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.,	:	
Respondents.	:	

REPLY BRIEF OF RESPONDENT SECRETARY OF STATE JON HUSTED

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

A. To ensure proper administration of the March 2012 congressional primary, Ohio's sixteen congressional districts must be finalized before December 7, 2011. 2

B. The apportionment provisions in H.B. 319 are exempt from referendum. 3

1. The *Taft* decision applies to H.B. 319. 3

2. *LetOhioVote* confirmed the holding of *Taft* 5

C. The Court cannot order relief—in this case, a stay of H.B.'s 319's effective date—that places the State in violation of federal law. 7

1. Federal law prevents the Secretary of State from administering Ohio's congressional election using the prior version of the code. 7

2. This Court's mandamus remedy must not itself cause an unlawful result. 8

CONCLUSION 12

CERTIFICATE OF SERVICE ..... unnumbered

TABLE OF AUTHORITIES

Page(s)

CASES

Cipollone v. Liggett Group, Inc. (1992)
505 U.S. 504 8

Kuznik v. Westmoreland County Board of Commissioners (Pa. 2006),
902 A.2d 476 ..... 10, 11

State ex rel. LetOhioVote.org v. Brunner,
123 Ohio St. 3d 322, 2009-Ohio-4900 ..... 5, 8

State ex rel. Ohio AFL-CIO v. Voinovich (1994),
69 Ohio St. 3d 225 4

State ex rel. Pressley v. Indus. Comm'n (1967),
11 Ohio St. 2d 141 ..... 8, 9

State ex rel. Riffe v. Brown (1997),
51 Ohio St. 2d 149 3

State ex rel. Sawyer v. O'Connor (1978),
54 Ohio St. 2d 380 9

State ex rel. Taft v. Franklin County Court of Common Pleas,
No. 98-364 (filed Mar. 20, 1998) 3

Taft v. Franklin County Court of Common Pleas (1998),
81 Ohio St. 3d 480 ..... *passim*

STATUTES

2 U.S.C. § 2c 8

R.C. 3513.01(A) 2

R.C. 3513.05 2

R.C. 3521.01 7

OTHER AUTHORITIES

H.B. 319 ..... *passim*

Ohio Const., art. II, § 1c 7, 8

Section 1d, Article II of the Ohio Constitution 3, 4

Pennsylvania Constitution 10

Article I, § 2 of the U.S. Constitution 8

INTRODUCTION

Relators urge this Court to subject the apportionment provisions of H.B. 319 to referendum, and to delay the law's effective date to permit their referendum effort to play out. Their argument, however, contains three deficiencies.

First, Relators believe that the date of the 2012 primary election is in flux. Not so. The Secretary of State, county elections boards, and this Court must operate under the current law—and that law compels election officials to administer a primary on March 6, 2012. By Relators' own admission, Ohio's congressional district lines "must be drawn prior to" December 7, 2011—"the filing deadline for th[is] primary election." Rel. Br. at 9.

Second, Relators' plea for a referendum on the apportionment provisions in H.B. 319 ignores this Court's decision in *Taft v. Franklin County Court of Common Pleas* (1998), 81 Ohio St. 3d 480. That case mirrors this case in all material respects. As in *Taft*, the General Assembly here enacted a substantive provision (the apportionment sections) and, in the same law, provided the appropriation ($2.75 million) necessary to implement the provision. Because implementation of the former "is dependent upon the appropriation," *Taft*, 81 Ohio St. 3d at 484, H.B. 319 is not subject to referendum.

Third, Relators fail to grasp the legal consequences of delaying H.B. 319's effective date. If H.B. 319's effective date is stayed, the prior version of the elections code—and Ohio's preexisting congressional boundaries—will remain in effect and state officials will have to enforce it. But those boundaries violate federal law, and the Supremacy Clause unambiguously prohibits the Secretary of State from using those boundaries to administer Ohio's 2012 congressional election. What is more, this federal-state conflict will, as Relators acknowledge, "lead to confusion amongst those who . . . seek election to Congress in 2012"—they will have no avenue by which to qualify as candidates for the ballot by December 7. Rel. Br. at 17.

