

IN THE SUPREME COURT OF OHIO

STATE EX REL., THE OHIO GENERAL ASSEMBLY, et al.,

Relators,

v.

JENNIFER BRUNNER, SECRETARY OF STATE,

Respondent.

Case No. 2007-0209

Original Action in Mandamus

MEMORANDUM OF AMICI CURIAE OHIO ALLIANCE FOR CIVIL JUSTICE, OHIO MANUFACTURERS' ASSOCIATION, OHIO CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OHIO, OHIO COUNCIL OF RETAIL MERCHANTS, OHIO BUSINESS ROUNDTABLE, OHIO CHEMISTRY TECHNOLOGY COUNCIL AND OHIO AUTOMOBILE DEALER'S ASSOCIATION, CONTRA RESPONDENT'S MOTION FOR RECONSIDERATION OR STAY

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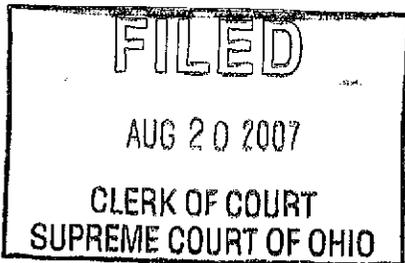


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MEMORANDUM CONTRA RESPONDENT'S MOTION

Amici curiae, pursuant to Rule XI, Section (3)(B) of the Rules of Practice of the Supreme Court of Ohio, file this Memorandum Contra Respondent's Motion for Reconsideration or Stay.

INTRODUCTION

On August 1, 2007, this Court held that "Section 1c, Article II of the Ohio Constitution provides for the effective date of Am.Sub.S.B.117¹," "as filed by the governor with the secretary's office on January 5, 2007." See *State ex rel. Ohio General Assembly v. Brunner*, 2007-Ohio-3780 ("*Brunner*" or "August 1 Decision"), ¶¶ 51-52. Section 1c, Article II of the Ohio Constitution provides that a law becomes effective "90 days after it shall have been filed by the governor in the office of the secretary of state." Thus, pursuant to this constitutional provision, S.B. 117 became effective on April 5, 2007.

In *Brunner*, this Court did not consider staying the effective date of S.B. 117 to allow the filing of a referendum petition because neither the Secretary nor the numerous *amici* that filed briefs in support of the Secretary asked this Court to do so. *Id.* at ¶ 52. Now the Secretary moves this Court "for reconsideration or a stay" to answer a hypothetical question that was not raised in the underlying proceedings. It is inappropriate for this Court to "reconsider" a matter that was not previously raised and, therefore, was not previously considered.

Further, there is no justification for a stay of the effective date of S.B. 117, as requested by the Secretary. Here, both the Secretary and her *amici* were aware when the underlying action was commenced on February 2, 2007 that the Secretary was being requested to publish the referendum date based on the bill's filing date of January 5, 2007 -- thus rendering April 5, 2007

¹ Hereafter, Am.Sub.S.B. 117 will be referred to as "S.B. 117."

as the effective date of S.B. 117. Id. at ¶ 12. Yet, no one requested a stay of the effective date of S.B. 117 (or a stay of the referendum period) prior to April 5, 2007. Failure to seek a stay in the underlying mandamus action is fatal to the Secretary's Motion. On the other hand, granting a stay perpetuates the disruption to the constitutionally-mandated process for ensuring the orderly enactment of laws. If a stay is granted and a referendum petition is filed, the Secretary's failure to perform her constitutional and statutory duties could result in delaying the effective date of S.B. 117 until after the November 2008 election.²

The Secretary of State's Motion for Reconsideration or Stay should be denied in its entirety.

ARGUMENT

A. The Secretary Of State's Motion For Reconsideration Or Stay Should Be Denied As It Seeks An Advisory Opinion

1. This Court Should Not Issue An Advisory Opinion.

The Secretary's Motion for Reconsideration or Stay expressly seeks "clarification" and "guidance" (Secretary's Motion at pp. 1 and 3) concerning the referendum process. She submits that recently several organizations presented a letter to her office inquiring whether the right of referendum of S.B. 117 is still available. All but one of these organizations participated as *amici* in the underlying mandamus action on behalf of the Secretary and were represented by the same counsel, who also signed the letter sent to the Secretary. The letter states that these organizations are "seriously considering initiating a referendum campaign." (Secretary's Motion at Ex. A).

