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OCT 06 2006

J. Kenneth Blackwell  
Secretary of State

IN THE COURT OF COMMON PLEAS  
OF FRANKLIN COUNTY

State ex. rel. Ohio Democratic  
Party, et al.,

Relators,

v.

J. Kenneth Blackwell  
Secretary, State of Ohio,

Respondent.

) Case No. 06CVH0911609

) Hon. Angela P. White

) **RELATORS' BRIEF IN SUPPORT**  
) **OF MANDAMUS**

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**I. INTRODUCTION**

To understand why a writ compelling the Secretary of State to issue directives that will address and hopefully prevent long lines at polling places and unsecured balloting operations, one need only look to the lessons of the past. These statements are from affidavits in a lawsuit filed on Election Day 2004 and describe conditions found in several counties, including Franklin County:

From Columbus Precinct 44D:

*“There are three voting machines at this precinct. I have been informed that in prior elections there were normally four voting machines. At 1:45 p.m. there are approximately eighty-five voters in line. At this time, the line to vote is approximately three hours long. This precinct is largely African-American. I have personally witness voters leaving the polling place without voting due to the length of the line.”*

Precinct 40 (Franklin County):

*“I am serving as a presiding judge, a position I have held for some 15+ years in precinct 40. In all my years of service, the lines are by far the longest I have seen, with some waiting as long as four to five hours. I expect the situation to only worsen as the early evening heavy turnout approaches. I have requested additional machines since 6:40 a.m. and no assistance has been offered.”*

Precinct 66H:

*“I observed a broken voting machine that was not in use for approximately two hours. The precinct judge was very diligent but could not get through to the BOE.”*

Precinct 18A (Franklin County):

*“At 4 p.m. the average wait time is 4.5 hours and continuing to increase... Voters are continuing to leave without voting.”*

## **II. LEGAL SUPPORT FOR THE WRIT**

“Three requirements must be met to establish a right to a writ of mandamus: that relator have a clear legal right to the relief prayed for, that respondent have a clear legal duty to perform the acts, and that relator have no plain and adequate remedy in the ordinary course of law.” *State ex rel. Manson v. Morris* (1993), 66 Ohio St.3d 440, 441, 613 N.E.2d 232. A writ may issue to compel performance of a

ministerial act, to compel the exercise of discretion, or to correct a gross abuse of discretion. *Truman v. Village of Clay Center* (2005), 160 Ohio App.3d 78, 83, 825 N.E.2d 1182.

**A. RELATORS HAVE A CLEAR LEGAL RIGHT TO THE RELIEF PRAYED FOR.**

In Ohio, all persons having the requisite qualifications have a constitutionally protected right to vote at all elections. This right is guaranteed by the Constitutions of the United States and Ohio. *MacDonald v. Bernard* (1982), 1 Ohio St. 3d 85, 438 N.E.2d 410. The right to vote is fundamental, and its fundamental nature is underscored by the equal weight accorded each vote and equal dignity owed to each voter. *Bush v. Gore* (2000), 531 U.S. 98, 121 S.Ct. 525.

**1. Right of Access to Polling Place**

“A citizen’s right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution...” *Baker v. Carr* (1962), 369 U.S. 186, 208. A vast framework of Ohio election law is in place to provide Ohioans a full and fair expression of their choice of candidates for any given election. At the heart of that legal framework is the Secretary of State, who as Ohio’s chief election official, has the duty to ensure that citizens have the opportunity to cast their votes.

There is no principle which permits the disenfranchisement of innocent voters for the mistaken or willful misconduct of election officers in performing the duty cast upon them. *Mewling v. Moorhead* (1938), 133 Ohio St. 395, 14 N.E.2d 15, citing *McGrane v. County of Nez Perce*, 18 Idaho 714, 726, 112 P. 312. A six-hour wait

time to vote, as was documented at various precincts in Franklin, Knox, Lucas and Cuyahoga Counties during the 2004 election, does not provide citizens a reasonable opportunity to vote.

