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RESPONDENT'S POSITION IS SELF-CONTRADICTION

But the statute does not say that the director of elections *can only* deliver an absentee ballot to a registered voter if the voter is a qualified voter when the request is made. . . . ***Nothing in the statute prevents a director of elections from the discretionary issuing of the absentee ballots.***

Project Vote v. Madison Cty. Bd. of Elections (N.D. Ohio, September 29, 2008), Case No. 1:08-cv-2266-JG, Opinion and Order [Resolving Doc. 7] at pp. 14-15. Based upon this rationale, the United States District Court sided with the Secretary of State to rule that absentee ballots must be permitted to be cast by newly registered voters on October 1-6, 2008.¹ The Secretary of State, Respondent herein, despite prevailing thereon an argument supporting an expansive use of absentee balloting now, argues to “strictly construe” and limit access to absentee ballots in this case.

Respondent's flip-flop is so stark that she took the unprecedented step of calling attention to it in Respondent's Tenth Affirmative Defense: “The Relators are estopped from bringing their claims. Their arguments are contrary to those made by similar electors in concurrently pending litigation relating to the question of whether or not the statement required by R.C. 3509.03(G) must be included in an application for an absent voter's ballot.” (Answer of Respondent, ¶ 48). In other words, Respondent's strict reading of R.C. 3509.03(G) in this case is irreconcilable with her victorious position in *Project Vote* and *Colvin*. Respondent prevailed in those cases. She must lose here.

¹ As the Court is aware, it issued a ruling in line with the *Project Vote* decision that same day in *State ex rel. Colvin v. Brunner*, Case No. 2008-1813. Because this Court's opinion has yet to be released, it cannot be cited herein.

**INNOCENT, INADVERTENT AMBIGUITY IS NO BASIS
FOR REJECTING APPLICATIONS**

The best argument Respondent could muster in support of punishing thousands of elderly voters is, “Ohioans . . . innocently and inadvertently failed to unambiguously affirm that they were qualified voters”. (Respondent’s Brief at 1). Note the “innocent” and “inadvertent” mistake: a failure to “*unambiguously affirm*” the qualified voter statement. Respondent does not argue that the thousands of voters didn’t make the statement, only that the statement might be ambiguous—albeit innocently and inadvertently ambiguous. Through this tortured language, Respondent concedes that the applicants *actually* made the qualified elector statement. Because the qualified elector statement was made, Respondent should issue a directive instructing the boards of election not to reject the McCain applications based on the absence of a mark in the square.

MANDAMUS IS APPROPRIATE

Respondent engaged in a schizophrenic discussion regarding whether Respondent’s Memorandum is binding on the boards of elections, and in turn whether mandamus is an appropriate in this case. Rather than dissect Respondent’s vacillations, Relator’s will focus the Court’s attention on Respondent’s admissions that mandamus is appropriate.

Respondent admits, “Relators want Secretary Brunner to direct the Boards of Elections to accept McCain absentee ballot applications . . . where [rejected because] the applicant has not marked the checkbox affirming that she is a qualified elector.” (*Id.* at 14). Respondent also acknowledged that the Court can “issue a writ of mandamaus to control or override the Secretary’s decision [where] there is an abuse of discretion,” as has occurred here.² (*Id.* at 16).

² The two cases Respondent cites where the court found mandamus not appropriate both involved requested to enjoin action rather than to compel it. *See, State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 1, 2006-Ohio-4334 (seeking to enjoin presentation of initiative to

Respondent admitted mandamus is appropriate even more in the brief she filed in *Colvin*: “In over words, the Supreme Court held that the Secretary’s duty to issue directives and advisories was a specific ministerial duty and thus appropriate for a writ of mandamus.” See Respondent’s Brief, p. 29 (September 29, 2008), *State ex rel. Colvin v. Brunner*, Case No. 2008-1813 (http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.asp?pdf=630594.pdf). Respondent also acknowledged in that case that mandamus “may be used to compel an officer to exercise his or her discretion in the face of an abuse of discretion.” *Id.* at 31. Respondent’s decision to graft both an “affirmation” requirement onto R.C. 3509.03 and a requirement that the signature appear within some amorphous distance from the qualified elector statement fly in the face of the express statutory language that “the application need not be in any particular form”. Mandamus should issue to correct this abuse of discretion.

Respondent claims to have acted within her discretion because there is no fundamental right to cast an absentee ballot. The fallacy of this argument is demonstrated by the text of the case Respondent cited—without quotation—in support of her assertion. “[O]nce the States grant the franchise, they must not do so in a discriminatory manner. More importantly, however, we have held that, because of the overriding importance of voting rights, classifications ‘which might invade or restrain them must be closely scrutinized and carefully confined’ where those rights are asserted under the Equal Protection Clause”. *McDonald v. Bd. of Election Commsrs. of Chicago* (1969), 394 U.S. 802, 808 (citations omitted). Once a state adopts absentee voting, it must apply the law uniformly. The *McDonald* plaintiff lost because “there [was] nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants’ ability to exercise the fundamental right to vote.” *Id.*

General Assembly); *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1 (seeking retraction of petition certification).

Here, Respondent has severely impacted the ability of Relators and thousands of similarly situated voters to exercise the fundamental right to vote. Respondent expects these untold thousands of predominantly septuagenarians and octogenarians to take the unnecessary step of resubmitting a duplicative application or voting in person. According to Respondent, this is an adequate remedy at law. Respondent missed the point. The applicants have already done everything necessary to obtain an absentee ballot. Requiring extra steps is a violation of law—not a remedy. Moreover, it is likely that some voters will not be told that their accurately completed applications were rejected, and will face possible disenfranchisement. Still others might be chilled from voting because of the unnecessary hurdles Respondent is arbitrarily placing in their paths. Respondent has detrimentally impacted their ability to vote.

