ORIGINAL

In the

Supreme Court of Ohio

STATE OF OHIO, ex rel. OHIOANS FOR FAIR DISTRICTS, et al.,	:	Case No. 2011-1646
Relators,	:	Original Action in Mandamus
v.	:	
JON HUSTED, SECRETARY OF STATE, et al.,	:	
Respondent.	:	

MERIT BRIEF OF RESPONDENT SECRETARY OF STATE JON HUSTED

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INTRODUCTION

On September 26, 2011, Substitute House Bill 319 was signed into law. H.B. 319 reapportions the State's territory from eighteen congressional districts to sixteen congressional districts, directs the county boards of election to notify every registered voter in Ohio of their new congressional district and voting precincts, appropriates $2.75 million for election officials to reprogram the State's elections systems and voting machines to reflect the new districts.

Federal law required the General Assembly to undertake this action in response to the 2010 Census, which reported a reduction in Ohio's share of the national population, and consequently, reduced the number of seats allotted to Ohio's congressional delegation in the U.S. House of Representatives. Ohio must administer the 2012 congressional election pursuant to sixteen new congressional districts.

Relators have filed an original action in this Court, seeking a writ of mandamus against the Secretary of State. They ask the Court to compel the Secretary to specify that H.B. 319 is subject to the constitutional right of referendum and shall not be effective for ninety days. They further seek an extension of the ninety day stay in which to submit the referendum petitions.

Notwithstanding the political nature of the redistricting process, the Secretary of State's concerns here are apolitical and ministerial. And they are simple and urgent. If the effective date of H.B. 319 is delayed, the State of Ohio will lack congressional boundaries that comply with federal law. And state election officials could not properly administer the 2012 election.

Relators are not entitled to a referendum under this Court's decision in *Taft v. Franklin County Court of Common Pleas* (1998), 81 Ohio St. 3d 480. Because implementation of the apportionment sections in H.B. 319 "is dependent upon the appropriation in Section 4," *id.* at 484, those sections are not subject to referendum.

But even if Relators are entitled to a referendum, they are not entitled to a ninety-day stay of H.B. 319's effective date under the Supremacy Clause. If H.B. 319's effective date is stayed, the prior version of elections code—and Ohio's preexisting eighteen-district map—will remain in effect and state officials will have to enforce it. But that map is now invalid under federal law. If the Secretary of State and county elections officials attempt to administer the 2012 congressional election using those prior code provisions, they will violate federal law. The requested relief in this case, if ordered, will force these officials to do just that.

For these reasons, the Court should conclude that H.B. 319 is not subject to referendum and dismiss Relators' mandamus complaint. But if the Court finds that the law is subject to referendum, it should decline Relators' request to stay H.B. 319's effective date due to the resulting conflict with federal law.

STATEMENT OF THE CASE AND FACTS

A. Ohio lost two seats in its congressional delegation after the 2010 Census.

Ohio currently holds eighteen seats in the U.S. House of Representatives. Each member of Ohio's congressional delegation represents a defined geographic district, as set forth in R.C. 3521.01.

In 2010, the federal government completed its decennial census of the national population under Article I, Section 2 of the United States Constitution. Consistent with 2 U.S.C. § 2a(a), the President transmitted a statement to Congress showing the population of each State and the number of Representatives allotted to each State. That statement reported a reduction in Ohio's share of the national population and, consequently, a reduction in the number of seats allotted to Ohio's congressional delegation in the U.S. House of Representatives. Beginning with the 113th Congress in January 2013, Ohio will have only sixteen House seats. See U.S. Census Apportionment Population and Number of Representatives, By State (2010).

B. The General Assembly enacted H.B. 319 to provide for the remapping and reprecincting of Ohio's congressional districts for the 2012 congressional election.

As required by federal law, 2 U.S.C. § 2c, the General Assembly passed Substitute House Bill 319 (H.B. 319), reapportioning the State's territory from eighteen congressional districts to sixteen congressional districts. See H.B. 319, §§ 1-2. The law further directs the county boards of election to notify every registered voter in Ohio of the primary election date, their new congressional district, and their new voting precinct. *Id.* § 3. H.B. 319 also appropriates $2.75 million to the Secretary of State for implementing the new congressional districts, for remapping and reprecincting Ohio's eighty-eight counties, and for reprogramming the State's voting systems and voting machines. *Id.* § 4.

In Sections 6 and 7 of H.B. 319, the General Assembly specified that H.B. 319 should go into immediate effect.

On September 26, 2011, H.B. 319 was signed into law by the Governor.

