

IN THE SUPREME COURT OF OHIO

CHARLES E. WILSON, et al.,	:	
	:	Case No. 2012-0019
Relators,	:	
	:	
v.	:	Original Action
	:	
GOVERNOR JOHN KASICH, et al.,	:	
	:	
Respondents.	:	

RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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Now come Respondents Governor John Kasich, Ohio Auditor of State David Yost, President of the Ohio Senate Thomas Niehaus, and Ohio Secretary of State Jon Husted pursuant to Civ.R 12(C), and ask this Court for a judgment on the pleadings. A memorandum in support is attached.

Respectfully Submitted,

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MEMORANDUM OF LAW

I. INTRODUCTION AND STATEMENT OF FACTS

Relators attempt to challenge Ohio House and Senate Districts adopted by the Ohio Apportionment Board (the "2012-2022 Ohio Apportionment Plan") by filing this action less than three weeks before ballots for the March 6, 2012 primary must be ready to mail to military voters, less than four weeks before statewide early voting, and a month after candidates filed their declarations of candidacies and petitions with the county boards of elections. The Ohio Apportionment Board adopted the legislative districts at issue on September 30, 2011, more than three months before this suit was filed. Relators' claims are barred by laches because Relators did not use the utmost diligence and unreasonably delayed filing this lawsuit. Any requested relief would prejudice the citizens of the State of Ohio and create electoral chaos.

The Ohio Apportionment Board is comprised of five individuals: (1) the Governor, (2) the Auditor of State, (3) the Secretary of State, (4) one person chosen by the Speaker of the House of Representatives and the leader in the Senate of the political party of which the Speaker is a member, and (5) one person chosen by the legislative leaders in the two houses of the major political party of which the Speaker is not a member. Every ten years, the Ohio Apportionment Board must meet and establish the boundaries for the Ohio House and Senate districts. Ohio Constitution, Article XI, Section 1. Consistent with its constitutional responsibility, the Ohio Apportionment Board met and established those districts. Specifically, on September 30, 2011, the Ohio Apportionment Board, by a 4-0 vote, adopted the amended apportionment plan as proposed by the Joint Secretaries to the Board.

On December 7, 2011, more than two months after the 2012-2022 Ohio Apportionment Plan was adopted, all candidates seeking election to the Ohio House and Senate filed

declarations of candidacies and petitions with their local county boards of elections to run in the districts adopted by the Ohio Apportionment Board. R.C. 3513.05. County boards of elections certified Ohio House and Senate candidates to the ballot on or before December 19, 2011 as required by law. R.C. 3513.05. County boards of elections must have ballots, including Ohio House and Senate candidates, ready to mail to military voters by January 21, 2012, and ready for early in-person absentee voting by January 31, 2012. R.C. 3509.01; R.C. 3511.04.

On January 4, 2012 (96 days after the apportionment plan was adopted, 17 days before military ballots are required to be ready, and only 27 days before early voting commences), Relators filed this action challenging the constitutionality of the 2012-2022 Ohio Apportionment Plan. Relators' claims should be dismissed because they are barred by the doctrine of laches. Relators unreasonably delayed in filing this action and any requested relief would prejudice the citizens of the State of Ohio.

II. LAW AND ARGUMENT

Relators' complaint is barred by the doctrine of laches because Relators waited an unreasonable amount of time to bring this lawsuit, knowing that the March 6, 2012 election was approaching. Elections cases are treated differently than most other cases whereby "[i]f relators in election cases do not exercise the **utmost diligence**, laches may bar an action for extraordinary relief." *State ex rel. Owens v. Brunner*, 125 Ohio St.3d 130, 2010-Ohio-1374, ¶ 16 (Emphasis added) (quoting *State ex rel. Craig v. Scioto Cty. Bd. of Elections*, 117 Ohio St.3d 158, 2008-Ohio-706, ¶ 11). The Court's "consistent requirement that expedited elections cases be filed with the required promptness is not simply a technical nicety." *State ex rel. Fishman v. Lucas Cty. Bd. of Elections*, 116 Ohio St.3d 19, 2007-Ohio-5583, ¶ 8 (quoting *State ex rel. Carberry v. Ashtabula*, 93 Ohio St.3d 533, 524, 2001-Ohio-1625). Rather, "[e]xpedited elections cases

‘implicate the rights of electors underlying the statutory time limits of R.C. 3505.01 and 3509.01.’ *Id.* (quoting *State ex. Rel. Ascani v. Stark Cty. Bd. of Elections*, 83 Ohio St.3d 490, 494 (1998)).