At bottom, this Court should not grant mandamus relief to Relators because, under *Taft*, the apportionment provisions in H.B. 319 are not subject to referendum. But even if the Court concluded that the law is subject to referendum, it cannot stay the effective date of H.B. 319. Doing so would revive the former version of the elections code—and the old congressional maps—in violation of federal law.

ARGUMENT

A. To ensure proper administration of the March 2012 congressional primary, Ohio's sixteen congressional districts must be finalized before December 7, 2011.

Relators concede that the 2010 Census requires the State of Ohio to reapportion its territory into sixteen congressional districts. Rel. Br. at 8. They further concede that the new districts "*must* be drawn prior to the [candidate] filing deadline for the primary election." *Id.* at 9 (emphasis added).

According to Relators, these mandates present no obstacle for the State of Ohio because "it is impossible to know the date upon which the 2012 primary election will be held." *Id.* at 11. They are wrong. The date for the 2012 primary is set, and it is imminent.

Current state law directs the Secretary of State to administer a primary election on March 6, 2012.[1] See R.C. 3513.01(A) ("[O]n the first Tuesday after the first Monday in March of 2000 and every fourth year thereafter . . . primary elections shall be held for the purpose of nominating persons as candidates of political parties for election."). Any person desiring to run in that election (including congressional candidates) must therefore file declarations "not later than four p.m. of the ninetieth day before the day of the primary election"—December 7, 2011. R.C.

[1] As Relators note (see Rel. Br. at 10), the General Assembly sought to delay the primary election date until May 2012 by enacting Am. Sub. H.B. 194 (2011). But a separate ballot committee, chaired by former Secretary of State Brunner, filed a referendum petition against H.B. 194. The filing of that petition delayed the effective date of H.B. 194, and with it, implementation of a May 2012 primary date.

3513.05. And by Relators' own admission, Ohio's congressional "districts must be drawn *prior to* th[is] filing deadline." Rel. Br. at 9 (emphasis added).

In short, the legal issues in this litigation are discrete and consequential. Can Relators submit H.B. 319 to referendum and, if so, are they entitled to a stay of H.B. 319's effective date in light of the grave conflict this would create with federal law? The answer to both questions is "no."

B. The apportionment provisions in H.B. 319 are exempt from referendum.

The Secretary of State agrees that all laws passed by the General Assembly are subject to referendum unless they fall under the exceptions listed in Section 1d, Article II of the Ohio Constitution. Rel. Br. at 13-14. The question here is whether H.B. 319 is exempt from referendum under Section 1d. The answer is provided in *Taft v. Franklin County Court of Common Pleas* (1998), 81 Ohio St. 3d 480.

1. The *Taft* decision applies to H.B. 319.

As the Secretary's merit brief detailed, the General Assembly enacted H.B. 697 to impose an assortment of taxes on Ohioans (conditioned on the results of a special election), to direct the Secretary of State to administer a special election, and to fund the costs of that election. The General Assembly also directed H.B. 697 to go into immediate effect.

A registered voter and taxpayer, David Zanotti, argued that the special election provision in H.B. 697 could not go into immediate effect because it did not fall within any exception listed in Section 1d, Article II. See Merit Br. of David Zanotti, *State ex rel. Taft v. Franklin County Court of Common Pleas*, No. 98-364 (filed Mar. 20, 1998), at 30-36. Mr. Zanotti acknowledged that another provision of H.B. 697 "appropriate[d] funds," but he asserted that "[t]he designation of the appropriation d[id] not control when the substantive law t[ook] effect." *Id.* at 35-36. Invoking Chief Justice O'Neill's dissent in *State ex rel. Riffe v. Brown* (1997), 51 Ohio St. 2d

149, and *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225, Mr. Zanotti accused the General Assembly of attempting to "defeat the right of referendum by including an appropriation." *Id.* at 36.