² The Secretary requests a stay of 90 days from August 1, 2007 -- the date of this Court's decision in *Brunner*. If this stay is granted and a referendum pursued, the filing of the required signatures seeking a referendum would automatically stay the effectiveness of S.B. 117 until after the referendum is on the ballot. See Section 1c, Art. II, Ohio Constitution. The requirements necessary to initiate a referendum cannot be performed within the required time period for the November 2007 ballot. Thus, if a stay is granted and a referendum pursued, the referendum would appear on the November 2008 ballot.

The Secretary contends she is in a difficult position being faced with either responding that referendum is still available, and accepting referendum petitions – which she believes will, if contrary to this Court’s holding, be viewed as violating the holding – or, responding that referendum is not available – which she believes will, if contrary to this Court’s holding, be viewed as an improper restriction on the citizenry’s right to referendum.

In her request for clarification, the Secretary is not asking this Court to reconsider anything that was considered or determined in the underlying mandamus action. Instead, she asks for an advisory opinion relating to a matter that could have been raised in the underlying action, but was not.

It is well-established that this Court cannot render advisory opinions. *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18 (recognizing Court’s “well-settled precedent that [it] will not indulge in advisory opinions.”); *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 34 (honoring the “cardinal principle of judicial restraint [that] if it is not necessary to decide more, it is necessary not to decide more[.]”) (quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (C.A.D.C.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment)).

In asking this Court to decide how she should respond to a hypothetical question as to how she might react if a referendum petition is filed (i.e., accept the petitions, or reject them as untimely), the Secretary seeks a textbook advisory opinion. “Until the parties can come forward with a specific factual setting, without strictly resorting to hypotheticals and speculation, this cause does not present a justiciable controversy. This court is not inclined to decide cases on

entirely hypothetical facts and render purely advisory opinions." *White Consol. Industries v. Nichols* (1984), 15 Ohio St.3d 7, 471 N.E.2d 1375.

The Secretary states that this Court's August 1 Decision "leaves open the *possibility* that [she] would accept or reject referendum petitions in error." (Secretary's Motion at p. 4) (emphasis added). But there is always the possibility that the Secretary, or any government official, will err. The Secretary asks that the Court assist her by rendering advice *just in case* a referendum petition is filed. This speculative scenario is not a live, ripe controversy for this Court to address.

The Secretary asks this Court to help her with an admittedly difficult task. But it is not the role of this Court to offer advice. This Court decides cases; it does not counsel the executive branch through advisory opinions. The Court should adhere to its prohibition against issuing advisory opinions and let its August 1 Decision stand.

2. The Court's August 1 Decision Contains No Ambiguity Which Needs To Be "Clarified."

Additionally, there is no need for clarification as there is no ambiguity in this Court's August 1 Decision. The Secretary suggests that ambiguity results from an alleged discrepancy between ¶ 52 of the majority opinion and ¶ 83 of Justice Stratton's concurrence. Even if the statements at issue were inconsistent (which they are not), it is axiomatic that the majority opinion is the controlling authority. See *GNFH, Inc. v. West American Ins. Co.*, 2007-Ohio-2722, ¶ 56, 2007 Ohio App. LEXIS 3630.

The majority opinion states that no party requested "a stay of the effective date of the law to allow for circulation of referendum petitions" and holds that "[a]ccordingly, Section 1c, Article II of the Ohio Constitution provides for the effective date of Am.Sub.S.B.No. 117." 2007-Ohio-3780, at ¶ 52. The constitutional provision cited provides that, in the absence of the

filing of referendum petition, a bill becomes effective “ninety days after it shall have been filed by the governor in the office of the secretary of state.” As the filing occurred January 5, 2007, S.B. 117 became effective April 5, 2007.

