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**FILED
SUPREME COURT
STATE OF OKLAHOMA**

JAN 14 2016

IN THE SUPREME COURT FOR THE STATE OF OKLAHOMA

**MICHAEL S. RICHIE
CLERK**

JASON R. JACKSON,)
)
 Petitioner,)
)
 vs.)
)
 TULSA COUNTY ELECTION BOARD,)
 ELAINE DODD, GEORGE WILAND, and)
 PATRICIA BRYANT,)
)
 Respondents,)
)
 and)
)
 JOHN R. FITZPATRICK, III,)
)
 Real Party in Interest.)

Case No. MA 114,591

An Original Action for
Writ of Mandamus

Received:	1-14-16
Declared:	am
Filed:	
CLERK/CLERK:	
CLERK/CLERK:	

AMICUS CURIAE BRIEF

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I. INTRODUCTION

The Oklahoma State Election Board (the "Board"), *amicus curiae*, takes no position as to whether this Court should assume original jurisdiction or grant the relief requested. The Board presents this Brief solely to explain its, and the Tulsa County Election Board's, obligations to absentee voters and how the requested relief may affect those obligations. By the time this Court makes a ruling in this matter, absentee voters will have received absentee ballots, and may have cast their votes, with the name of the Real Party in Interest, Mr. Fitzpatrick, listed as a Republican primary candidate for the office of Tulsa County Sheriff. The Petitioner, Mr. Jackson, requests Mr. Fitzpatrick's name stricken from the ballot. If a remedy is required in this matter, the Board suggests only that guidance be provided in light of the absentee voting laws at issue.

II. PERTINENT BACKGROUND

The election at issue is for the office of Tulsa County Sheriff. Mr. Jackson and Mr. Fitzpatrick seek the Republican primary nomination for this office. There are 9 Republican primary candidates in total seeking to become Tulsa County Sheriff. The primary election for this office is conducted by the Tulsa County Election Board, and it occurs on Tuesday, 1 March 2016. *See* 26 O.S. Supp. 2015, § 3-101(C)(2) (effective 1 November 2015) (prescribing timeframes for county elections). Due to a

confluence of election cycles, this county office is being considered at the same time voters consider the federal Presidential Preferential Primary. *See* 26 O.S. 2011, § 20-101 (setting date for presidential preferential primaries). As such, the choices for both the county and federal offices are printed on the same ballot, including the absentee ballots. All regular ballots for this election will be sent to the printers this week.

This proceeding may directly affect the absentee voting process. All absentee ballots for this election have been printed. The Board began transmitting electronic absentee ballots for this election to overseas voters and absent uniformed services voters, with active absentee applications for electronic ballots, on the morning of 13 January 2016. Other overseas voters and absent uniformed services voters that requested absentee ballots by mail will be sent ballots no later than 15 January 2016. Other voters that have requested printed absentee ballots will be sent ballots on 29 January 2016 per the custom and practice of the Tulsa County Election Board. These ballots have already been printed. The Board and the Tulsa County Election Board have already incurred significant expenses for the administration of this election.

III. DISCUSSION

This proceeding primarily affects overseas voters and absent uniformed services voters. The Board has already sent out electronic

ballots to some of these voters. Printed ballots will be sent to some absentee voters on 15 January 2016. Should this matter continue until the end of the month, traditional absentee voters will be affected. Printed absentee ballots will be transmitted to these voters beginning 29 January 2016.

A. Overview of Pertinent Absentee Ballot Statutes

1. *Overseas Voters and Absent Uniformed Services Voters*

i. **Federal Requirements**

Federal law requires Oklahoma to, among other things, establish procedures for “absent uniformed services voters” and “oversees voters” to cast absentee votes for any federal election. 52 U.S.C. § 20302(a)(1)-(7); see 52 U.S.C. § 20310(1) (defining “absent uniformed services voter”), (5) (defining “oversees voter”). The absentee ballots may be transmitted to such voters either by mail or electronically. 52 U.S.C. § 20302(a)(7), (f). Importantly, the absentee ballots must be transmitted to such voters at least 45 days in advance of an election for federal office. *Id.* at § 20302(a)(8)(A); See generally *U.S. v. Alabama*, 778 F.3d 926 (11th Cir. 2015) (discussing Section 20302 in detail). The Board or a County Election Board may only transmit to a requesting voter an absentee ballot after the 45-day deadline when the voter submits an absentee ballot application after this 45-day deadline. *Id.* at § 20302(a)(8)(B).

ii. State Requirements

Oklahoma law requires the Board and County Election Boards, as the case may be, to distribute absentee ballots to all uniformed services voters and overseas voters – *i.e.* “covered voters” under the Oklahoma election statutes – requesting absentee ballots for any election held in this State. See 26 O.S. 2011, §§ 14-137(1) (defining “covered voter” to include uniformed services voters and overseas voters), 14-142 (providing for application methods for covered voters). The absentee ballots may be transmitted to recipients either by mail or electronically. *Id.* at § 14-144(A)-(B). Importantly, the absentee ballots must be transmitted to covered voters at least 45 days before an election.¹ 26 O.S. Supp. 2013, § 14-118(A). The Board or a County Election Board may only transmit to covered voters an absentee ballot after the 45-day deadline when a covered voter submits an absentee ballot application after the 45-day deadline. *Id.* In doing so, the absentee ballot must be transmitted to the covered voter within 48 hours of receipt of the application. *Id.*

¹ The Secretary of the Board is authorized, in cases of extraordinary emergencies, to establish alternative procedures to facilitate absentee voting by overseas voters and absent uniformed services voters. 26 O.S. 2011, § 14-135. However, such authority is only invoked by, for example, “a natural disaster or an armed conflict involving United States Armed Forces, or mobilization of those forces, including National Guard and Reserve components . . .” *Id.* The Board suggests the requested relief in this matter does not fall within the category of “national or local emergency of other situations[s]” contemplated by Section 14-135.