C. To ensure proper administration of the 2012 congressional election, Ohio's congressional district maps must be in place before December 7, 2011.

The Ohio Constitution mandates that primary elections occur "as provided by law." Ohio Const., art. V, § 7. The Revised Code, in turn, imposes a series of mandatory deadlines on candidates, county boards of election, and the Secretary of State in the months and weeks leading up to the primary election.

The Secretary of State must administer a primary election on March 6, 2012. See R.C. 3501.01(E).[1] The purpose of this election is to "nominat[e] persons as candidates of political

[1] The State conducts its primary elections in May in all non-presidential-election years. See R.C. 3501.01(E)(1) & (E)(2) (primary elections shall be held in May of each year, except in years in which a presidential primary election is held, in which case primary elections shall be held on the first Tuesday after the first Monday in March).

parties for election to offices to be voted for at the succeeding general election." R.C. 3513.01. This includes candidates seeking election to the U.S. House of Representatives.

To qualify for the 2012 ballot, candidates for Congress must file a declaration of candidacy by December 7, 2011, with the board of elections of the most populous county in their district. R.C. 3513.05 (declarations must be filed "not later than four p.m. of the ninetieth day before the day of the primary election"). Each congressional candidate must also submit petition papers with the signatures of "fifty qualified electors" from his or her district "who are members of the same political party." *Id.*

That declaration-of-candidacy filing triggers a series of statutory responsibilities. Election officials shall "promptly transmit" the petition papers to each county election board within the candidate's district. *Id.* Each board must then open those petitions to public inspection until December 17, 2011. *Id.* (petitions shall be "open to public inspection until four p.m. of the eightieth day before the day of the next primary election").

By December 19, 2011, the county election boards must "determine the validity or invalidity of the signatures on the petition papers." *Id.* (boards shall review signatures "not later than the seventy-eighth day before the day of that primary election"). And any protests to the validity of a petition must be filed by December 23, 2011. *Id.* ("The protest . . . shall be filed not later than four p.m. of the seventy-fourth day before the day of the primary election").

This statutory process and calendar are choreographed carefully for a reason. By December 27, 2011, the Secretary of State must certify the forms of the official ballots to be used at the primary election. *Id.* The Secretary and the county boards of election must also certify the names of the candidates to be printed on the primary election ballots on that same day. *Id.*

Once final certification occurs, county election boards have a few short weeks to finalize and print the ballots for voters. Absentee ballots for the 2012 primary must be ready for uniformed and overseas voters by January 21, 2012, and for all other voters by January 31, 2012. R.C. 3509.01.

Due to the strict and statutory nature of these deadlines, the Secretary of State and the county election boards must implement Ohio's congressional district maps well before December 7, 2011. See Accompanying Aff. Candidates must know the boundaries of their congressional district so they can file their petitions with the proper county election board. *Id.* They also need this information to ascertain which electors are geographically qualified to sign their petitions. Boards of election must then verify that petition signers reside within the candidate's corresponding congressional district. *Id.* As a result, the Secretary of State and the county boards need this boundary information to begin the important and time-consuming task of reprogramming their voter databases and election management systems. *Id.*

Simply put, election officials cannot accurately process candidate petitions or certify the primary election ballot until Ohio's congressional district maps are established.

D. Relators filed a mandamus complaint against the Secretary of State, seeking to exercise a right of referendum on the reapportionment sections of H.B. 319.

On September 28, 2011, Relators filed an original action in this Court, seeking a writ of mandamus against the Secretary of State. They wish to exercise a right of referendum, as described in Sections 1c and 1d, Article II of the Ohio Constitution, on the sections in H.B. 319 that reapportion Ohio's congressional districts. See Compl. ¶ 22. Relators ask this Court to compel the Secretary to specify, in both his paper and electronic journals, that H.B. 319 is "subject to the constitutional right of referendum" and that it "shall not be effective for ninety (90) days." *Id.* at p. 7. Relators also seek "an extension of the ninety (90) day period in which to

submit the referendum petition . . . to allow Relators a meaningful opportunity to circulate a referendum petition." *Id.*

On October 12, 2011—three hours before this filing—Relators presented the Secretary of State and the Attorney General with a summary referendum petition for certification under the procedures outlined in R.C. 3519.01(B)(1). Consistent with the General Assembly's directive, the Secretary of State intends to reject the petition on the ground that H.B. 319 is not subject to referendum.

ARGUMENT

Respondent Secretary of State's Proposition of Law No. I:

Because implementation of the apportionment provisions in H.B. 319 is entirely dependent on an appropriation in the same Act, the provisions are not subject to referendum.