In elections cases, “laches is not an affirmative defense, and [persons seeking relief] have the burden of proving that they acted with the requisite diligence.” *Smith v. Scioto County Bd. of Elections*, 123 Ohio St.3d 467, 2009-Ohio-5866, ¶ 14 (quoting *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, ¶ 13). Although this is not an “expedited elections matter” under Ohio Supreme Court Rule 10.9, a decision in favor of Relators in this case could gravely affect the March 6, 2012 primary election, by invalidating all or part of the 2012-2022 Ohio Apportionment Plan, and thereby create electoral chaos. Accordingly, Relators have the burden to prove that their claims are not barred by laches.

An action should be dismissed on the basis of laches when there is an “(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.” *Owens*, 2010-Ohio-1374, ¶ 16 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145 (1995)).

A. Relators unreasonably delayed more than three months to bring this lawsuit, and they cannot demonstrate otherwise.

This Court has “held that a delay as brief as *nine days* can preclude our consideration of the merits of an expedited election case.” *State ex rel. Landis v. Morrow County Bd. of Elections*, 88 Ohio St.3d 187, 189 (2000) (citing *Paschal v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St. 3d 141 (1995)). In *Rust v. Lucas County Board of Elections*, this Court dismissed relator’s lawsuit, in part, on the basis of laches. 108 Ohio St.3d 139, 2005-Ohio-5795, ¶ 15. In that case, relator filed an action after the Lucas County Board of Elections rejected his

nominating petition and refused to certify his candidacy for the Toledo Board of Education. *Id.* at ¶¶ 2-5. Recognizing the importance of diligence that attaches to elections cases, this Court held that the action was barred by the doctrine of laches because relator “failed to act with the requisite diligence by waiting 28 days from the September 8 * * * rejection of his candidacy to file this expedited election case challenging the board’s decision.” *Id.* at ¶ 15. The Court further noted the importance of the fact that “[b]y the time this case was filed, the statutory deadline to have absentee ballots printed and ready for use had already passed.” *Id.* at ¶ 15 (citing R.C. 3509.01).

In *State ex. rel. Fishman v. Lucas Cty. Bd. of Elections*, relator allowed 16 days to pass before he filed a petition with the Lucas County Board of Elections contesting the candidacy petition of the respondent. 116 Ohio St.3d 19, 2007-Ohio-5583, ¶¶ 2-3. Then, relator waited an additional 38 days after the Lucas County Board of Elections denied his petition before filing this original action. *Id.* at ¶ 4. This Court held that relator’s action was barred by the doctrine of laches, specifically noting that relator’s delay “resulted in this case not being briefed before the expiration of the R.C. 3509.01 deadline for the board to have the absentee ballots for the November 6 election printed and ready for use.” *Fishman*, 2007-Ohio-5583, ¶ 9.

Like the relators in the *Rust* and *Fishman* cases, here Relators allowed an unreasonable amount of time to pass such that county boards of elections will have printed and mailed absentee ballots to military and other voters by the time this case is ready for decision. On September 30, 2011, the Ohio Apportionment Board adopted the new districts for the Ohio House of Representatives and Senate. (See the 2012-2022 Ohio Apportionment Plan, Exhibit C, Michael McDonald Affidavit, filed in support of Complaint).

Despite this fact, Relators have unreasonably delayed while candidates and county boards of elections prepared for the March primary election. Candidates for the Ohio House of Representatives and Senate filed their declarations of candidacies and petitions by December 7, 2011 as required by state law. R.C. 3513.05. Additionally, dates have passed for county boards of elections to make decisions to certify candidates, hold protest hearings, and accept declarations of intent for write-in candidates. R.C. 3513.05; R.C. 3513.041. Furthermore, Relators' decision to delay may also disrupt significant upcoming dates for voters. Most notably, county boards of elections must have absentee ballots prepared for military voters by January 21, 2012 (45 days before the primary election). R.C. 3509.01; R.C. 3511.04. Because military voters are often living outside of Ohio or even the United States, this group of voters is most affected by Relators' decision to initiate litigation at this late stage in the elections calendar. Any impediment in getting ballots to military voters could hamper the voters' ability to receive, vote, and return their ballots in a timely manner to county boards of elections. Relators have not diligently pursued litigation in this case.

