

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO, ex rel.** :  
**VALERIA E. GONCALVES, et al.,** :  
 :  
 *Relators,* : Case No. 2015-1475  
 :  
 v. : **Original Action in Mandamus**  
 :  
**MAHONING COUNTY BOARD OF** :  
**ELECTIONS, et al.,** :  
 :  
 *Respondents.* :

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**ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENT  
SECRETARY OF STATE JON HUSTED**

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## **INTRODUCTION**

Relators, Valeria Goncalves, Mary Khumprakob, Edson Knight, Heidi Kroeck, Young Tensley, and Hattie Wilkins, seeks extraordinary relief against the Mahoning County Board of Elections and its Members by requesting that this Court overturn the Board's August 26, 2015 decision and place the City of Youngstown's "Community Bill of Rights" charter amendment on the November 3, 2015 general election ballot. However, despite naming Ohio's Secretary of State Jon Husted in this action, Relators seek no specific relief against the Secretary. In this case, the Secretary has no legal duty or authority to place Youngstown's "Community Bill of Rights" charter amendment on Mahoning County's general election ballot.

While the Secretary is not a proper party to this mandamus action, and should be dismissed on these grounds alone, as a practical matter, the Secretary asserts that Relators' Complaint should be barred by laches, and that the Mahoning County Board of Elections and its Members properly concluded that the charter amendment is unconstitutional. For all of these reasons, Relators' request for a writ of mandamus should be denied.

### **I. STATEMENT OF THE CASE**

Relators filed this writ of mandamus against the Mahoning County Board of Elections, its Members, and Secretary of State Jon Husted on September 4, 2015. *See generally* Compl. However, Relators fail to even allege that Secretary Husted has a clear legal duty to perform any act, or that Secretary Husted is directly involved in this dispute at all. *Id.*; *see also* Relators' Brief at 4-7. Rather, Relators' focus is on the Mahoning County Board of Elections and its Members.

According to the Complaint, this dispute involves a proposed amendment to the Youngstown City Charter sought to be placed on the ballot by the Youngstown City Council. Compl. ¶ 2. On August 24, 2015, the City Council voted to forward the proposed charter

amendment to the Mahoning County Board of Elections. *Id.* ¶ 3. The Board of Elections confirmed that proponents of the amendment had obtained a sufficient number of valid signatures in order to place the amendment on the ballot. *Id.* ¶ 19. However, on August 26, 2015, the Board unanimously voted not to certify the amendment, finding the substance of the proposed amendment was unconstitutional. *Id.* ¶¶ 19, 21, 23.

Relators argue that the Board does not have the authority to determine whether the proposed amendment is unconstitutional, *id.* ¶¶ 20, 22, and request a writ of mandamus that “requires Respondents to comply with the requirements of O.R.C. § 3501.11 and the Ohio and United States Constitutions by immediately mandating and requiring the Respondents” to place the proposed charter amendment on the November 3, 2015 election ballot, *id.* at 11.

Additionally, the Complaint alleges that the Board’s decision not to certify the proposed amendment was based, in part, on a letter Secretary Husted issued relating to county officials in Athens, Fulton, and Medina Counties upholding statutorily-prescribed protests and determining that proposed charter petition provisions in those counties were invalid. *Id.* ¶¶ 8, 16, Ex. B.

As it relates to Secretary Husted, this Court should deny Relators’ requested relief for three reasons. First, Secretary Husted is not a proper party, and Relators have not alleged that the Secretary has failed to perform a clear legal duty or even that he has any direct involvement in this matter. Second, Relators filed this mandamus action too late to be entitled to an extraordinary writ in an election case. Third, the Secretary’s letter relating to other counties does not support a writ of mandamus being issued against the Secretary. Consequently, the Complaint should be dismissed as to the Secretary, and additionally the writ of mandamus should be denied in its entirety.

## II. ARGUMENT

### Proposition of Law 1

#### **Secretary Husted Is Not a Proper Party to this Action; There Are No Allegations that He Was Directly Involved in the Matter or Failed to Perform a Clear Legal Duty**

In order to be entitled to a writ of mandamus, Relator must show that (1) it has a clear legal right to the requested relief; (2) that Secretary Husted has a clear legal duty to perform the requested relief; and (3) it lacks an adequate remedy in the ordinary course of the law. *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-0036, 985 N.E.2d 441, ¶ 14. Relator “must prove these requirements by clear and convincing evidence.” *Id.*

If a named respondent does not have a clear legal duty to perform the requested relief, they are not proper parties to the mandamus action and should be dismissed from the complaint. *See State ex rel. Kenner v. Village of Amberley*, 80 Ohio St.3d 292, 293, 685 N.E.2d 1247 (1997) (dismissing mandamus action when relators “failed to name the proper respondents . . . and the named respondent [did] not have a duty to perform any of the requested acts”); *State ex rel. Clark v. Lile*, 80 Ohio St.3d 220, 221, 685 N.E.2d 535 (1997) (noting that, when respondents have no duty to perform the requested relief, they are not proper parties).