Except in certain circumstances, "[n]o law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state." Ohio Const., art. II, § 1c. Laws providing for "appropriations for the current expenses of the state government and state institutions" are one such exception to this rule. *Id.* § 1d. They "shall go into immediate effect," and therefore are not subject to referendum. *Id.*

Under this Court's decision in *Taft v. Franklin County Court of Common Pleas* (1998), 81 Ohio St. 3d 480, the reapportionment provisions in H.B. 319 fall within the "appropriations" exception. Because these provisions are dependent upon a $2.75 million appropriation in the same law, they go into immediate effect under the Ohio Constitution.

A. Under *Taft*, an election-related provision is not subject to referendum if it depends on an appropriation in the same act.

The *Taft* litigation addressed the constitutionality of H.B. 697, which the General Assembly passed in February 1998 to respond to this Court's directive in *DeRolph v. State* (1997), 78 Ohio St. 3d 193. The law contained five relevant sections:

- Section 1 imposed an assortment of taxes on Ohioans beginning July 1, 1998;
- Section 2 conditioned the implementation of those taxes on the results of a special election to occur on May 5, 1998;
- Section 3 directed the Secretary of State to submit to the voters at a May 5, 1998 special election the question whether these taxes should be approved;
- Section 4 appropriated $400,000 "for the advertising costs associated with the statewide special election required by this act"; and
- Section 5 specified that "Sections 2, 3, 4, and 5 of this act go into immediate effect."

Am. Sub. H.B. 697 (1998), at 1-4.

David Zanotti, a registered voter and taxpayer, sued the Secretary of State in common pleas court to stop the special election. Zanotti claimed that the General Assembly violated the Ohio Constitution by ordering Sections 2, 3, and 5 of H.B. 697 into immediate effect. At the request of the Secretary of State, this Court accepted jurisdiction over the case.

In briefs before this Court, Zanotti invoked Sections 1c and 1d of Article II of the Ohio Constitution. He argued that H.B. 697 did not satisfy any of the exceptions in Section 1d and, therefore, could "not take effect until May 20, 1998, ninety days after the Act was filed with the Secretary of State." Merit Br. of David Zanotti, *State ex rel. Taft v. Franklin County Court of Common Pleas*, No. 98-364 (filed Mar. 20, 1998), at 34. Therefore, Zanotti claimed, the Secretary of State "lack[ed] the legal authority to conduct the May 5, 1998 special election." *Id.* at 37.

The Court disagreed: "Section 1d, Article II permits certain laws, including 'appropriations for the current expenses of the state government and state institution,' to take

immediate effect and not be subject to the referendum." *Taft*, 81 Ohio St. 3d at 484. Sections 2, 3, and 5 of H.B. 697—which "t[ook] immediate effect"—"comport[] with the Constitution . . . because implementation of the statewide election is dependent upon the appropriation in Section 4." *Id.*

The holding of *Taft* remains good law. In *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900, the Court emphasized that the legislative provisions in *Taft*—"although they did not appropriate money"—"were not subject to referendum . . . because implementation of those sections . . . depended upon the appropriation of money for the election in a separate section of the same act." *Id.* at ¶ 43.

B. Implementation of the apportionment provisions in H.B. 319 for the 2012 congressional election is dependent on an appropriation in the same act.

This case is on all fours with *Taft*. Under R.C. 3501.01(E), the State of Ohio must conduct a primary congressional election on March 6, 2012.[2] But that election cannot occur until election officials remap and reprecinct Ohio voters into the sixteen congressional districts in accordance with the 2010 Census.

The General Assembly enacted H.B. 319 to meet that objective. The law contains five key sections:

- Section 1 reapportions the State of Ohio into sixteen congressional districts, as required by the 2010 Census;
- Section 2 repeals Ohio's existing eighteen congressional districts, which no longer comply with federal law;

[2] The General Assembly enacted legislation that called for delaying the primary election date until the first Tuesday after the first Monday in May. See Am. Sub. H.B. 194 (2011). A separate ballot committee, chaired by former of Secretary of State Jennifer Brunner, has filed a petition seeking a statewide referendum on that legislation. Therefore, the Secretary of State must proceed with the March 6, 2012 primary date in current law.

- Sections 4 and 5 appropriate $2.75 million to the Secretary of State for implementation of the new congressional districts; and
- Section 7 specifies that "[t]he sections and items of law contained in th[e] act . . . go into immediate effect."

