

Case No. 08-1950

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. DEWEY STOKES,

Relator,

v.

**JENNIFER BRUNNER,
SECRETARY OF STATE OF OHIO,**

Respondent.

Original Action in Mandamus

Expedited Election Matter Under S.CT.PRAC.R. X, §9

MERIT BRIEF OF RELATOR DEWEY STOKES

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STATEMENT OF FACTS

Relator Dewey Stokes is a resident of Franklin County, Ohio and is a qualified elector and a duly appointed election observer (an “observer”) under Ohio law. See Affidavit of Dewey Stokes (“Stokes Aff.”), attached to Relator’s Petition for Writ of Mandamus at ¶ 2-4; Relator’s Certificate of Appointment of Observer, attached to Stokes Aff. as Exhibit A. As a qualified elector and observer, Relator has an interest in securing his right to observe in-person absentee voting.

On January 27, 2006, a new law allowing “no-fault” absentee voting became effective in Ohio. This law changed the former Ohio absentee voting law by “permit[ting] any qualified elector to vote by absent voter’s ballots at an election,” and by “eliminat[ing] the qualifications that electors were required to meet under former law in order to vote by absent voter ballots.” See Legislative Services Commission Bill Analysis, Sub.H.B. No. 234, citing R.C. 3509.02(A), 3509.02(C), 3509.03, and 3509.04(B). As a result of the change in law, all registered Ohio voters are able to cast their ballots prior to the scheduled date for the election of November 4, 2008 at polling places all over the state.

The actual process and rules governing in-person absentee voting and voting on election day are the same. For example, on both election day and each day of the 35-day period for in-person absentee voting, boards of elections must observe certain formalities, including the provision of a minimum number of handicapped parking locations, a nonskid ramp of not over eight percent gradient, a large precinct map, a United States flag that is approximately two and one-half feet long, and small flags to be placed one hundred feet from the polling place entrance. See R.C. 3501.11(Z); R.C. 3501.29(B)(1)(b)-(c); and 3501.30(A)(1)-(4). These formalities ensure that voters will perceive no meaningful distinction between in-person absentee voting sites and election day voting sites. The Secretary herself characterizes this period of in-person

absentee voting as “early voting,” further demonstrating that there is no meaningful distinction between the two processes. See Secretary of State’s Website, <http://www.sos.state.oh.us/SOS/mapsEV.aspx?page=361> (last visited October 14, 2008).

On September 23, 2008, just eight days before the start of the in-person absentee voting period, Respondent, Secretary of State Jennifer Brunner (the “Secretary”), issued Advisory 2008-24, which directed Ohio’s boards of elections not to accept observers during the 35-day period for early voting at board of elections offices or other designated sites. (See Advisory 2008-24, attached as Exhibit B to Stokes Aff.) The Secretary’s rationale for her Advisory was that “the Ohio General Assembly has not provided for election observers during the 35 day period for in-person absentee voting at boards of elections offices or other designated sites.” (*Id.*)

On October 3, 2008, Relator received credentials to serve as an observer in Franklin County. (Stokes Aff. at ¶ 3.) At approximately 11:05 A.M. on the same day, Relator presented himself at an early voting location inside a building at Franklin County Veterans Memorial and announced his intention to serve as an observer. (*Id.* at ¶ 4.) While inside the building, Relator personally witnessed people obtaining absentee ballots and casting them. (*Id.*) After he presented himself as a duly credentialed observer, Relator was approached by Michael Stinzanio, Director of Franklin County Board of Elections, and Matthew Damschroeder, Deputy Director of Franklin County Board of Elections, who, purporting to be acting under the authority of the Secretary, informed Relator that he would not be permitted to serve as an observer. (*Id.* at ¶ 5.)