Justice Stratton’s concurrence in no way conflicts with the majority opinion. She notes that “the veto is ineffective and that Am.Sub.S.B.No. 117 is a valid law subject to the referendum process.” 2007-Ohio-3780, at ¶ 83. This does not mean, as the Secretary posits, that S.B. 117 is *still* subject to the referendum process. Rather, it means that like any non-emergency law, S.B. 117 was not *immediately* effective, but was instead effective 90 days after being filed with the Secretary of State on January 5, 2007.

For this reason, also, the Secretary’s Motion should be denied.

B. The Secretary Of State’s Motion For Stay Should Be Denied.

In her Motion, the Secretary seeks -- for the first time -- an order staying the effective date of S.B. 117. This request should be denied.

1. Issues Not Raised In The Proceedings Below Should Not Be Raised For The First Time On Reconsideration.

“An application for reconsideration is * * * not appropriately used to raise new arguments that were neglected earlier by the party.” *City of Akron v. Callaway*, 2005 Ohio App. LEXIS 2558, at *8. See also *In re Traylor*, 2005-Ohio-1348, ¶ 8, 2005 Ohio App. LEXIS 1310 (“It has been stated many times that a motion for reconsideration * * * is not an opportunity to raise new arguments that a party simply neglected to make earlier in the proceedings.”) (applying App.R. 26(A)); *United States v. Martinez* (C.A.11 1996), 96 F.3d 473, 475 (“We do not consider issues or arguments raised for the first time on petition for rehearing.”). Because the Secretary did not ask for a stay of the effective date of S.B. 117 until after this Court decided the underlying mandamus action, the Court should not consider this issue.

2. By Failing To Timely Raise It, The Secretary Has Waived The Issue Of Staying The Effective Date Of S.B. 117

The Secretary's failure to seek a stay of the effective date of S.B. 117 sooner constitutes a waiver of the right to seek such relief. "Equity aids the vigilant, not those who slumber on their rights." *McPherson v. McPherson* (1950), 153 Ohio St. 82, 91, 90 N.E.2d 675. The Secretary has not been vigilant in seeking a stay. This case was filed February 2, 2007, well within the 90-day referendum period for S.B. 117. As this Court noted, Relators' Complaint expressly asked this Court to compel the Secretary to, *inter alia*, publish "that any referendum petitions challenging Amended Substitute Senate Bill No. 117 must be filed with the Secretary of State within 90 days of the filing of Amended Substitute Senate Bill No. 117 on January 5, 2007[.]" 2007-Ohio-3780, ¶ 12. Therefore, the Secretary and her *amici* were on notice at least 60 days prior to April 5, 2007 that Relators were asking this Court to compel the Secretary to treat S.B. 117 as effective on April 5, 2007 -- in the absence of a filing of a referendum petition prior to that date.³ Yet, no one requested a stay of the effective date of S.B. 117 prior to April 5, 2007 (or at any time during the six months this case was pending).

Therefore, the Secretary and her *amici* are not justified in waiting until after this Court's decision to ask for a stay of the effective date of S.B. 117, and they cannot now claim unfairness because the referendum deadline expired on April 5, 2007. They were clearly on notice that this was the outcome Relators sought in the mandamus action. If they were contemplating a referendum, they should have acted *before* April 5, 2007 by either filing a referendum petition or seeking a stay of the effective date of S.B. 117. By not doing so, they deprived this Court of the

³ Further, through extensive media coverage of this issue, the Secretary and her *amici* undoubtedly were well-aware even before the mandamus action was filed that Relators recognized S.B. 117 as properly filed with the Secretary of State on January 5, 2007 (and that the 90-day referendum time began running on that date).

opportunity to expedite its decision in this case or to take other action to ensure the orderly enactment of laws.

3. A Stay Of The Effective Date Of S.B. 117 Would Further Disrupt The Orderly Enactment of Laws.

The referendum process is designed to create *certainty* as to whether a bill filed with the Secretary of State is or is not effective law 90 days thereafter. As this Court recently stated:

[A]bsent a petition for referendum being filed with the Secretary of State, certainty exists with respect to the effective date of new legislation because Section 1c, Article II of the Ohio Constitution specifies that it shall go into effect ninety days after it shall have been filed by the Governor in the office of the Secretary of State. As a corollary, when the electorate is asked to vote on a referendum on newly enacted legislation, such certainty also exists because, upon the filing of a referendum petition, the effective date of new legislation is stayed pending the outcome of the referendum vote. See Section 1c, Article II, Ohio Constitution.