2. **Right to Have Security Measures in Place**

It is a well-established principle that citizens “must be confident that their vote, cast for a candidate or an issue, will not be disturbed except under extreme circumstances that clearly affect the integrity of the election.” *In re Election Contest of Dec. 14, 1999 Special Election* (2001), 91 Ohio St.3d 302, 304 744 N.E.2d 745, citing *In re Election Contest of Democratic Primary held May 4, 1999 for Clerk, Youngstown Mun. Court* (2000), 88 Ohio St.3d 258, 263.

**B. RESPONDENT HAS A CLEAR DUTY TO PERFORM THE ACTS PRAYED FOR.**

Relators’ petition seeks a writ of mandamus requiring the Secretary of State to alleviate congestion at polling places, including the use of back-up paper ballots, to manage malfunctioning voting machines to ensure that votes cast on such voting machines are not lost, and to assure the security of voting machines and related equipment so as to avoid accidental or willful adverse impacts on the voting process.

The Secretary of State has a clear legal duty to provide directives in these areas. The Secretary of State, as Ohio’s highest ranking authority in election matters, is not limited to voting and breaking two-to-two ties of county boards of elections. *State ex rel. Cleveland City Council v. Cuyahoga County Bd. Of Elections* (1974) 40 Ohio App.2d 299, 318 N.E.2d 889. He also has authority to compel observance by

county election officers of the requirements of election laws through the issuance of directives, and he performs such other duties as are required by law. *Id.* In fact the Ohio Revised Code in Section 3501.05 mandates that he provide certain guidance to the county Boards, stating he “shall do all of the following”, specifically including these:

Provide directives on how to properly conduct the elections.

Issue rules and instructions on how to conduct the elections.

Compel the observance of the election laws by the local officials.

**1. Duty to Provide Adequate Voting Supplies.**

Ohio law clearly requires that the boards of elections supply sufficient voting materials to meet the needs of voters. Each polling place must have “adequate facilities...for conducting the election,” including “a sufficient number of screen or curtained voting compartments to which electors may retire and conveniently mark their ballots.” R.C. 3501.29. The board also “shall provide for each polling place the necessary ballot boxes, official ballots, cards of instructions, registration forms,...and all other supplies necessary for casting and counting the ballots and recording the results of the voting at the polling place.” R.C. 3501.30.

In turn, the Secretary of State is required by law to “issue instructions by directives and advisories to members of the boards as to the proper methods of conducting elections.” R.C. 3501.05(C). The Secretary is further required to “prepare rules and instruction for the conduct of elections”, “compel the observance by

election officers in the several counties of the requirements of the election laws”, and “perform all other duties required by law.” R.C. 3501.05 (M) & (AA).

In addition, Ohio law provides expressly for the provision of additional ballots when, during voting, heavy turnout results in insufficient ballots at a polling place. Specifically, the law provides that “if during the time the polls are open additional ballot or supplies are required, the board of elections, upon requisition by telephone or in writing and signed by a majority of the election judges of the precinct stating why such additional supplies are needed shall supply them as speedily as possible.” R.C. 3505.17.

However, in 2004 even the order of a federal judge could not cause election officials to provide paper ballots on Election Day to reduce congestion in precincts located in Franklin and Knox Counties. See Attachments to Petition. There simply were no paper ballots or poll workers trained to use them available on Election Day. Advance planning for this contingency is essential if the debacle of 2004 is going to be avoided on November 7, 2006.

The various boards of elections did not provide the “necessary official ballots” and there were not enough electronic vote recording divides or paper devices to allow voters to cast their ballots within a reasonable time on Election Day. These failures resulted in inordinate delays and deterred voters from enduring the lengthy waits needed to cast their ballots and which ultimately prompted a federal judge to issue an emergency court order on Election Day, requiring county boards of election to make special accommodations for voters in two Ohio counties.

As the chief election official, the Secretary of State must know of the problems in 2004 and he has a clear duty to issue directives to ensure that the failures of 2004 do not repeat. At the hearing Friday, counsel for the Secretary suggested the presence of all new machines would eliminate congestion. Does he mean having many of the poll workers and voters getting used to new machines for the first time will make things faster? Certainly it will do just the opposite and thus any efficiencies from the new machines will be balanced against the lack of familiarity with them. Combine this with the fact that the ballot will contain an unusually high number of initiatives and the pace of voting will be significantly slowed.