The Secretary’s interpretation of Ohio law in Advisory 2008-24 is contrary to the plain language of R.C. 3501.11(Z), which provides that on any day on which an elector may vote in person at a board of elections or other designated site, the site is considered a “polling place for that day,” and 3505.21, which says that election observers “shall be permitted to be in and about

the polling place during the casting of ballots.” Moreover, the Secretary’s Advisory fails to acknowledge that in-person absentee voting prior to election day creates an environment so substantially similar to election day voting that the same rationale for requiring observers on election day should also apply during the 35-day in-person absentee voting period. Accordingly, Relator seeks a writ of mandamus to ensure that observers are permitted to observe at polling places during the 35-day in-person absentee voting period. Relator respectfully requests expedited relief under Rule X, Section 9 of the Court’s Rules of Practice.

ARGUMENT

Respondent Secretary Jennifer Brunner is the Ohio Secretary of State and, pursuant to R.C. 3501.01(U), is the chief election officer of the state. As such, she must follow the requirements of Ohio’s election laws, and ensure that elections are conducted as prescribed by Ohio law. The Secretary has violated her duties as chief election officer by issuing Advisory 2008-24, precluding election observers who are properly appointed under R.C. 3505.21 from observing the casting of ballots at polling places for in-person absentee voting, as required by Ohio law. Therefore, the Court should issue a writ of mandamus to require the Secretary to comply with all applicable provisions of Ohio law and to ensure the openness of the election process.

RELATOR HAS MET THE STANDARD FOR A WRIT OF MANDAMUS.

The Court “has expressly recognized that if the secretary of state ‘has, under the law, 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. Colvin v. Brunner* (Oct. 1, 2008), Slip Op. No. 2008-Ohio-5041, ¶ 20, quoting *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, 226, 43 O.O. 36, 94 N.E.2d 785. The remedy of mandamus is appropriate to correct the Secretary’s error

when, as here, her Advisory provided “an erroneous interpretation of the election laws.” *Id.*, quoting *Melvin*, 154 Ohio St. at 225.

Relator is entitled to the requested writ of mandamus because: (1) Relator has a clear legal right to the requested relief; (2) the Secretary has a corresponding clear legal duty to provide that right; and (3) there is no adequate remedy in the ordinary course of the law for the Secretary’s failure to provide Relator’s clear legal right. *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 2007-Ohio-5838, 876 N.E.2d 1231, ¶ 13.

As set forth below, Relator has a clear legal right to observe a “polling place during the casting of ballots.” R.C. 3505.21. A “polling place” is “the board or * * * another site designated by the board” “on any day in which an elector may vote in person” at that site. R.C. 3501.11(Z). Under R.C. 3501.05, the Secretary has a corresponding legal duty to follow Ohio law and issue appropriate directives and advisories to permit Relator to observe in-person absentee voting. Relator has no adequate remedy in the ordinary course of the law. Specifically, given the proximity of the November 4, 2008 general election, an injunction is not an adequate remedy “because any appellate process would last well past the election.” *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections* (1995), 72 Ohio St.3d 289, 292, quoting *State ex rel. Smart v. McKinley* (1980), 64 Ohio St.2d 5, 6.

Accordingly, Relator asks this Court to issue a writ of mandamus directing Respondent: (1) to declare that observers are permitted at all active polling places during in-person absentee voting; (2) to issue appropriate guidance directing local election officials to permit observers in all early voting locations, pursuant to procedures in R.C. 3505.21; and (3) to provide such further additional relief as is necessary and appropriate.

First Proposition of Law

Ohio Law Requires the Secretary To Permit Qualified Individuals To Observe the Casting of Ballots During the 35-Day In-Person Absentee Voting Period Based on R.C. 3501.11(Z), 3505.21, and Public Policy.

Second Proposition of Law

The Secretary's Advisory 2008-24 Directs Ohio's Boards of Elections That They May Refuse To Allow Qualified Election Observers To Observe During the 35-Day In-Person Absentee Voting Period and Is Therefore Contrary to Ohio Law.

