatory duty placed solely upon the director of the board which is enforceable through an action in mandamus. Neither the board of elections nor the Secretary of State is mentioned within *R.C. §3509.04*. The willful or negligent failure of the director to process a properly completed application and deliver an absentee ballot to an applying qualified elector upon the opening of absentee voting is a felony of the fourth degree. *R.C. 3599.16*.

By its terms, *R.C. § 3509.03* permits substantial compliance. So long as the information required under the section appears at some location within the body of the application, the elector has substantially complied, the application is complete and it must be processed. It matters not that this information appears before or following a signature or on separate pages. This is understandable as the Revised Code includes a failsafe section mandating that absentee voters strictly comply with the requirements of *R.C. §§ 3509.04 and 3509.05*³ and more importantly, execute the required information under penalty of election falsification when completing the absentee identification envelope and casting a ballot. Absentee ballots not completed and delivered to the board in strict compliance with these sections must be rejected by the board and may not be counted. *R.C. §3509.07*.

The use of pre-printed absentee ballot applications by candidates, political parties, and other organizations is widespread. While Secretary Brunner’s memorandum does not specifically refer to the McCain application included with your request for an opinion, recent news reports make very clear that this is the document to which her memorandum referred. In her memorandum, Secretary Brunner asserts that “if an application has on it a check box directly related to the statement that the applicant is a qualified elector or voter, the applicant must take the affirmative action of checking the box to incorporate the statement into the form that the applicant signs.”

statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and address of the elector; (F) A statement identifying the election for which absent voter's ballots are requested; [and] (G) A statement that the person requesting the ballots is a qualified elector; *R.C. §§ 3509.03* . (The elector may also provide an alternate mailing address).

³ *R.C. §3509.04* requires the identification envelope to be pre-printed with a form with elector identification and voting jurisdiction information. The statute provides the language to be contained in the form bracketed by quotation marks in both the published and electronic versions of the code. While boards are free to arrange the required information in a format that meets their needs, they are not free to omit any of the information from the form. *R.C. § 3509.05* provides that “the elector shall cause the statement of voter on the outside of the identification envelope to be completed and signed, under penalty of election falsification.” The elector may include a copy of the required identification in lieu of completing that portion of the statement.

Secretary Brunner's position in this regard is not supported by the Revised Code, relevant decisions of the Supreme Court of Ohio, nor her own recently promulgated directives.

In the first instance, nothing in *R.C. §3509.03* requires any "affirmation" other than the elector's signature on the form. As indicated above, the signature may precede or follow any of the required information. By requiring an applicant to place a qualifying mark in what may – or may not be – a check box⁴ the Secretary is engrafting an additional requirement into *R.C. §3509.03* that simply is not there.

Secondly, the Secretary's memorandum directly conflicts with her directive 2008-63 dated August 13, 2008. The directive announced a clear policy that "all Ohio elections officials work to ensure that persons eligible to vote in the general election by absentee ballot be afforded a timely opportunity to do so." *Id.* The directive ordered the boards to develop procedures to immediately register prospective voters appearing at the board during the several days between the opening of absentee voting and the close of voter registration, issue them an absentee ballot, and permit them to vote at the time of registration unless the board is "not satisfied as to the validity of the application and the applicant's qualifications." *Id.* Ohio law provides that absentee ballots shall only be issued to qualified electors. *R.C. 3509.02*. A qualified elector is a person who has been "a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days." *R.C. § 3503.01*. By directing the boards to accept applications and issue ballots to persons not meeting the statutory definition of a qualified elector, Secretary Brunner is applying a substantial compliance interpretation with respect to same day registration and voting while now requiring strict compliance for applications received by mail.