As Mr. Zanotti did in *Taft*, Relators here assert that Sections 1 and 2 of H.B. 319 "may not legally take effect until ninety (90) days after [the law] is filed with the Secretary of State." Compl. ¶ 28. And as it did in *Taft*, the Court should reject this argument.

Section 1 of H.B. 319 is not self-executing. It simply draws a map, apportioning thousands of land tracts into sixteen districts. Implementing that provision depends entirely upon the appropriation in Section 4, which allocates $2.75 million for election officials to remap and reprecinct Ohio voters into the sixteen congressional districts. Without that money, the county election boards cannot reprogram their voter databases and election management systems and, in turn, voters cannot cast ballots in those congressional districts. See Accompanying Aff.

To be sure, the apportionment provisions in Section 1 do not themselves appropriate any money. But that is not the issue. Because implementation of those sections "is dependent upon the appropriation in Section 4," *Taft*, 81 Ohio St. 3d at 484, they are not subject to referendum.

Under the established law of the State, the Court should dismiss Relators' mandamus complaint.

<u>Respondent Secretary of State's Proposition of Law No. II:</u>

Staying the effective date of H.B. 319 would contravene federal law.

If the apportionment provisions in H.B. 319 are subject to referendum, Relators' requested relief—a stay of H.B. 319's effective date—poses an intractable problem: The requested stay would place the State and its election officials on a collision course with federal law for the 2012 congressional election. This Court should not—and under the Supremacy Clause cannot—stay

the effective date of H.B. 319, even if it determines that the reapportionment provisions are subject to referendum.

A. A referendum petition stays the effective date of new legislation, leaving the State and its officials to enforce the preexisting version of the law.

Section 1c, Article II of the Ohio Constitution operates in a straightforward fashion. Every law, except those laws discussed in Section 1d, shall go into effect ninety days after its filing with the Secretary of State. But if a citizen delivers a referendum petition with an appropriate number of signatures during that period, the law will "be submitted to the electors of the state for their approval or rejection . . . at the next succeeding regular or general election."[3] Ohio Const., art. II, § 1c. Until such election occurs, "no such law, section or item shall go into effect." *Id.* State officials must proceed with their duties under the prior version of the law.

Section 1 of H.B. 319 apportions the State into sixteen congressional districts, as required by the 2010 Census and 2 U.S.C. 2c. Section 2 of H.B. 319 calls for the repeal of Ohio's existing eighteen congressional districts, which no longer comply with federal law. If the effective date of H.B. 319 is stayed, then the Act's repeal provision is not triggered and only the boundaries from the preexisting map would remain in effect.

The State and its officials would then be left with an untenable mandate: Administer the 2012 congressional election under the old (and now unlawful) eighteen-district map. In short, a stay of H.B. 319 would keep Ohio's prior map in place while Relators' referendum effort plays out.

[3] The terms "general election" and "regular election" refer to the election held on the first Tuesday after the first Monday in each November. R.C. 3501.01(A), (C).

B. Because federal law invalidates the prior map, the Supremacy Clause bars enforcement of the stay provision in Ohio Const., art. II, § 1c.

This cannot occur. Federal law invalidates the preexisting congressional map and, at the same time, prevents the Secretary of State from administering an election pursuant to those former boundaries. The Supremacy Clause of the U.S. Constitution therefore precludes the Court from staying the effective date of H.B. 319, even if the Court determines that the reapportionment provisions are subject to referendum.

Ohio's preexisting congressional map violates federal law in two ways: First, the "equal representation" standard in Art. I, § 2 of the U.S. Constitution requires that congressional districts be apportioned to achieve population equality "as nearly as is practicable." *Karcher v. Daggett* (1983), 462 U.S. 725, 730 (quoting *Wesberry v. Sanders* (1964), 376 U.S. 1, 7-8, 18). Under the 2010 Census, the population across Ohio's old congressional districts is not equally apportioned. Second, a federal statute directs that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established." 2 U.S.C. § 2c. Ohio is now entitled to only sixteen districts, but the preexisting congressional map assumes eighteen congressional districts.

Given these two deficiencies, the prior map is invalid. Any effort by the Secretary of State and county officials to administer the 2012 election using Ohio's preexisting congressional map would violate federal law. But the stay provision in Section 1c, Article II of the Ohio Constitution, if activated in this litigation, would keep that prior map alive and require election officials to rely on it for the 2012 congressional election.

