

**IN THE COURT OF COMMON PLEAS  
OF FRANKLIN COUNTY**

State ex. rel. Ohio Democratic Party, et al.,	)	Case No. 06CVH0911609
	)	
	)	Hon. Angela P. White
	)	
Relators,	)	<b><u>RELATORS' BRIEF IN</u></b>
	)	<b><u>OPPOSITION TO RESPONDENT'S</u></b>
v.	)	<b><u>MOTION TO DISMISS</u></b>
	)	
	)	
J. Kenneth Blackwell	)	Richard M. Kerger (0015864)
Secretary, State of Ohio,	)	Kimberly A. Donovan (0074726)
	)	Zachary M. Clark (0080450)
	)	KERGER & ASSOCIATES
Respondent.	)	33 S. Michigan St., Suite 100
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	)	
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	)	

This is not a case about the content of directives. It is not a case suggesting that directives of the Secretary are incorrect. This is not a case in which the Secretary has exercised his discretion.

The fact is that the Secretary has done NOTHING with respect to the three issues presented in the Amended Petition for a Writ of Mandamus. That is why this case was filed.

If, as the Secretary suggests in his Motion to Dismiss, Relators<sup>1</sup> had run into Court in April seeking a Writ of Mandamus, the argument would have been that such relief was premature. The Secretary would have had plenty of time to issue directives in these areas and certainly did not need a Court telling him to do that.

So the Relators waited. As the end of August approached, the Secretary had not only not done anything, but, apparently he was not going to do anything on these three key matters.

A letter was then sent to the Secretary asking him to promulgate directives in these areas and asking him to do so by a definite date. That date came and went with not only no directives being issued, but no response whatsoever from the Secretary.

It was only at that point did it become clear that the Secretary had no intention of acting in these areas.

The Respondent relies heavily on *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1. However, that case in fact establishes the basis for the relief requested here. In *Hodges*, the Secretary of State had issued specific instructions concerning an

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<sup>1</sup> In his brief, the Respondent suggests that two of the three Relators are not properly before the Court. The Amended Petition was amended specifically to add the designation “State ex rel.” and it was intended as to all of the Relators, not merely the Ohio Democratic Party, and accordingly this basis for a denial of relief should be over-ruled. In any event, it has no legal effect on the outcome of the case since the Ohio Democratic Party is clearly properly before the Court.

initiative petition. While the Supreme Court said that mandamus would not issue to tell him how to exercise his discretion, it certainly is an appropriate remedy to require him to do his job.

In Ohio Revised Code Section 3501.04, it is directed that he “shall perform these duties ...” The duties expressly relate to the conduct of elections. In Ohio Revised Code Section 3501.05, he is again instructed that he “shall do all of the following ...” which specifically includes issuing “instructions by directives and advisories to members of the Boards as to the proper methods of conducting elections.” He has not done that with respect to these areas, which are certainly critical parts of the electoral process.

Respondent cites to *State ex rel. Tillimon v. Weiber* (1990), 65 Ohio St. 3d 468. In that case, the petitioner sought to have a judge required to issue timely decisions and to in fact decide the case in his favor. The Supreme Court understandably refused, finding it could not direct a judge as to how to exercise his discretion.

But what has happened here is that the Secretary has said he will not ever exercise his discretion on these points. For example, the response of the Respondent is not that there is a directive on the way, but simply that he does not have to do anything. That ought not to be an acceptable response on matters as critical as this.

Accordingly, Relators ask that the Motion to Dismiss be denied and the Secretary directed to issue the directives in the areas specified.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was mailed this \_\_\_\_ day of October, 2006 to:

Mr. J. Kenneth Blackwell  
Ohio Secretary of State  
180 E. Broad Street, 16<sup>th</sup> Floor  
Columbus, OH 43215