Here, Relators fail to establish that Secretary Husted has a clear legal duty to place the proposed charter amendment on the ballot; therefore, he should be dismissed because he is not a proper party. In the entire Complaint, only four paragraphs even mention Secretary Husted. Compl. ¶¶ 1, 7, 8, 16. Relator first alleges that they are filing this mandamus action to compel the Board, “together with Respondent Ohio Secretary of State Jon Husted,” to certify the proposed amendment. *Id.* ¶ 1. Second, Relators assert that Secretary Husted does not have the authority to deny certification of a proposed charter amendment. *Id.* ¶ 7. Importantly, however,

Relators make no allegations that the Secretary actually denied the certification. *See generally id.* Third, Relators allege that the Board relied on an opinion of Secretary Husted. *Id.* ¶ 8. Lastly, Relator alleges that Jon Husted is the Secretary of State, and that he issued an opinion on August 13, 2015, finding proposed charter provisions in Athens, Fulton, and Medina Counties to be invalid. *Id.* ¶ 19.

Tellingly, none of these allegations mention any duty, let alone a clear duty, for the Secretary of State to certify the proposed charter amendment. It is true that the Complaint alleges that the Board has a duty to certify the proposal, but there are no allegations to this effect regarding the Secretary and no law supporting such a duty. *See generally id.* Furthermore, Relators do not argue in their Brief that the Secretary has any duty, but rather, focus solely on the Board's alleged duty. *See* Relators' Brief at 4-7. The fact that the Secretary has no duty in this matter is evident in Relators' prayer for relief. Relators request that "Respondents" comply with the requirements of R.C. 3501.11. Compl. at 12; *see also* Relators' Brief at 2, 6 (arguing that the Board exceeded its power under R.C. 3501.11). However, this section only details the duties of boards of elections. R.C. 3501.11 ("Each board of election shall . . ."). Nothing in R.C. 3501.11 creates a duty for the Secretary; the section imposes duties solely upon boards of elections. Accordingly, Relators have failed to show, by clear and convincing evidence, that Secretary Husted has a clear legal duty to certify the proposed amendment.

Relators' sweeping claim that the Secretary "colluded" with the Board on this matter is completely unsupported by the Complaint or the record, Relators' Brief at 14; the only allegation regarding the Secretary is that the Board relied, in part, upon his opinion to different entities when it determined not to certify the petitions. *Id.* ¶¶ 8, 16. If reliance on an opinion is collusion, then anytime anyone relies on this Court's opinions, this Court could be said to have colluded with that person. That would be an absurdity and cannot be accurate.

Because the Secretary has no clear legal duty to provide the relief requested, he is not a proper party to this action. *Kenner*, 80 Ohio St.3d at 293. Therefore, this Court should dismiss the Complaint as to Secretary Husted and deny the writ of mandamus.

### **Proposition of Law 2**

#### **The doctrine of laches bars Relators' Complaint because they waited too long to file.**

Relators' request should be denied for the simple reason that they have filed too late to be entitled to an extraordinary writ in an election case.

This Court repeatedly has applied laches, the equitable doctrine requiring parties not to delay and sit on their rights, with particular force in elections cases. *See, e.g., State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88 Ohio St.3d 187, 189, 724 N.E. 2d 775 (2000) (22-day delay barred expedited elections matter); *Paschal v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 141, 142 (1995) (election cases require “extreme diligence” and “promptest of action”); *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995); *State ex rel. Ascani v. Stark Cty. Bd. of Elections*, 83 Ohio St.3d 490, 493-94 (1998). This Court has denied a writ based on a nine-day wait, holding that the relators did not employ “the requisite diligence required in [that] case.” *Paschal*, 74 Ohio St.3d at 142.

Here, Relators also waited nine days to file this mandamus action. The Board voted on August 26, 2015, not to certify the proposed charter amendment, *see* Compl. ¶19, but Relators waited until September 4, 2015, to file for a writ of mandamus. Not only is this the same wait time disallowed in *Pashcal*, but it is even more troubling because a different Relator—the City of Youngstown—was able to file its complaint on the exact same issue within two days of the Board's vote. *See State ex. rel. City of Youngstown v. Mahoning Cty. Bd. of Elections*, Case No. 2015-1422 (complaint filed on August 28, 2015). It is obvious that the matter is not so complicated to need nine days to draft a complaint when the City of Youngstown was able to

draft and file a substantially similar complaint within two days. Therefore, Relators failed, like the *Paschal* relators, to employ the requisite diligence required to file an election case. 74 Ohio St.3d at 142. Accordingly, this Court should deny the requested writ for this reason alone.