The federal-state conflict here is stark. Federal law says that the prior map is invalid, but triggering the stay provision of the Ohio Constitution would keep that map alive and require

election officials to rely on it in preparing for the 2012 congressional election. It would be impossible for State and county election officials to comply with both requirements: To treat the old map, at once, as both dead *and* alive. Under the Supremacy Clause in Article VI of the U.S. Constitution, state law—even a state constitutional provision—must yield to federal voting law mandates. See *Roman v. Sincock* (1964), 377 U.S. 695, 711; *Reynolds v. Sims* (1964), 377 U.S. 533, 584; accord *Kuznik v. Westmoreland County Board of Commissioners* (Pa. 2006), 902 A.2d 476, 508 ("[T]he state referendum requirement must yield to the federal law.").

Simply stated, Relators' requested relief—a ninety-day stay of H.B. 319—would throw the Secretary of State and county elections boards into a legal black hole. During this period, officials would be forced to process petitions, validate signatures, and certify candidates for the primary election using the prior version of the elections code, and the prior eighteen-district map. But indisputably, those provisions are invalid under federal law, which now commands Ohio to elect its congressional representatives from sixteen districts. Because federal law invalidates the prior map, the Supremacy Clause bars the Court from activating the stay provision in Ohio Const., art. II, § 1c, even if the Court otherwise determines that the reapportionment provisions are subject to the right of referendum.

C. A stay of H.B. 319's effective date will invite uncertainty, confusion, and judicial intervention into the State's congressional election.

A stay of H.B. 319 also threatens real damage to the candidates, voters, and the principles of representative democracy.

In a few short weeks, candidates will begin to file declarations of candidacy and petition papers with signatures from qualified electors with the county boards of elections. County election boards will have to process those applications, validate those signatures, and certify the form and content of the election ballots—all before the end of this calendar year. As the chief

elections officer, the Secretary of State oversees this process. Consistent with Ohio law, he must administer an orderly and fair primary election on March 6, 2012.

To perform these statutory duties, the Secretary of State and county election boards need fixed and final boundaries for Ohio's sixteen congressional districts. See Accompanying Aff. Either the Secretary of State and county election officials must use the boundaries in H.B. 319, or they must use another set of boundaries that comply with state and federal law.

A ninety-day stay of H.B. 319's effective date is the worst possible outcome because it leaves Ohio's electoral process—and its election officials—in a legal vacuum a few short weeks before the December 7, 2012 filing deadline. There would be no lawful map in place, and without valid congressional boundaries, candidates will not know what congressional district they reside in, or which of their neighbors could sign their petition papers. County election boards cannot process applications, validate signatures, or certify candidates for the ballot. And voters cannot participate in the democratic process because they will not be able to identify which candidates are running in their districts. See *Kuznik*, 902 A.2d at 149 ("The right of electors, through a referendum . . . does not take precedence over the critical need to ensure that in the Spring Primary Election, voters are not disenfranchised.").

Frustrated candidates and voters will then ask the courts—and the federal courts in particular—to fill the vacuum caused by the stay. "When the State, through its legislature or other authorized body, cannot produce the needed decision, then federal courts are left to embark on the delicate task of redistricting." *Branch v. Smith* (2003), 538 U.S. 254, 278 (internal quotations, alteration, and citation omitted); accord *Georgia v. Ashcroft* (2003), 539 U.S. 461, 488 n.2. If this occurs, a federal court would be empowered to impose a reapportionment plan

on Ohio voters, and order state officials to appropriate funds and supply personnel to implement its plan.

The less intrusive course, and the better course for avoiding protracted uncertainty and confusion, is as follows. If the reapportionment provisions in H.B. 319 are subject to referendum (and, under the *Taft* decision, they are not), the Court should allow Relators to place the law before the voters for approval or disapproval at the November 2012 general election. If they are successful, the reapportionment provisions in H.B. 319 will be repealed. But in the interim, the Court should not stay the effective date of H.B. 319. This will permit the Secretary of State and county election officials to begin orderly administration of the 2012 congressional election in a few short weeks, and do so in compliance with all federal mandates.

CONCLUSION

For these reasons, the Court should dismiss Relators' mandamus complaint. In the alternative, if the Court finds that the law is subject to referendum under *Taft*, the Court should issue a limited writ of mandamus, ordering the Secretary of State to treat H.B. 319 as subject to the right of referendum, but denying Relators' request to stay the effective date of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief was served by electronica mail this 13th day of October, 2011, upon the following counsel:

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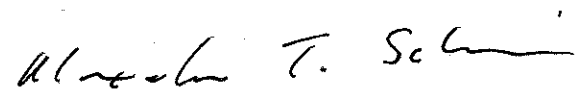

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