- A. **A Writ of Mandamus Is Proper Because Relator Has a Clear Legal Right To Observe In-Person Absentee Voting at Polling Places.**

Relator has a clear legal right to observe in-person absentee voting because (1) the plain language of the Ohio Revised Code permits observers to be present at polling places during in-person absentee voting; (2) the Secretary's interpretation of R.C. 3505.21 is incorrect, contrary to Ohio law, and entitled to no deference; (3) The Secretary's Advisory 2008-24 violates public policy by making Ohio elections secretive, opaque, and disparate.

1. **The Plain Language of the Ohio Revised Code Permits Observers To Be Present at Polling Places During In-Person Absentee Voting.**

Ohio Revised Code 3505.21 states, in part:

Upon the filing of a certificate, the person named as observer in the certificate shall be permitted to be in and about the *polling place* for the precinct *during the casting of the ballots* * * * *

R.C. 3505.21 (Emphasis added.) A complete understanding of 3505.21 requires a further explanation of the term "polling place," which is defined under R.C. 3501.01(R) to mean "that place provided for each precinct at which the electors having a voting residence in such precinct may vote." Thus, the emphasis on *voting* at a "polling place" is present in the definition of the word, and the term "polling place" is given further meaning by looking to other relevant sections of the Ohio Revised Code.

R.C. 3501.11(Z) requires every county board of elections to treat any place where there is in-person absentee voting as a “polling place.” Every county board of elections must do the following:

On any day on which an elector may vote in person at the office of the board or at another site designated by the board, consider the board or other designated site a polling place for that day. All requirements or prohibitions of law that apply to a polling place shall apply to the office of the board or other designated site on that day.

R.C. 3501.11(Z). (Emphasis added.)

The Court uses the “rules of grammar and common usage” when construing provisions of the Ohio Revised Code. *State ex rel. Colvin*, 2008-Ohio-5041, ¶43, quoting *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, 817 N.E.2d 76, ¶23. The plain language of the above sections, when read together, permits observers to observe in-person absentee voting at polling places.

R.C. 3505.21 is the only section of Chapter 35 that is dedicated to observers. The pertinent provision of R.C. 3505.21 permits observers to be present at “the *polling place* for the precinct *during the casting of the ballots*.” R.C. 3505.21. (Emphasis added.) Therefore, the two important phrases in R.C. 3505.21 for determining whether observers should be permitted to observe in-person absentee voting are “polling place” and “casting of ballots.”

Any place where voters are allowed to vote in-person is legally treated as a “polling place.” R.C. 3501.11(Z); see also Secretary’s Directive 2008-50, at 1 (explaining that polling places for in-person absentee voting “must meet all applicable requirements for polling places”). The General Assembly, with full knowledge that in-person voting would occur on days other than election day, required local boards of elections to treat board of elections buildings or other designated sites the exact same way on any day “on which an elector may vote in person” as those sites are treated on election day. *Id.* Such a requirement by the General Assembly

recognizes that all proper votes are counted in the same way, regardless of whether they are cast on election day or on a day within the 35-day period in advance of the election. Thus, the General Assembly decided that there should not be a distinction for the purpose of observers between in-person absentee voting locations and in-person election day voting locations because any board of election building or other designated site where a vote can be cast is a “polling place.”

R.C. 3505.21 also expressly requires observers to be allowed to observe the “casting of ballots.”¹ Notably, the General Assembly did not distinguish between an observer’s right to observe the casting of ballots on election day and his or her right to observe the casting of ballots during in-person absentee voting. According to Webster’s Dictionary, to “cast” means “to deposit or give (a ballot or vote).” Webster's Unabridged Dictionary (2007) 323.

¹ In *State ex rel. Colvin*, the Court cited *State ex rel. Lorenzi v. Mahoning Cty. Bd. of Elections* (Oct. 25, 2007), Mahoning App. No. 07 MA 127, 2007-Ohio-5879, for the proposition that “[a]n absentee ballot is not actually ‘cast’ until it is counted * * *” *State ex rel. Colvin*, 2008-Ohio-5041, at ¶ 51. However, in *State ex rel. Lorenzi* the Mahoning County Court of Appeals cited no support for their contention and relied on alternate authority for their decision. *State ex rel. Lorenzi*, 2007-Ohio-5879, at ¶ 26.