This Court rejected those arguments: "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. The special election provision in H.B. 697—which "t[ook] immediate effect"—"comports with the Constitution . . . because implementation of the statewide election is dependent upon the appropriation in Section 4." *Id.*

The parties in the case come to this Court with the same dispute: The General Assembly enacted H.B. 319 to reapportion the State of Ohio's congressional districts (as required by federal law) and to fund the Secretary of State's implementation of those districts. The legislature further specified that H.B. 319 go into effect immediately.

In their mandamus complaint, Relators press the same argument Mr. Zanotti did in *Taft*. They acknowledge that H.B. 319 appropriates money for state government expenses, but they argue that the appropriation does not place the substantive provisions of H.B. 319 beyond the reach of referendum. Rel. Br. at 14. And like the relator in *Taft*, Relators here accuse the General Assembly of attempting "to flout the right of referendum." *Id.* at 15.

This argument did not prevail in *Taft*, and it does not prevail here. As the Secretary explained previously, the apportionment provisions of H.B. 319 are not self-executing. Their implementation depends upon the $2.75 million appropriation in Section 4, which funds the reprogramming of election management systems and voter databases. Because implementation of the apportionment provisions "is dependent upon the appropriation" contained in a different

section of the Act, *Taft*, 81 Ohio St. 3d at 484, the apportionment provisions are not subject to referendum.

Perhaps recognizing the similarities between this litigation and *Taft*, Relators attempt to minimize the decision's significance. They observe that "no change to the permanent law" occurred in *Taft* because "H.B. 697 was defeated by the voters at the [special] election." Rel. Br. at 17. They also suggest that the Court denied relief to Mr. Zanotti because "requir[ing] a referendum would have been a vain act." *Id.*

But neither of these rationales is mentioned in the *Taft* decision, let alone relied upon as a basis for the holding. Rather, the Court denied relief after concluding that the special election provision in H.B. 697 was dependent on an appropriation and, therefore, exempt from referendum. See *Taft*, 81 Ohio St. 3d at 484. That is the singular holding of *Taft*. And that holding applies to this case: Under *Taft*, the reapportionment provisions in H.B. 319 are not subject to referendum.

2. *LetOhioVote* confirmed the holding of *Taft*.

In their closing paragraphs, Relators invoke this Court's decision in *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900. But that case provides further evidence that Relators are *not* entitled to a referendum on H.B. 319.

First, *LetOhioVote* reaffirmed the *Taft* decision. The Court explained that, while the legislative provisions in *Taft* "did not appropriate money," the provisions were also "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 ¶ 42. Because the apportionment provisions in H.B. 319 are also dependent on an appropriation in another section of the act, they too are not subject to referendum.

Second, the circumstances of *LetOhioVote* bear no resemblance to this litigation or to *Taft*, and the differences are instructive. In its 2010-2011 biennial budget bill, the General Assembly authorized the State Lottery Commission to operate video lottery terminals (VLTs). *Id.* at ¶ 3. It then appropriated the anticipated revenue from VLTs—some $2.2 billion—to the Department of Education. *Id.* Finally, the General Assembly specified that the VLT-implementing provisions of the bill would "take effect immediately" because "they are or relate to an appropriation for current expenses" of state government. *Id.* at ¶ 4 (alterations omitted).

This Court concluded that the VLT-implementing provisions "[were] not themselves appropriations for state expenses because they d[id] not set aside a sum of money." *Id.* at ¶ 29. It also rejected the Respondents' reliance on *Taft* because "the VLT provisions [were] not dependent upon any appropriation." *Id.* at ¶ 43. Rather, "the dependency [was] reversed: the appropriation of over $2.2 billion to the Department of Education . . . [was] dependent . . . upon the projected revenues from the enactment of the VLT provisions." *Id.*

In this case, by contrast, the apportionment provisions of H.B. 319 *are dependent upon the appropriation in the same act*. As the Secretary's merit brief explained, Section 1 of H.B. 319 (the apportionment provision) groups thousands of land tracts into districts. The Section has no significance until election officials reprogram their voting systems and databases to integrate those districts. The General Assembly appropriated $2.75 million so that this reprogramming, remapping, and reprecincting could occur.