To date, he has done nothing. If the Secretary does not act, the same widespread disenfranchisement of Ohio voters will occur. Relators have requested that the appropriate guidance be issued to the boards of election and have given the Secretary ample time to act. To date, the Secretary has refused to meet his clear legal obligation.

It has been held 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. *State ex rel Melvin v. Sweeney* (1950), 154 Ohio St. 223, 94 N.E. 2d 785. It logically follows that where the Secretary of State has failed altogether to issue directives to the boards of elections as to their duties, mandamus is the correct vehicle for relief.

## 2. Duty to Instruct on Machine Repairs.

It should be immediately apparent that voting machines must operate correctly in order to ensure that the votes of Ohioans are accurately counted. It is also true that any machine can malfunction and since the voting machines are only used on Election Day, it is certain that malfunctions will occur while people are voting. The comments of counsel for the Secretary Friday that pretesting eliminates possible problems flies in the face of logic and the experience of the primary election this year. There are tens of thousands of machines which have to be trucked across the counties, carried into polling places and put in operation by tens of thousands of different people. There is no question that some of those machines will malfunction.

As the Affidavit of Professor Dan Wallach makes clear, in attempting to repair voting machines in the polling places during the election, repairmen or poll workers could inadvertently cause a loss of votes already recorded in malfunctioning machines. The loss of votes would be from inadvertent actions, not intentional. No one would know that it happened but the outcome of any number of contested races could be affected by such conduct.

The possibility of deleting votes inadvertently must be known to the Secretary and yet he has not issued any instructions to the Boards of Elections as to how they should proceed in handling malfunctioning machines during Election Day to avoid that potential. While there may be several different models of machines, they all have essentially the same potential to fail, although perhaps in different ways.

But the point is that the 75 year-old Election Day poll worker ought not to be effecting repairs to voting machines during the voting.

As noted, there is a Constitutional right to vote and it necessarily follows that if there is such a right, there is a right to have the votes counted accurately. By failing to promulgate instructions through directives dealing with repairing machines, the Secretary has violated a clear duty to the voters of Ohio.

### 3. Duty to Secure Ballots.

In the Constitution, there are numerous amendments which deal with the right to vote. Most important is the Fourteenth which prohibits any abridgment of the right to vote for state judicial officers or the members of its legislature. Candidates for both of these offices will be on the ballot in November and accordingly, any failure of the Secretary of State to address issues impacting voters will necessarily abridge their rights under this Amendment.

As the Affidavit of Professor Wallach also makes clear, security of voting machines is a matter of paramount concern. Before, during and after the election, the machines are susceptible to intercepts which could alter the vote counts, and perhaps more significantly, these efforts to manipulate vote totals could be carried out in a way that would be entirely undetectable by anyone.

It is also possible that the machines could malfunction for reasons related to their own problems, not ones inflicted intentionally. In Cuyahoga County in the primary elections of 2006, some 70,000 votes were not recorded by the voting machines. Recent studies of the problem made clear that the same sort of problems

could exist in any of Ohio's 43 counties using similar machines. See Exhibit A attached. Notwithstanding the difficulties in Cuyahoga County and the knowledge that voting machines can be interfered with in a variety of ways, the Secretary of State has done absolutely nothing to instruct the local Boards as to how to ensure the security of their voting machines and related equipment.

The Ohio Revised Code's advice to Boards on security is that the materials should "carefully preserve" the ballots. The Ohio Administrative Code has similarly helpful guidance as to what to do with voter verified paper audit tapes - keep them under conditions which will prevent tampering. OAC 115:05-1-01(E)(5)(a). A copy is attached.

And to be fair, the Secretary has issued a directive stressing the importance of the security of the equipment and requiring Boards to store the equipment in rooms which have double locks so as to assure that one major party representative can have each key.

What these circumstances led to in 1991 was a holding by the Ohio Supreme Court that storing ballots after the election in unsecured plastic tubs was not a violation of the statute. *In re Election of November 6, 1990 (1991)*, 58 Ohio State 3d 103.