If the court follows *State ex rel. Lorenzi's* definition of “casting a vote” - that it is not cast until it is counted - then observers are *not even permitted to be at polling places on election day*, except during the actual *counting* of ballots. As the Secretary noted in her Advisory 2008-24, this was not the intent of the General Assembly. Ex. B. to Stokes Aff. at 1. One of the specifically enumerated times that observers are allowed is “on election day at precincts or at the boards of elections.” *Id.* If the Court adopts the *State ex rel. Lorenzi* definition and applies it consistently, it will completely eviscerate the role of observers for in-person absentee voting and for voting on election day – a result that was clearly not contemplated by the General Assembly. The Court should thus apply reasonable construction to R.C. 3505.21. See *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, ¶ 28 (courts have a duty to construe constitutional and legislative provisions to avoid unreasonable or absurd consequences).

Even if the Court upholds the definition of “cast” espoused by the Mahoning County Court of Appeals, the process for in-person absentee voting and election day voting is so substantially similar that no voter can tell the difference. Thus, even if the Court finds that an absentee ballot is not “cast” at the polling place during early voting, observers should be permitted for in-person absentee voting in the interest of openness and preserving the intent of the General Assembly.

R.C. 3505.23, which addresses the actual “marking of the ballot,” provides a similar meaning for casting of ballots, stating that “the voter shall deliver the voter’s ballots * * * to the judge having charge of the ballot boxes” and the judges shall “*deposit* each such ballot in the proper ballot box.” R.C. 3505.23 (Emphasis added.) The plain language and common usage of the word “cast” should be given substantial weight because it is not used in the section of the Revised Code that discusses in-person voting on election day. *Id.* Thus, a vote is “cast” when the decision is made by the voter and his or her ballot is deposited with the board of elections director or employees. Giving R.C. 3505.21 its ordinary meaning, an observer has the right to observe the casting, or depositing of votes at a polling place, during in-person absentee voting and during voting on election day.

Applying the in pari materia rule of construction, Relator has a legal right to observe in-person absentee voting. Under that rule, statutes that relate to the same subject matter must be construed in pari materia so as to give full effect to the provisions. See *State ex rel. Choices for South-Western City Schools v. Anthony*, 108 Ohio St.3d 1, 2005-Ohio-5362, 840 N.E.2d 582, ¶ 46. Construing R.C. 3505.21 in pari materia with 3501.11(Z) observers are permitted to observe *polling places*, and a “polling place” is “the board or * * * another site designated by the board” “on any day in which an elector may vote in person” at that site. R.C. 3501.11(Z). Every location where in-person absentee voting, which is the act of an elector voting in person, takes place, is a “polling place” where observers are allowed by Ohio law.

2. The Secretary’s Interpretation of R.C. 3505.21 Is Incorrect, Contrary to Ohio Law, and Entitled to No Deference.

In Advisory 2008-24, which the Franklin County Board of Elections relied upon when it refused Relator’s attempt to observe the in-person voting at Veterans Memorial, the Secretary provided her rationale for refusing to allow observers during the 35-day in-person absentee

voting period. Her principal argument is that, because the Revised Code does not expressly say that observers are permitted to observe in-person absentee voting, the General Assembly must have intended for observers to not be allowed to observe in-person absentee voting.

The Secretary's position in Advisory 2008-24 is wrong. First, as discussed above, the plain language of R.C. 3505.21 provides that observers shall be permitted to observe "the polling place of the precinct during the casting of ballots." R.C. 3505.21. Second, the specific inclusion of observers in some sections of the Ohio Revised Code does not exclude observers from other sections. This is particularly true when other election officials who are clearly intended to be included in a section are also omitted from that section.