In short, H.B. 319 mirrors the challenged legislation in *Taft*. Because its substantive provisions are dependent upon an appropriation in the same act, those provisions are not subject to referendum. *Taft* remains good law, and so Relators' position fails.

C. The Court cannot order relief—in this case, a stay of H.B.'s 319's effective date—that places the State in violation of federal law.

Relators acknowledge that the relief they seek—particularly, a stay of H.B. 319—would have serious consequences. Rel. Br. at 17. They dismiss these consequences as merely "messy." *Id.* But that understatement ignores the intractable legal conflict a stay would create. Whatever one thinks of H.B. 319, if the effective date of that Act is stayed, Ohio would revert to the preexisting congressional districts in R.C. 3521.01—and that right there is the problem. At that point, election officials would be obliged under *state* law to administer the upcoming congressional primary using the old district boundaries. But as a matter of *federal* constitutional and statutory law, those old districts are invalid and unlawful.

Accordingly, even if this Court directs the Secretary to treat H.B. 319 as subject to referendum, the Court cannot order a stay of the law's effective date. Issuing a stay would immediately place the State in conflict with federal law. Instead, if the apportionment provisions in H.B. 319 are deemed subject to referendum, 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 (and state legislators would be forced back to the drawing board). But in the interim, the Court should not—and cannot—stay the effective date of H.B. 319.

1. Federal law prevents the Secretary of State from administering Ohio's congressional election using the prior version of the code.

In most cases, the referendum procedures in the Ohio Constitution operate in a straightforward fashion. If a citizen delivers a timely referendum petition to the Secretary of State with an appropriate number of signatures, the challenged law will "be submitted to the electors of the state for their approval or rejection . . . at the next succeeding regular or general election." Ohio Const., art. II, § 1c. Until the election occurs, "no such law, section or item shall

go into effect." *Id.* State officials then proceed as if the challenged law never existed; they must perform their responsibilities under the prior version of the law.

To be sure, this procedure may result in financial or administrative hardships. See *LetOhioVote*, 2009-Ohio-4900, at ¶ 55 ("We are not unmindful of the effect our decision may have on the state budget."). But most of the time, these are *practical* difficulties that the State, its agencies, and officials can manage.

This situation is unique: If H.B. 319's effective date is stayed, the law containing the prior boundaries would come back into force. As a matter of *state law*, the Secretary of State and county boards would need to process candidate petitions, validate signatures, certify ballots, and administer the March 2012 congressional primary under those provisions. But as a matter of *federal law*, the congressional districts in that prior law are invalid. These districts are too numerous, they are malapportioned, and, therefore, they violate the "equal representation" standard in Article I, § 2 of the U.S. Constitution and the mandates of 2 U.S.C. § 2c.

Simply put, if H.B. 319 cannot go into effect, the prior version of the code would command state and county officials to administer a congressional election with districts that violate federal law. Any mandamus relief must avoid this command, as it would violate the Supremacy Clause. See *Cipollone v. Liggett Group, Inc.*, (1992) 505 U.S. 504, 516 ("[S]ince *McCulloch v. Maryland,* it has been settled that state law that conflicts with federal law is without effect.") (internal quotation, alteration, and citation omitted).

2. This Court's mandamus remedy must not itself cause an unlawful result.

The Secretary of State catalogs these consequences for a reason. Mandamus is, at its core, an equitable remedy that falls "within the sound discretion of the court to which application of the writ is made." *State ex rel. Pressley v. Indus. Comm'n* (1967), 11 Ohio St. 2d 141,

161. Before "exercising the extraordinary power of mandamus," the Court first considers whether the Relators' requested relief "would be impossible, illegal, or useless." *Id.* at 162.