B. Despite the unreasonable delay, Relators can provide no excuse to explain why this lawsuit was filed in January, more than three months after the districts were adopted.

There is no excuse for Relators' unreasonable delay. Whether the districts were consistent with the Ohio Constitution did not change between September 30, 2011, when the plan was adopted, and January 4, 2012 when the lawsuit was filed. Further, Relators cannot argue that the delay was caused by the need for expert review of the districts. The conclusory affidavit filed simultaneously in support of the complaint did not provide any detail about individual districts and what facts made those districts unconstitutional. Moreover, public records regarding the apportionment process were available throughout the period that the Ohio

Apportionment Board held meetings and received input on the competing plans. Relators offer no explanation as to why they waited until three months after the final plan was adopted to challenge the plan.

C. Relators had knowledge of the alleged wrong on September 30, 2011.

Months before the filing of their lawsuit, Relators had knowledge and access to the publicly available information that forms the basis of their allegations. Relators knew that the Ohio Apportionment Board approved the 2012-2022 Ohio Apportionment Plan on September 30, 2011. The Ohio Constitution requires the apportionment plan be published no later than October 5 of the year in which it was made. Ohio Constitution, Article, XI, Section 1. The plan adopted by the Ohio Apportionment Board was also widely covered in the media. Relators admit that the Ohio Apportionment Board held open, public meetings. Cmplt. ¶ 64. Relators admit that the Ohio Apportionment Board held a series of public hearings regarding the process, at which the public could appear to ask questions or provide testimony. *Id.* As early as August 4, 2011, Relators knew that script agendas were used for convenience to make the meetings run more smoothly. *Id.* To the extent that the Relators were dissatisfied with the conduct of such meetings, they were on notice of any defects no later than September 30, 2011, the date of the last meeting. Accordingly, Relators had knowledge that the 2012-2022 Ohio Apportionment Plan passed long before the Relators filed this lawsuit.

D. Relators' unexcused, unreasonable delay impairs the ability of county boards of elections to conduct the primary election and hinders the ability of Ohio voters to vote.

Prejudice in expedited election cases occurs where a moving party's delay "impairs boards of elections' ability to prepare, print, and distribute appropriate ballots because of the expiration of the time for providing absentee ballots." *Owens* 2010-Ohio-1374, ¶ 19 (quoting

State ex rel. Willke v. Taft, 107 Ohio St.3d 1, 2005-Ohio-5303, ¶ 18). As this Court recognized in *Fishman*, “[i]f relator[] had acted more promptly, this might have been avoided and any potential prejudice . . . [as a result of the] statutory obligation to absentee voters would have been minimized.” *Id.* (quoting *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 201, 2002-Ohio-5583, ¶ 18). All candidates and voters in Ohio are prejudiced by Relators waiting until January to file this action. Candidates have filed their petitions, county boards of elections have certified candidates and prepared the ballot, and some voters will vote before this election matter is resolved. R.C. 3513.05; R.C. 3513.041; R.C. 3509.01; R.C. 3511.04; R.C. 3509.01. The prejudice is severe and far-reaching.

Based on Relators’ unexcused, unreasonable delay that prejudiced the voters of Ohio, this Court should dismiss the complaint based on the doctrine of laches.

III. CONCLUSION

For the reasons set forth in this Memorandum of Law, Respondents Kasich, Yost, Niehaus, and Husted respectfully request that this Court deny Relators’ complaint and dismiss this case in its entirety.

Respectfully Submitted,

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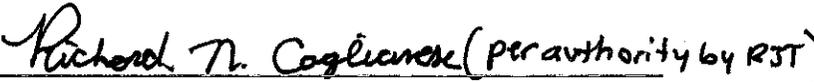
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Respondents' Motion for Judgment on the Pleadings* was served on this 17th day of January 2012, by electronic mail and U.S. mail, postage prepaid, to:

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