The only section in the Ohio Revised Code that specifically refers to in-person absentee voting is 3509.05(A), which provides in pertinent part:

When absent voter's ballots are delivered to an elector at the office of the board, *the elector may retire to a voting compartment provided by the board and there mark the ballots*. Thereupon, the elector shall fold them, place them in the identification envelope provided, seal the envelope, fill in and sign the statement on the envelope under penalty of election falsification, and deliver the envelope to the *director of the board*.

R.C. 3509.05(A). (Emphasis added.) This section does not expressly provide for the presence of anyone during in-person absentee voting other than the "director of the board." *Id.* The section does not bar observers. The General Assembly obviously intended that people who are vital to the election process should be present during in-person absentee voting. The Secretary's reading of the statute would prohibit the presence of anyone other than the director of the board of elections from being present during in-person absentee voting.

The General Assembly intended for observers, board of elections employees, and members of the board of elections to be present during in-person absentee voting because, from a practical standpoint, those individuals are necessary to carrying out the process. The language

explaining the process for in-person absentee voting in R.C. 3509.05(A) is the same as that used in the section that explains the process for voting on election day. See R.C. 3505.18(B) (“The elector shall then retire to one of the voting compartments to mark the elector’s ballots.”). The General Assembly used the same language in referring to in-person absentee voting and voting at a polling place on election day because the processes are the same, such that the same protections should be applied for in-person absentee voting and election day voting. Accordingly, the Secretary’s interpretation of R.C. 3505.21 is contrary to Ohio law and violates Relator’s clear legal right to observe the casting of ballots at polling places.

Moreover, the Secretary’s unreasonable interpretation of Ohio law is not entitled to deference. The Court must only defer to the Secretary’s interpretation of law if it is “reasonably supported by the pertinent provisions.” *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, 778 N.E.2d 32, ¶ 22. Here, the Secretary’s interpretation of the law regarding the presence of observers during the 35-day in-person absentee voting period ignores duly appointed observers’ right to “observe polling places during the casting of ballots.” R.C. 3505.21. Specifically, the Secretary’s interpretation as set forth in Advisory 2008-24 does not address the use “polling place” in other sections throughout the Ohio Revised Code and fails to follow the plain language of R.C. 3505.21, which allows observers to be present during the “casting of ballots.” *Id.*

3. **The Secretary’s Advisory 2008-24 Violates Public Policy and the Equal Protection Clause by Making Ohio Elections Secretive, Opaque and Disparate.**

Election observers play an important role in Ohio’s long and proud tradition of open, honest, and transparent elections. The purpose of election observer provisions in the Ohio Revised Code was described by the United States Court of Appeals for the Sixth Circuit as a “statutory process[] [that] operate[s] to preclude voting by those who are not entitled to vote.”

Summit Cty. Democratic Cen. and Executive Committee v. Blackwell (C.A.6 2004), 388 F.3d 547, 551. Election observers will “at the very least serve the important state interest of safeguarding voter confidence in the integrity and legitimacy of representative government. And, at the most, the presence of observers would provide minimal safeguards to deter or detect fraud and voter intimidation that could all too easily occur under these circumstances. *Ohio Republican Party v. Brunner* (S.D. Ohio Sept. 29, 2008), No. 2:08-cv-00913, slip op., 6-7. Therefore, the presence of election observers during in-person absentee voting serves an important public policy of the state.

The exact same rationale for favoring election observers on election day — that sunlight is the best disinfectant — applies to in-person absentee voting. When the Secretary discusses in-person absentee voting with the general public on her website, she refers to it as “early voting.” Secretary of State’s Website, <http://www.sos.state.oh.us/SOS/mapsEV.aspx?page=361> (last visited October 14, 2008). Further, the same technical requirements exist for early voting and election day voting. As discussed above, on both election day and each day of the 35-day period for in-person absentee voting, boards of elections must observe a number of formalities, including the provision small flags to be placed one hundred feet from the polling place entrance. See R.C. 3501.11(Z); R.C. 3501.29(B)(1)(b)-(c); and 3501.30(A)(1)-(4).