See *Thornton v. Salak*, 112 Ohio St.3d 254, 2006-Ohio-6407, 858 N.E.2d 1187, ¶¶ 19-20.

Plainly, a referendum petition is intended to place provisions of a bill on the ballot *before* they become law.

This Court's Decision makes clear that the purported "veto" of S.B. 117 was void and that the bill took effect 90 days after the January 5, 2007 filing with the Secretary. If the stay sought by the Secretary is issued now, it would result in an unprecedented situation whereby S.B. 117 will have been in effect for several months (from April 5, 2007 through August 1, 2007 or the date a stay is issued), then will not be in effect during the period of the stay, and then later will be in effect again --or not -- depending on whether a valid referendum petition is filed. This is not the way a referendum is to work. Courts, litigants, and citizens should not be required to check on whether the bill's provisions were or were not in effect during a certain period or on a

particular date. The orderly process of enacting laws, set forth in the Ohio Constitution, must be followed to avoid chaos and uncertainty.

4. The *Voinovich* Decision Does Not Require A Stay.

The Secretary relies on the Court's decision in *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 1994-Ohio-1 to support her request for a stay. *Voinovich* is distinguishable from the instant matter in two significant ways. First, unlike the Secretary and her *amici*, the *Voinovich* relators sought protection of their referendum rights during the 90-day referendum period. Second, unlike the situation here where the right of referendum has always existed, the *Voinovich* Court overruled existing law to create a right of referendum that did not previously exist.

The *Voinovich* relators specifically asked the Court to determine whether the bill at issue in that case, which included both appropriation and non-appropriation provisions, denied Ohio citizens the right to a referendum. *Id.* at 228. Notably, the *Voinovich* relators asked the Court to determine if a referendum applied to the non-appropriation provisions of the bill *prior* to the expiration of the 90-day disputed referendum period. Thus, the issue of whether a referendum period would be allowed was expressly raised to the Court *before* the Court issued its decision and *before* the 90-day referendum period had expired.

Unlike the Secretary and her *amici*, the *Voinovich* relators did not wait until months after the expiration of the referendum period to ask the Court to determine referendum rights. In light of *Voinovich*, the delay of the Secretary and her *amici* is without justification and should not be used to further postpone the effective date of S.B. 117. This Court ruled that the veto of S.B. 117 was "ineffective." *Brunner* at ¶ 50. As a result, S.B. 117's referendum period expired on April 5, 2007.

Additionally, the *Voinovich* Court addressed a different constitutional provision than the one at issue in the instant case. In doing so, it overruled existing law and created a right of referendum that did not previously exist. The constitutional provision at issue in *Voinovich* was Section 1d, Article II, which limits the power of referendum by identifying certain types of laws that are ineligible for referendum. Section 1d provides: “[l]aws providing for tax levies, appropriations . . . and emergency laws . . . shall go into immediate effect . . . The laws mentioned in this section shall not be subject to the referendum.”

Prior to *Voinovich*, the controlling authority on Section 1d was *State ex. rel Riffe v. Brown* (1977), 51 Ohio St.2d 149, 154, 365 N.E.2d 876, in which the Court held that if Article II, Section 1d applies to any one section of a law, the entire law was ineligible for referendum. Thus, where a bill included both appropriation and non-appropriation provisions, that entire bill would become effective immediately under *Riffe*.

The *Voinovich* Court, however, overturned its decision in *Riffe* and adopted a more precise approach to Section 1d, Article II. Under *Voinovich*, a referendum exists for non-appropriation provisions of a bill, while the appropriation provisions become immediately effective. *Voinovich*, at 236. Because it created a right of referendum which did not previously exist, this Court provided a 90-day period for the filing of a referendum petition.

Significantly, the *Voinovich* Court created a right of referendum that did not previously exist, then allowed the right to be exercised. In the instant case, the right of referendum existed, but was never invoked.

