

**IN THE SUPREME COURT OF OHIO**

State ex rel. Ohioans for Fair Districts, et al., :

Relators, :

vs. :

Hon. Jon Husted  
Ohio Secretary of State, :

Respondent, :

and :

The Ohio General Assembly, :

and :

William G. Batchelder  
In his official capacity as Speaker of the  
House of Representatives of the State of  
Ohio, :

and :

Thomas E. Niehaus  
In his official capacity as President of the  
Senate of the State of Ohio, :

Proposed Intervening Respondents. :

Case No. 11-1646

Original Action in Mandamus

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**UNOPPOSED MOTION OF PROPOSED INTERVENORS THE OHIO GENERAL  
ASSEMBLY, SPEAKER WILLIAM G. BATCHELDER, AND SENATE  
PRESIDENT THOMAS E. NIEHAUS TO INTERVENE**

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SUPREME COURT OF OHIO

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**UNOPPOSED MOTION OF PROPOSED INTERVENORS THE OHIO GENERAL  
ASSEMBLY, SPEAKER WILLIAM G. BATCHELDER, AND SENATE  
PRESIDENT THOMAS E. NIEHAUS TO INTERVENE**

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Pursuant to Civ.R. 24(A) and (B), The Ohio General Assembly, Speaker of the Ohio House of Representatives William G. Batchelder, and President of the Ohio Senate Thomas E. Niehaus (“proposed Intervenors”) hereby move to intervene as Respondents in this case. The reasons for this motion are more fully stated in the attached memorandum in support. Relators have indicated through counsel that they do not oppose this motion. A proposed answer to the Complaint in Original Action in Mandamus is attached as Exhibit A in accordance with Civ.R. 24(C).

Respectfully submitted,

Michael DeWine  
Ohio Attorney General



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**MEMORANDUM OF PROPOSED INTERVENORS THE OHIO GENERAL  
ASSEMBLY, SPEAKER WILLIAM G. BATCHELDER, AND SENATE  
PRESIDENT THOMAS E. NIEHAUS IN SUPPORT OF UNOPPOSED MOTION  
TO INTERVENE**

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**I. INTRODUCTION AND BACKGROUND**

As a result of the 2010 census, Ohio's apportioned U.S. House congressional representation is reduced from 18 to 16 members.<sup>1</sup> That reduction, coupled with population shifts within the state, requires Ohio's congressional districts to be redrawn. Federal law recites that voters are to be given the opportunity to elect their U.S. Representatives by district. The arduous task of providing for the new redistricting plan is assigned to the Ohio General Assembly by Section 4, Article I, United States Constitution and by Sections 2a and 2c, Title 2, U.S.Code. William G. Batchelder and Thomas E. Niehaus are respectively the Speaker of the Ohio House of Representatives and the President of the Ohio Senate. In their leadership positions in the General Assembly, these individuals are among those responsible for drafting and signing the bill that provides for Ohio's congressional districts.

On September 26, 2011, Ohio Governor John R. Kasich signed into law Sub. H.B. No. 319 ("SHB 319" or the "Act"), which the House and Senate previously had passed. The Act appropriates \$2,750,000 to implement congressional redistricting,

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<sup>1</sup> See United States Census Bureau map at <http://2010.census.gov/2010census/data/apportionment-data.php>

including “remapping and reprecincting counties, and reprogramming database systems and voting machines.” Section 4, SHB 319. The Act directs the Ohio Secretary of State and Director of Budget and Management to expend the appropriated funds to implement redistricting, using the new boundaries described in section one of the Act.

New district maps are not self-executing. Rather, the Secretary of State and the Ohio county boards of election are required to reorganize the myriad tasks and services associated with running an election along the newly drawn lines. Moreover, the reorganization must be done months ahead of party primaries in a presidential election year. This task is both daunting and expensive. Indeed, with key deadlines approaching as soon as December 7, 2011, timely reorganization presents a formidable and costly challenge.

The Act by its terms took effect immediately, on September 26, 2011, and is not subject to referendum. Relators allege that Secretary Husted has a clear legal duty to treat Sections 1 and 2 of SHB 319 as subject to referendum and to refrain from implementing those sections for at least 90 days. (Compl. at ¶ 30).

Proposed Intervenor, who are responsible for the bill providing for new congressional districts, have a direct interest in this litigation different from the interests of any other party to this litigation. Accordingly, Proposed Intervenor seek to intervene to protect that interest. Relators have indicated through counsel that they do not oppose the motion.

## II. LAW AND ARGUMENT

### A. Proposed Intervenors Are Entitled To Intervene As A Matter of Right Under Civ.R. 24(A).

The proposed Intervenors are entitled to intervene based on their direct interest in this litigation, which interest cannot be adequately protected by other parties. Civ.R. 24(A)(2) states that, upon timely application, anyone shall be permitted to intervene in an action: “when the person seeking to intervene claims an interest related to the action and is so situated that the disposition of the action may impair that person’s ability to protect that interest, unless existing parties adequately represent the applicant’s interest.” Civ.R. 24 must be liberally construed in favor of intervention. See *State ex rel. Smith v. Frost* (1995), 74 Ohio St. 3d 107, 1995-Ohio-265, 656 N.E.2d 673. Proposed Intervenors meet all the requirements of Civ.R. 24(A)(2).