Indeed, the mandatory small flags are provided to mark the location where “persons other than election officials, *observers*, police officers, and electors waiting to mark, marking, or *casting their ballots*² shall not loiter, congregate, or engage in any kind of election

² The language in R.C. 3501.30(A)(4) is another example of how the definition of “casting a ballot” in *State ex rel. Lorenzi* is inconsistent with the intent of the General Assembly. The General Assembly was not concerned about voters waiting outside of polling places after the polls have closed during the counting of ballots. Instead, observers are needed during the “casting of ballots” because that is the time when voters are placing their votes and are subject to

campaigning.” R.C. 3501.30(A)(4). (Emphasis Added.) The appropriate polling place supplies and safeguards, such as the one hundred foot flag zone, are required during in-person absentee voting because the same concerns about voter fraud are present during that time.

As a practical matter, an in-person absentee voting location is in no way distinguishable from an election day polling place. See *Ohio Republican Party*, at 6-7. In both instances, a voter goes to a polling place and “retires” to a “voting compartment” to cast his or her ballot. R.C. 3509.05(A), R.C. 3505.18(B). And, of course, every properly cast vote, whether by an in-person absentee voter — or an “early voter” as the Secretary refers to them on her website — or an in-person election day voter, counts for the same amount. The Secretary is making a distinction without a difference between in-person absentee voting and election day voting. The early voting process is the same for voters, so it should be given the same protection as election day voting.

Indeed, the Secretary herself has recognized the importance of observers to the election process:

Poll observers play an important role in assuring the public that *election processes* are open and transparent, affecting public trust of the *process*, and thus, the potential for future participation in the democratic *process*.

Secretary of State Directive 2008-29. (Emphasis added.) The Secretary correctly noted the importance of observers to the *process* of the election — not merely election day voting. In-person absentee voting is as important a part of the election process as election day voting.

Similarly, the United States has recognized the importance of transparent elections by allowing observers from other countries to view the casting of ballots at polling places across the nation. Election observers from other nations were asked by the State Department to observe

the highest likelihood of voter fraud or intimidation, as evidenced by the one hundred foot buffer zone.

voting in the 2004 presidential election, and will again observe at polling locations on November 4 of this year. See International Team to Monitor Presidential Election, <http://www.cnn.com/2004/ALLPOLITICS/08/08/international.observers/index.html> (last visited October 14, 2008) (Representative Barbara Lee noted that “[t]he presence of monitors will assure Americans that America cares about their votes and it cares about its standing in the world.”); Office for Democratic Institutions and Human Rights, Limited Observation of General Elections, http://www.osce.org/odihr/item_12_34038.html (last visited October 14, 2008). Former United States President Jimmy Carter’s Carter Center summarized the important role of observers in elections: “Experience around the world has shown that credible and impartial observers can strengthen an electoral process by reassuring voters that they can safely and secretly cast their ballots and that any electoral fraud will be detected.” Carter Center Website, International Election Observation, http://www.cartercenter.org/peace/democracy/nav_question2.html (last visited October 14, 2008).

Further, Advisory 2008-24 poses an unnecessary risk that the Equal Protection Clause will be violated because, without observers, in-person absentee voters suffer a disproportionate risk of having their votes voided due to voter irregularities. The risks of voter intimidation and voter fraud are very serious, particularly in a year where, according to the Secretary, there are 665,949 new voters registered in Ohio. Mark Niquette, *Voting Sign-Ups Hit Record, Ohio Adds 665,949, to Nearly 8.2 Million*, COLUMBUS DISPATCH, October 8, 2008, at B1. In choosing to refuse election observers for in-person absentee voting, the Secretary unnecessarily put the confidence of Ohioans in their election process at risk. Had the Secretary followed the law and allowed in-person absentee observers, there would be no risk of lost confidence and a substantially lower risk of actual voter fraud, intimidation, or other irregularities.