But that is as far as the collective guidance on security given to county boards goes, and that is woefully inadequate. There are no suggestions like requiring a log of all persons having access to the voting machine storage area with an indication as to why they entered. Requirements that, in addition to having two keys,

representatives of each party must be in the storage room when it is open would help. Absolutely no information is provided as to what should occur on Election Day. Professor Wallach and people like him could provide even more helpful suggestions, but only if they are asked.

By ignoring this area, the Secretary has created a potential for an election rooted in mistakes, errors and violations of the Constitutional right to vote. While some counties may be doing it well, others certainly are not. As a Colorado judge observed 10 days ago in a case in which he ordered Colorado's Secretary of State to issue directives on security before the next election "And again I believe most of the counties are probably complying. But it's apparent to the Court that some don't have those minimum requirements, and there's no reason that the Secretary of State in mitigation of this problem can't order that they do it." Court's Ruling in *Conroy et al. v. Dennis, et al.*, hearing September 22, 2006 (a copy is attached).

It is for this reason that Relators ask that the Court issue a writ of mandamus dealing with the need for directives from the Secretary of State concerning the security of voting machines and related equipment.

**C. PETITIONERS HAVE NO PLAIN AND ADEQUATE REMEDY IN THE ORDINARY COURT OF LAW.**

Because the November 2006 election is less than two months away, the Relators lack an adequate remedy in the ordinary course of law. *State ex rel. Brown v. Butler Cty. Bd. of Elections* (2006), 109 Ohio St. 3d 63, 846 N.E. 2d 8; *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections* (1995), 72 Ohio St. 3d 289, 291-292, 649 N.E. 2d 1205;

*State ex rel. Smart v. McKinley* (1980), 64 Ohio St. 2d 5, 6, 18 O.O. 3d 128, 412 N.E. 2d 393.

Though a declaratory judgment action could ultimately lead to an order requiring the Secretary to take action,<sup>1</sup> a declaratory judgment action filed at this point would never result in relief prior to the 2006 election. Nor does the availability of an injunction preclude a writ of mandamus. As the Ohio Supreme Court held in *State ex. rel. Fenske v. McGovern* (1984), 11 Ohio St. 3d 129, 131, 464 N.E. 2d 525, the Ohio Supreme Court:

“There is no emergency request for action in the ordinary course of the law. The extraordinary remedy of mandatory injunction available in the court of common pleas is not a plain and adequate remedy in the ordinary course of law precluding exercise of the original jurisdiction in mandamus conferred upon the courts of appeals by Section 3, Article IV of the Ohio Constitution.”

Id., citing sixth paragraph of the syllabus of *State ex. rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St. 2d 141, 228 N.E. 2d 631.

A writ of mandamus is the only way to compel the Secretary of State to act before the election, before the Relators are further disenfranchised by exceedingly long polling lines, the loss of votes during attempted repairs and loosely enforced security measures.

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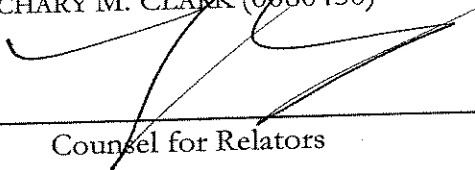
<sup>1</sup> At least one declaratory judgment action in which the League of Women Voters and various other plaintiffs seek similar relief to that requested herein is currently tied up in the federal appellate system on defense raised by the Secretary of State and deemed to be “frivolous” by the District Court.

**III. CONCLUSION**

If the Secretary continues to sit idle and allow the November election to go forward without further directives regarding the security of voting machines before, during and after Election Day, regarding the handling of malfunctioning machines in the polling places and directing the usage of paper ballots for overcrowded polling places, voters will be disenfranchised as they were in 2004.

Respectfully submitted,

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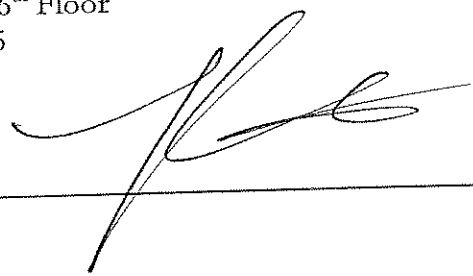
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was mailed this 31 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

  
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