First, proposed Intervenors’ motion is timely. In determining whether an application is timely, “the basis of the alleged right to intervene is balanced against trial convenience and potential prejudice to the rights of the original parties.” *Blackburn v. Hamoudi* (10th Dist. 1986), 29 Ohio App.3d 350, 352, 505 N.E.2d 1010. “Factors to consider include the point to which the suit has progressed, the length of time the applicant knew or should have known of the pending suit, and the reason for the delay in attempting to intervene.” *State ex rel. Gray Road Fill, Inc. v. Wray* (10th Dist. 1996), 109 Ohio App. 3d 812, 815-816, 673 N.E.2d 198.

Proposed Intervenors have not delayed in filing this motion. The mandamus action was filed on September 28, 2011, only 9 days ago. No briefing schedule has

been set and proposed Intervenor will comply with any briefing schedule established by this Court. Thus, no prejudice or delay will result from allowing intervention. See *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St.3d 501, 503, 1998-Ohio-192, 696 N.E.2d 1058.

Second, disposition of this case may impair proposed Intervenor's ability to protect their direct interest in upholding the constitutionality of the Act and exercising their constitutional duty to appropriate monies for the current expenses of state government so that the Secretary of State can run the next congressional election. Section 4, Article I, United States Constitution provides that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof . . . ." Ohio state law also charges the General Assembly with drawing the congressional districts to elect members of Congress. See R.C. 105.51(C)(1) (citing the general assembly's "duty to establish districts for the election of representatives to congress."). Each of the proposed Intervenor was directly and intimately involved in passing and enacting the statute being challenged by Relators in this case. No two individuals are more connected to SHB 319 than proposed Intervenor William G. Batchelder and Thomas E. Niehaus, who are Speaker of the House and President of the Senate, respectively. It is their signatures that appear on the bill. (See attachments to Affidavit of Relator Chris Redfern).

At the heart of Relators' Complaint is the allegation that SHB 319 is not immediately effective, and its implementation should be delayed 90 days to permit a

possible referendum pursuant to Section 1c, Article II, Ohio Constitution. (Compl. at ¶ 30). But, delaying implementation of SHB 319 conflicts with obligations of the General Assembly under the U.S. Constitution and federal statutes. Congressional elections must be timely held pursuant to a constitutional redistricting plan, and one-thousand signatures (if indeed they are proffered) cannot be the basis for denying Ohio citizens the right to vote in properly and timely held congressional elections. Certainly, the drafters of the bill, the legislative leadership, and the General Assembly, which approved the bill, have an interest in any litigation intended to prevent the effective implementation of the law.

Moreover, any delay in implementation of SHB 319 would place into serious jeopardy the primary election to be held in Ohio in March 2012. Any individual who seeks to run in a partisan primary must file a declaration of candidacy by December 7, 2011. See R.C. 3513.05. If the implementation of SHB 319 were to be delayed by 90 days, there would be no districts assigned prior to the December 7 deadline, and candidates would not be able to timely file their petitions because they would not know in which district they reside. To combat this problem, the General Assembly expressly declared in Section 6 of SHB 319:

It is the intent of the General Assembly that the Congressional districts established by Sections 1 and 2 of this act take immediate effect, to enable the boards of elections to complete their required remapping and reprecincting of this state so that candidates may file their candidacy petitions in the new districts, the boards may properly verify those petitions, the boards may notify electors of their new districts and, if applicable, voting locations, and elections may be conducted in those districts for the 2012 primary election.

A delay in the implementation of the bill would thwart the General Assembly's intentions and impair its interests in making the statute effective immediately to ensure that all processes related to redistricting are completed in advance of all deadlines for the 2012 primary election.

Finally, the interests of proposed Intervenor are not adequately protected by the other parties to this action. The Secretary of State must adhere to the provisions of SHB 319 in determining which sections of the law go into immediate effect and are exempt from referendum. No other party to this litigation is charged with the constitutional and federal statutory obligation to provide for congressional districts and thus no other party can adequately represent the interests of proposed Intervenor.

**B. Proposed Intervenor Should Be Permitted To Intervene Under Civ.R. 24(B).**

In the alternative, proposed Intervenor should be permitted to intervene under Civ.R. 24(B). Civ.R. 24(B)(2) provides that, upon timely application, anyone may intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. For the same reasons discussed above, intervention is appropriate in this case. The proposed Intervenor are responsible for drafting and approving the bill that Relators seek to submit for a referendum. Proposed Intervenor's defenses and Relators' claims share many issues of law and fact in common, including whether SHB 319 is subject to referendum. Moreover, proposed Intervenor motion is timely and will not prejudice any party.

### III. CONCLUSION

For the reasons stated above, proposed Intervenor request that the Court permit them to intervene in this action as Respondents.