As Relators anticipated, Respondent's only argument against issuing the ballots is "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." (Respondent's Brief at 23). At a minimum, Respondent *should have* instructed the boards of election to issue ballots to the 95% of the applicants who requested the ballots be delivered to their registered address. With respect to the 5% who provided other addresses, Respondent did not contest the fact that her Memorandum violates the provisions of R.C. Chapter 3504. and R.C. 3509.021 prohibiting former residents from casting ballots in a presidential election. Accordingly, ballots should be issued to all complete McCain Applications.

The inadequacies of the "remedy" proposed by Respondent is demonstrated by the many less intrusive means Respondent could have addressed the "innocent" and "inadvertent" "ambiguity". Respondent could have ordered the boards of election to issue the ballots and

enclose a note reminding the voter of the obligation to vote in their current precinct. Respondent could have instructed the boards of elections to call the voters and ask them if they intended for the qualified elector statement to be a part of the application. The contrast between the burdens Respondent places on existing registered voters compared to the accommodations she demands be made to newly registering voters violates equal protection and demonstrates that mandamus is appropriate.

RESPONDENT ABUSED HER DISCRETION

Strikingly, Respondent did not even attempt to distinguish this case from the nearly identical *Eubanks v. Hale* (Ala. 1999), 752 So.2d 1113, 1127. In *Eubanks*, the Alabama Supreme Court ruled that an applicant for an absentee ballot need not check a box indicating the reason for the absentee request when there is only one option on the form. The straight-forward logic of that case should be persuasive here.

Respondent claims that Relators and the thousands of similarly situated voters have an adequate remedy at law because they can resubmit a new application. However, Respondent does not have the discretion to arbitrarily declare complete applications to be incomplete. Nor does she have the discretion to subject the class of voters who submitted a McCain Application to unnecessary procedural hurdles that will likely result in some percentage of them not being able to cast a ballot.

Respondent claims that her Memorandum “clarifies existing statutory law regarding absentee ballot applications”. Respondent, however, never argued that R.C. 3509.03(G) is ambiguous or in need of her form of “clarification.” The statute requires the statement appear on the application. Nothing more. “Clarification” in the form of arcane additional requirements is not within Respondent’s discretion.

Respondent's abuse of discretion is further demonstrated by the portions of her brief spent lauding herself. Respondent argues that because R.C. 3509.03 is part of "a highly complex, technical, and sometimes ambiguous set of interrelated statutory provisions," (*Id.* at 1, 5), Ohioians should use only her Form 11-A to request an absentee ballot. If Respondent truly believes that only her form should be used, then she should lobby the General Assembly to remove "the application need not be in any particular form" from R.C. 3509.03. Moreover, as Relators have demonstrated Respondent's forms are not infallible. Form 11-A mistakenly minimizes the R.C. 3599.21 F-4 felony of fraudulently requesting an absentee ballot. Respondent argues that it is ok that she does not mention the F-4 felony because the same action is also an F-5 felony under a different section that applies when a statute "calls for a statement to be made under penalty of election falsification". R.C. 3599.36. The error here is that no section requires the penalty of election falsification for absentee ballot applications.

Relators recognize that the propriety of Form 11-A is not central to the disposition of this case. However, the double standard that Respondent applies by forgiving her own transgressions while not issuing ballots to "innocently", "inadvertently" "ambiguous" applications that meet the requirements of R.C. 3509.03 violates the Voter Rights Act and the Fourteenth Amendment.

COUNSEL OF RECORD DID NOT PROVIDE CONTESTED TESTIMONY

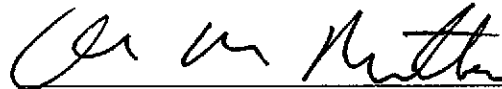
Relator closes with the petty argument that the affidavit of Charles M. Miller should be stricken. The Court should ignore the request because it was not made by motion. *See* S.Ct. Prac. R. XIV, § 4(A). Moreover, the argument is misguided. Ohio Rule of Professional Conduct 3.7(A)(1) provides: "A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless . . . the testimony relates to an uncontested issue." The affidavit in question merely stated that the law firm that represents Relators tallied the number of applications and the age of applicants submitted into evidence. The summary of the thousands of

documents has not been contested by Respondent. To the extent that the facts are contested, the paralegal working on the case can be substituted as the witness. Moreover, a lawyer will not be disqualified where “the disqualification of the lawyer would work substantial hardship on the client.” Ohio R. Prof. Conduct 3.7(A)(3). Due to the extremely expedited nature of election cases, the fact that no live testimony will be provided by Mr. Miller, and the fact that the submission of evidence in this case is complete; disqualifying Mr. Miller would be unjustified. Most critical to the request made by Relators, the rule does not provide for the exclusion of evidence. Finally, because the affidavit merely summarizes the uncontested evidence, striking the affidavit would not impact the merits of this case. Accordingly, Respondent’s “motion” should be denied, if not ignored.

CONCLUSION

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. Respondent further has the duty to correct her erroneous Memorandum by advising the various boards of election not to reject any McCain Application based upon the absence of a mark in any box on the application. Accordingly, Relators respectfully request the Court issue a Writ of Mandamus.

Respectfully submitted,

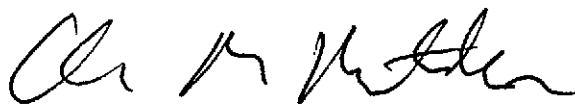


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF OF RELATORS shall be served upon the following parties by electronic mail on the 1st day of October, 2008.

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