Since the county sheriff election occurs simultaneously with a federal election, the offices for both county and federal government are contained on the same ballot. In accordance with 52 U.S.C. § 20302(a)(8)(A) and 26 O.S. Supp. 2013, § 14-118(A), the absentee ballots for overseas voters and absent uniformed services voters are being transmitted no later 15 January 2016.² Such voters that requested electronic ballots have already received them.

2. *Other Absentee Voters*

i. **Traditional Absentee Voters**

Oklahoma voters requesting traditional absentee ballots – *i.e.* those voters not falling within a specific statutory class of absentee voters – must do so no later than 5:00 p.m. on the Wednesday preceding an election. 26 O.S. 2011, § 14-103; *see also* 26 O.S. Supp. 2013, § 14-105 (providing for absentee ballot application process and forms). Oklahoma law does not expressly provide for a date certain on which such absentee ballots must be transmitted to such voters. *See* 26 O.S. 2011, § 14-106 (stating it is the duty of the county election board secretary “to verify the registration of said [absentee] voter and to transmit . . . ballots which said

² The 45-day deadline for this election cycle occurs on Saturday, 16 January 2016. Therefore, the overseas voter and absent uniformed services voter absentee ballots are being transmitted no later than Friday, 15 January 2016.

voter has requested and is entitled to receive.”). However, it is the custom and practice of the Tulsa County Election Board to transmit such absentee ballots 30 days before an election. As the election at issue will occur on 1 March 2016, traditional absentee voters with active absentee applications will be sent absentee ballots on 29 January 2016.

ii. Other Specific Classes of Absentee Voter

a. Physically Incapacitated Voters

Persons physically incapacitated may vote by absentee ballot. 26 O.S. Supp. 2013, § 14-110.1. No express statutory date is provided for when such persons must receive an absentee ballot. *See* 26 O.S. 2011, § 14-111.1 (mirroring Section 14-106). However, it is the custom of the Tulsa County Election Board to transmit such absentee ballots 30 days before an election. As the election at issue will occur on 1 March 2016, physically incapacitated absentee voters will be sent absentee ballots on 29 January 2016.

b. Voters Confined to Long-Term Care Facilities

For persons confined to nursing facilities or State Veterans Centers, a statutory procedure exists to permit those persons to cast absentee votes. 26 O.S. 2011, §§ 14-114, 14-115. The procedure requires absentee ballots to be received and votes cast on certain days of the week preceding

an election. *See id.* at § 14-115(1). These voters will be receiving absentee ballots the last week of February 2016.

c. Voters Becoming Physically Incapacitated

Persons that become physically incapacitated after 5:00 p.m. on the Tuesday preceding an election may cast an absentee vote within a short statutory timeframe. 26 O.S. 2011, § 14-115.1. Such voters will be receiving absentee ballots the last week of February 2016.

d. Emergency Responders

First responders and emergency workers may cast absentee votes when such voters are deployed “to assist with the rescue, recovery, or relief effort of a declared natural disaster or state of emergency . . .” 26 O.S. Supp. 2013, § 14-115.6(A). The absentee ballots must be requested within 10 days preceding the election. *Id.*

e. In-Person Absentee Voters

Finally, any registered voter may cast an absentee vote in-person. *See* 26 O.S. Supp. 2013, § 14-115.4. In-person absentee voting may only occur on the Thursday and Friday immediately preceding an election. *Id.* at § 14-115.4(A)(1). These voters will be receiving absentee ballots the last week of February 2016.

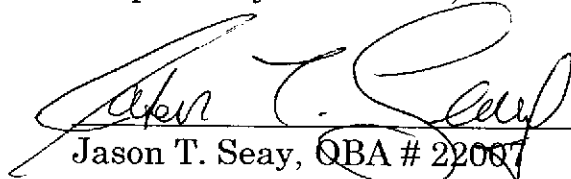
B. Preliminary Numbers of Absentee Voters Affected

As of the filing of this brief, the Board shows 2,442 active absentee ballot applications on file for Tulsa County. Of those, 217 are overseas voters or absent uniformed services voters and 1,452 are traditional absentee ballot voters. The remaining 773 active applications constitute specific classes of absentee voters other than traditional absentee voters, overseas voters and absent uniformed services voters.

IV. CONCLUSION

Should a remedy be necessary in this matter, the Board requests consideration be given to the absentee voting laws discussed above and to the voters subject to them. Ballots have already been printed, electronic absentee ballots have already been transmitted to some voters, and some absentee voters may have already cast votes by the time this Court hands down a ruling in this matter. The Board further suggests this Court consider the potential for disruption to the election process, and the expense to the Board and the Tulsa County Election Board caused by such disruption, in creating a remedy should one be necessary.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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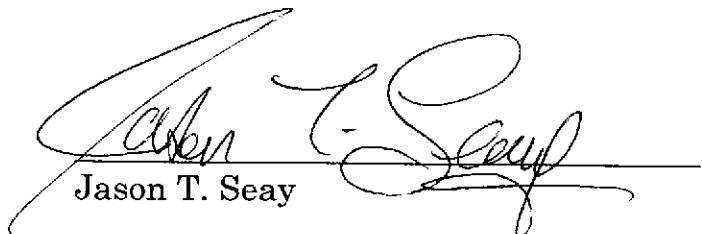
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