To that end, the Court will refuse to grant mandamus relief that itself violates federal law. For instance, in *State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St. 2d 380, a group of prosecutors sought mandamus against a common pleas court judge who, after taking a no-contest plea for driving while intoxicated, unilaterally reduced the charge to reckless driving. Although the Court criticized the trial judge's actions as illegitimate, it refused to order the judge to vacate the conviction and issue new findings, noting that such an order would trench on the federal double jeopardy prohibition. *Id.* at 382-83.

If H.B. 319 is subject to referendum, ordering a stay of its effective date will similarly conflict with federal mandates. As discussed above, officials would have to prepare for the 2012 congressional primary using the prior version of the elections code and the old eighteen-member congressional district boundaries. But every act they take will be invalid under federal law, which permits Ohio only sixteen districts.

The conflict will also violate the rights of congressional candidates and voters. Relators candidly acknowledge that their requested relief would "lead to confusion amongst those who may wish to seek election to Congress in 2012." Rel. Br. at 17. But their casual response—"Any crisis . . . rests solely on the leadership [of the General Assembly]," *id.* at 13—fails to grasp the legal implications of the situation. If congressional candidates cannot access the ballot for the March 2012 primary due to confusion, they cannot exercise their constitutional right to seek public office. And if the candidates cannot qualify for the ballot, voters cannot exercise their constitutional right to select their desired representatives.

Indeed, when the Pennsylvania Supreme Court faced a near identical conflict in 2006, it held that its "state referendum requirement must yield to federal law." *Kuznik v. Westmoreland County Board of Commissioners* (Pa. 2006), 902 A.2d 476, 508.

After the 2000 election, Congress required the States to replace lever voting machines with electronic voting systems. *Id.* at 480. To comply with that mandate, the Secretary of the Commonwealth and local elections officials agreed to replace Pennsylvania's outdated voting equipment before an upcoming primary election. *Id.* at 481-82.

In doing so, the Secretary ran afoul of state law. Under the Pennsylvania Constitution and Election Code, voters have the right—through a referendum—to approve the adoption of a voting system. *Id.* at 486-88. No such referendum was held, however, because the Secretary concluded that a referendum would prevent Pennsylvania from complying with federal law. *Id.* at 485-86. The federal Help America Vote Act (HAVA) mandated the replacement of the voting machines *before* the upcoming primary; the State could not wait for a referendum challenge. *Id.* at 493.

The Pennsylvania Supreme Court sided with the Secretary, concluding that the right of referendum under state law "obstruct[ed]" the federal legislation. *Id.* at 480. "Fundamental as it is," the court reasoned, the right of referendum "does not stand alone or operate in a vacuum." *Id.* at 494. If the reforms were stayed for referendum, the court determined, the Secretary would be forced to violate federal law and disenfranchise Pennsylvania electors. Therefore, the Court refused to permit a referendum on the voting reforms because doing so would "impede[] election administration and frustrate[] voter access." *Id.* at 508.

A similar dilemma is presented here: If H.B. 319 is subject to referendum, critical constitutional and federal statutory requirements preclude the requested stay of the law's

effective date. If H.B. 319's effective date is stayed for their referendum effort, the State of Ohio will revert to the prior version of Ohio's election law and to the old district boundaries contained therein. Because those old boundaries violate federal law, and because the ensuing conflict will impair the right of candidates and voters to access the ballot, the Court should not—and, under the Supremacy Clause, cannot—order a stay. See *Kuznik*, 902 A.2d at 508 ("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.").

CONCLUSION

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

Respectfully submitted,

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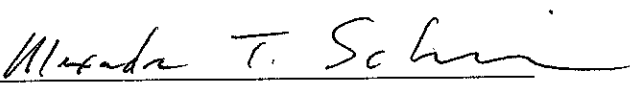

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I certify that a copy of the foregoing Reply Brief was served by electronic mail on this 13th day of October, 2011, upon the following counsel:

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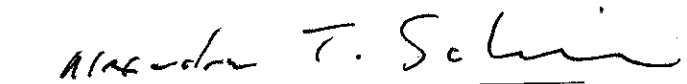

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