Third, in resolving elections matters, the Supreme Court has stated: "irregularities, which were not caused by fraud and which have not interfered with a full and fair expression of the voters' choice, should not effect a disfranchisement of the voters." *Mehling v. Moorehead*, 133 Ohio St. 395, 406 (1938). It has also found that courts must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections. *State ex rel. Ruehlmann v. Luken*, 65 Ohio St.3d 1, 3, (1992). And further, compliance with every technicality is not "required in order to constitute substantial compliance, unless . . . conformance to each technical requirement of the printed form serves a public interest and a public purpose." *Stern v. Board of Elections of Cuyahoga County*, 14 Ohio St.2d 175, 180 (1968). More particularly – and more recently – the Supreme Court determined

⁴ The McCain form has printed squares in several locations; one of which appears – without instruction – next to a statement meeting the requirements of both *R.C. 3509.03 (F) and (G)*: "I am a qualified elector and would like to receive an Absentee Ballot for the November 4, General Election." The statement and the square appear immediately above the applicant address, date of birth, and signature lines. Other squares are next to voter identification requirements and include the instruction "One of the following:" While the Secretary's impression that these squares are check boxes is certainly understandable, it is equally reasonable that the squares are intended simply as bullet points in an inartfully designed application mailed by a campaign committee. This second interpretation is all the more reasonable when the statement associated with the box is not accompanied by instructions; and, more importantly as the inclusion of the "statement" is all that the statute requires.

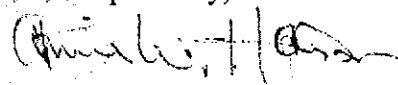
that a forged application for an absentee ballot is not cause to reject a subsequently received valid ballot. *In re Election Contest of Dec. 14, 1999 Special Election* 91 Ohio St.3d 302, 306 (2001). It should also be noted that persons who timely register to vote are permitted to vote even though their registration applications are not processed and deemed satisfactory until after election day. *State ex rel Oster v. Lorain County Bd. of Elections* (2001), 93 Ohio St.3d 480; *R.C. §3503.16* (change of residence).

Fourth, Secretary Brunner has chosen not to issue a directive concerning this question.⁵ Even had she done so, it is doubtful that it would have had any mandatory effect as the discretion to determine the validity of an absentee ballot application lies solely with the director of the board. *See, OAG 2005-006, and authorities cited.*

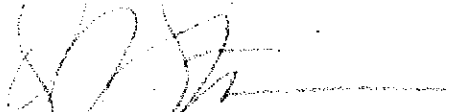
Finally it should be noted that the wholesale rejection of absentee applications that are arguably complete and in strict compliance with *R.C. § 3509.03* depletes the available resources of the several boards – both in terms of money and manpower – at a time when they may be put to better use.

In response to your specific question, Ohio law does not require a voter to place a “check” or other mark in any box appearing on a pre-printed absentee ballot application. An application signed by the elector containing the information and statements required by *R.C. § 3509.03* is not deficient regardless of whether the information and statements are pre-printed on the form or completed by the elector. Upon receipt, such an application must be processed by the director of the board of elections. If it is determined by the director that the applicant is a qualified elector, an absentee ballot must be sent to the applicant.

Respectfully,



James W. Harper
Chief Assistant Prosecuting Attorney



David T. Stevenson,
Assistant Prosecuting Attorney

⁵ The Secretary issued a directive (2008-82) regarding absentee ballots on the same day (9/5) she issued the “memorandum” regarding deficient absentee applications. Had the Secretary intended the subject of the memorandum to be included within a directive, she would have included it in Directive 2008-82 or refashioned the memorandum as an additional directive.

VOTE BY MAIL REQUEST CARD

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

NAME



Ms. Betty Smith
1455 Larry Joe Dr.
Cincinnati, OH 45230-2331

VOTER REGISTRATION ADDRESS

CITY/STATE/ZIP

Address to mail ballot:
(if different from voter registration address):

VOTER MAILING ADDRESS

CITY/STATE/ZIP

Date of birth: March 23, 1931

Signature: Betty B. Smith

One of the following:

- Ohio driver's license number _____
- Last four digits of Social Security number
- A copy of your current and valid photo identification, military identification, current utility bill, bank statement, government check, paycheck, or other government document that shows your name and current address. (Note: You cannot use as proof of identification a notice that the board of elections mailed to you.)