For these reasons, the Secretary’s Motion for a Stay should be denied.

C. **The Secretary Of State's Motion For Reconsideration Should Be Denied.**

Finally, the Secretary asks that if the Court has determined that referendum is no longer available, such decision be reconsidered and that referendum be made available.

This Court held that Section 1c, Article II of the Ohio Constitution provides for the effective date of S.B. 117. The 90-day requirement set forth in this constitutional provision is not malleable or subject to adjustment with the circumstances of each case:

Our analysis begins and ends with the Ohio Constitution, our state's most fundamental law. We decide this case solely upon our considered understanding of the requirements expressed within the text of this governing document. * * * The Ohio Constitution's prescribed procedure for the creation of statutory law bears upon the fundamental allocation of authority between the legislative and executive branches of state government.

2007-Ohio-3780, ¶¶ 30, 31. *See also Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St.3d 1, 15, 539 N.E.2d 103 (“Where the language of a statute or constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written.”).

Indeed, courts are to “strictly construe applicable requirements for initiative and referendum,” *State ex rel. McCord v. Delaware Cty. Bd. of Elections*, 106 Ohio St.3d 346, 2005-Ohio-4758, 835 N.E.2d 336, ¶ 38, and “[t]he time within which a referendum petition must be filed is mandatory as all the constitutional or statutory provisions with reference to such filing must be fulfilled in order that the referendum petition be valid.” *Dubyak v. Kovach* (1955), 164 Ohio St. 247, 250, 129 N.E.2d 809. *See also Kochen v. Young* (1961), 252 Iowa 389, 107 N.W.2d 81, 84 (“It is the general rule that the time limit fixed by statute for filing a referendum petition is mandatory and jurisdictional.”) (citing, *inter alia*, this Court's decision in *Dubyak*); *De Szendeffy v. Threadgill* (App. 1994), 178 Ariz. 464, 874 P.2d 1021, 1023 (“Strict compliance with constitutional and statutory requirements is required for a referendum petition[.] * * * The

time for filing a referendum petition is not subject to equitable tolling.”); *State ex rel. Uhlman v. Melton* (1965), 66 Wn.2d 157, 401 P.2d 631, 633 (“The rule that strict compliance with such statutory requirements is mandatory and jurisdictional, and that failure to so comply is fatal to the referral procedure has been adopted in many jurisdictions.”).

Further, the 90-day deadline was not automatically extended due to the filing of this case:

* * * The commencement of a suit to determine the validity of an act, either with or without an emergency clause, ***does not prevent the act from going into effect, after which a referendum cannot be had.***

82 Corpus Juris Secundum (1999), Statutes, Section 138 (emphasis added). This point is well-explained as follows:

The mere commencement of a suit to determine the constitutionality of an enactment, either with or without the emergency clause, will not prevent such an enactment from going into effect at the legally specified time; otherwise many salutary laws might be in this manner indefinitely postponed from going into effect at the times specified by the Constitution, and thereby placing in the hands of litigants and courts the power of regulating or varying the time fixed by the Constitution in which legislative acts shall go into effect.

State ex rel. Richards v. Whisman (1915), 36 S.D. 260, 154 N.W. 707, 708-09, *dismissed for want of jurisdiction*, (1916), 241 U.S. 643.

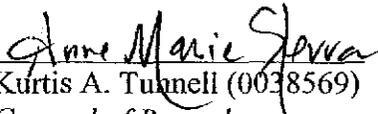
Therefore, as this Court has ruled that S.B. 117 was filed with the Secretary of State on January 5, 2007, Section 1c, Article II of the Ohio Constitution compels the conclusion that the bill became effective as law 90 days later, on April 5, 2007. Any reconsideration of this portion of this Court’s original decision cannot be done without flouting the plain language of the Ohio Constitution.

The Secretary’s Motion for Reconsideration should be denied.

CONCLUSION

For all of the reasons set forth herein, the Secretary of State's Motion for Reconsideration or Stay should be denied in its entirety.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed to the following person(s) by ordinary mail, postage pre-paid, on August 20th day of August 2007.

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