As the Secretary herself acknowledged in Advisory 2008-24, “court challenges based on disparate treatment between counties” may result if some counties permit in-person absentee voting and other counties do not. Advisory 2008-24 at 2. The Secretary’s concern about litigation is well-founded, as different counties have applied the Advisory in different ways. Currently, the boards of elections in Franklin, Montgomery, and Summit Counties are deadlocked on whether or not to allow observers for in-person absentee voting. (Affidavit of Keri Hertel “Hertel Aff.,” filed contemporaneously herewith, at ¶ 4.) The Secretary has not yet voted to break the deadlock, as she is required to do under Ohio law. See R.C. 3501.11(X).

The Secretary’s Advisory 2008-24 created a situation where observers in some counties have not been permitted to observe in-person absentee voting, while other observers in other counties have been permitted to observe in-person absentee voting. (Stokes Aff. ¶ 4-5; Hertel Aff. at ¶ 6.)

In the interest of openness and fairness, observers should be permitted to observe the process of in-person absentee voting, just as observers are permitted to observe voting on election day. The same protections should be permitted for in-person absentee voting and election day voting at all polling places across Ohio’s 88 counties. The Secretary, courts, world leaders, and the General Assembly have all recognized that it is in the best interest of any election process to include observers to protect against fraud, voter intimidation, and other potential problems.

Accordingly, Relator has a clear legal right to observe in-person absentee voting, based on the Ohio Revised Code and the public policy of Ohio.

B. A Writ of Mandamus Is Appropriate Because the Secretary Has a Legal Duty To Issue Directives That Comport with Ohio Law and Has Ignored Her Duty.

The Secretary is the “chief election officer of the state.” R.C. 3501.04. It is the duty of the Secretary to: “[i]ssue instructions by directives and advisories to members of the boards as to the proper methods of conducting elections,” “[p]repare rules and instructions for the conduct of elections,” “prescribe the form of registration cards, blanks, and records,” and “[c]ompel the observance by election officers in the several counties of the requirements of the election laws.” R.C. 3501.05(B), (C), (F), and (M). The Secretary has therefore ignored her legal duty to follow Ohio law and issue appropriate directives that will permit Relator to observe in-person absentee voting at polling places.

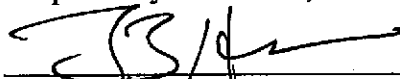
C. A Writ of Mandamus Is Appropriate Because Relator Has No Adequate Remedy at Law.

Relator has no adequate remedy in the ordinary course of the law. Specifically, given the proximity of the November 4, 2008 general election, an injunction is not an adequate remedy “because any appellate process would last well past the election.” *State ex rel. Thurn*, 72 Ohio St. 3d at 292, (quoting *State ex rel. Smart*, 64 Ohio St. 2d at 6).

CONCLUSION

As a duly credentialed observer, Relator has a clear legal right under Ohio law to observe in-person absentee voting at polling places. Rather than following the law and allowing Relator to observe in-person absentee voting, and in spite of the public policy considerations supporting observers for in-person absentee voting, the Secretary has substituted her own judgment for the plain language provided by the General Assembly. In doing so, the Secretary has left Relator with no adequate remedy for her failure to issue proper advice about Ohio election law. Accordingly, the Court should issue a writ of mandamus to require the Secretary to immediately direct Ohio boards of elections to allow observers to observe in-person absentee voting.

Respectfully Submitted,



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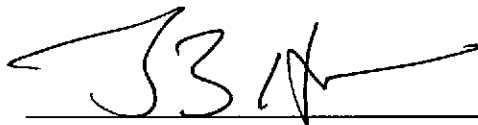
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Merit Brief of Relator In Support of
Petition for Writ of Mandamus was served upon the following, by electronic delivery, this 14th
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