Respectfully submitted,

Mike DeWine  
Ohio Attorney General



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*Special Counsel for Proposed Intervenor The Ohio  
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and Senate President Thomas E. Niehaus*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following  
this 7th day of October, 2011 by first class United States mail:

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Robert J. Tucker (0082205)

IN THE SUPREME COURT OF OHIO

State ex rel. Ohioans for Fair Districts, et al.,:

Relators,

vs.

Hon. Jon Husted  
Ohio Secretary of State, et al.,

Respondents.

Case No. 11-1646

Original Action in Mandamus

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ANSWER OF INTERVENOR-RESPONDENTS THE OHIO GENERAL  
ASSEMBLY, SPEAKER WILLIAM G. BATCHELDER, AND SENATE  
PRESIDENT THOMAS E. NIEHAUS

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For their answer to the Complaint in Original Action in Mandamus (“the Complaint”) of Relators, Intervenor-Respondents The Ohio General Assembly, Speaker William G. Batchelder, and Senate President Thomas E. Niehaus (“Intervenors”) state as follows:

1. Intervenors deny that Substitute House Bill 319 of the 129<sup>th</sup> General Assembly (SHB 319) is subject to referendum and therefore deny that any right to referendum has been denied. The remaining allegations in paragraph 1 of the Complaint state only legal conclusions to which no response is required.

2. Intervenors state that the allegations in paragraph 2 of the Complaint state a legal conclusion to which no response is required.

3. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 of the Complaint, and, therefore, deny the same.

4. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 of the Complaint, and, therefore, deny the same.

5. Intervenor admits the allegations in paragraph 5 of the Complaint.

6. Intervenor states that the allegations in paragraph 6 of the Complaint state a legal conclusion to which no response is required.

7. Intervenor states that the allegations in paragraph 7 of the Complaint state a legal conclusion to which no response is required.

8. Intervenor states that the allegations in paragraph 8 of the Complaint state a legal conclusion to which no response is required.

9. Intervenor admits the allegations in paragraph 9 of the Complaint.

10. Intervenor admits the allegations in paragraph 10 of the Complaint.

11. Intervenor admits the allegations in paragraph 11 of the Complaint.

12. Intervenor admits the allegations in paragraph 12 of the Complaint.

13. Intervenor admits the allegations in paragraph 13 of the Complaint.

14. Intervenor admits the allegations in paragraph 14 of the Complaint.

15. Intervenor admits the allegations in paragraph 15 of the Complaint.

16. Intervenor admits the allegations in paragraph 16 of the Complaint.

17. Intervenor denies the allegations in paragraph 17 of the Complaint.

18. Intervenors state that the allegations in paragraph 18 of the Complaint state a legal conclusion to which no response is required.

19. Intervenors admit the allegations in paragraph 19 of the Complaint.

20. Intervenors admit the allegations in paragraph 20 of the Complaint.

21. Intervenors admit the allegations in paragraph 21 of the Complaint.

22. Intervenors are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the Complaint, and, therefore, deny the same.

23. Intervenors are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23 of the Complaint, and, therefore, deny the same.

24. Intervenors re-state their responses to paragraphs 1-23 of the Complaint as if fully re-stated herein.

25. In response to the allegations in paragraph 25 of the Complaint, Intervenors state that Section 1c, Article II, Ohio Constitution speaks for itself.

26. In response to the allegations in paragraph 26 of the Complaint, Intervenors state that Section 1d, Article II, Ohio Constitution speaks for itself.

27. In response to the allegations in paragraph 27 of the Complaint, Intervenors state that Sections 1c and 1d, Article II, Ohio Constitution speak for themselves.

28. Intervenors deny the allegations in paragraph 28 of the Complaint.

29. Intervenors deny the allegations in paragraph 29 of the Complaint.

30. Intervenors deny the allegations in paragraph 30 of the Complaint.

31. Intervenors deny the allegations in paragraph 31 of the Complaint.

32. Intervenors deny each and every allegation in the Complaint not expressly admitted herein as true.

### AFFIRMATIVE DEFENSES

1. SHB 319 is an appropriation that is not subject to referendum under Section 1d, Article II, Ohio Constitution.

2. Relators do not have a clear legal right to the relief they request in their Complaint.

3. Respondent Ohio Secretary of State does not have a clear legal duty to perform the acts that Relators seek to compel in their Complaint.

4. Respondent Ohio Secretary of State does not have the authority to perform the acts that Relators seek to compel in their Complaint.

5. The United States Constitution and Sections 2a and 2c, Title 2, U.S.Code require the Ohio General Assembly to enact new congressional districts in time for Ohio's primary and general elections. Relators cannot compel the Ohio Secretary of State to interfere with this responsibility.

6. The Relators' claims are not ripe.

7. This case is controlled by this Court's opinion in *State ex rel. Taft v. Franklin County Court of Common Pleas* (1998), 81 Ohio St. 3d 480, 1998-Ohio-333, 692 N.E.2d 560.

8. The Relators are not entitled to a referendum or a stay of the effective date of SHB 319.

9. Intervenor-Respondents reserve the right to add additional defenses, including affirmative defenses, as this case proceeds.

Respectfully submitted,

Michael DeWine  
Ohio Attorney General



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following  
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