### **Proposition of Law 3**

#### **The proposed charter amendment is unconstitutional.**

Even if the Court considers the merits of this case, the proposed charter amendment is unconstitutional and the writ should not issue.<sup>1</sup>

In this case, a decision in favor of the Relators would produce unreasonable consequences, and it would result in the waste of county and judicial resources. In the event the amendment is approved, litigation will certainly follow involving the very same issues raised in the Secretary's August 13, 2015 decision and letter. Relator's Ex. C. Engaging in time-consuming and resource-intensive litigation only to be back in front of Ohio appellate courts in the future makes little sense.

Moreover, the courts have often held that mandamus is not appropriate to order a vain act. *See State ex rel. Moore v. Malone*, 96 Ohio St.3d 417, 2002-Ohio-4821, 775 N.E.2d 812, ¶ 38 (“Mandamus will not issue to compel a vain act.”); *see also State ex rel. Beckstedt v. Eyrich*, 120 Ohio App. 338, 345, 195 N.E.2d 371 (1st Dist. 1963). It is well-established that mandamus cannot require submission of a ballot issue that “does not contain any question which a municipality is authorized by law to control by legislative action.” *State ex rel. Rhodes v. Bd. of Elections*, 12 Ohio St.2d 4, 4 230 N.E.2d 347 (1967). In *State ex rel. City of Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093, 895 N.E.2d 177, ¶¶ 26-27, this Court found it to be an abuse of discretion to deny a protest that challenged a proposed

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<sup>1</sup> The contents of the Secretary's letter are the subject of another expedited election case that was filed before this case. *See Walker v. Husted*, Sup. Ct. No. 2015-1371, filed on Aug. 19, 2015. Whether the proposed amendment is constitutional may be decided by that case.

ordinance that included “predatory language without legal effect” and that “would also not constitute a proper legislative action.”

This Court’s analysis in *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, also is instructive on this point. There, the Court acknowledged the city clerk’s discretionary authority to review initiative petitions, but found that he abused his discretion when he refused to submit the petitions for review to the board of elections because the petitions, which sought to control an administrative action, were not the proper subject of an initiative petition. *Oberlin*, 106 Ohio St.3d at ¶¶ 14-16.

The *Oberlin* Court continued, however, stating that “[d]eciding this issue will thus have the beneficial effect of resolving the entire expedited case on the issues that the parties have submitted to us for determination so as to avoid further litigation that granting the writ would surely engender.” *Id.* at ¶ 19. Finding that the clerk “should have complied with R.C. 731.28 and 731.29 by transmitting the petition and a certified copy of the ordinance to the board of elections for its signature verification, [the Court] need not grant the requested writ of mandamus if the board of elections would ultimately have been required to withhold the initiative and referendum from the ballot.” *Id.* at ¶ 17. The Court ultimately determined that the matter was not appropriately placed on the ballot, and thus denied the writ. *Id.* at ¶ 35. “It is axiomatic that ‘[m]andamus will not issue to compel a vain act.’” *Id.* at ¶ 17, citing *Moore*, 96 Ohio St.3d at ¶ 38 (alteration in original).

For the sake of judicial economy, and in order to avoid unreasonable results or the compelling of a vain act, this Court should deny the writ. As is clear from the face of the amendment, the amendment seeks to prohibit virtually all oil and gas operations within the City of Youngstown. Specifically, Section 122-3 makes it unlawful “to engage in the extraction of oil and gas within the City of Youngstown,” which would “include the use of unconventional high

volume, high pressure, horizontal and directional drilling technology, commonly known as ‘hydro-fracturing,’ and related activities.” That section also prohibits the “depositing, disposal, storage, and transportation of water or chemicals to be used in the extraction of oil and gas, and the disposal or processing of waste products from the extraction of oil and gas.” These prohibitions run directly counter to federal law, Ohio Constitution Article II, Section 36, and R.C. 1509.02, and they present a thinly disguised attempt to circumnavigate this Court’s very recent pronouncements in *State ex rel. Morrison v. Beck Energy Corp.*, \_\_\_ Ohio St.3d \_\_\_, 2015-Ohio-0485.

In *Morrison*, this Court stated that “[i]n its current form, R.C. 1509.02 centralizes regulatory authority in state government, entrusting a division of ODNR with ‘sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations’ within Ohio.” 2015-Ohio-485 at ¶ 4. In fact, the statute states that R.C. Chapter 1509 and the “rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.” R.C. 1509.02. Based upon this language, the Court struck down five municipal “home rule” ordinances as preempted by R.C. 1509.02 and ruled those subjects to be the sole and exclusive authority of the Ohio Department of Natural Resources. *Morrison*, 2015-Ohio-485, ¶ 34.

The proposed charter amendment at issue here is an unabashed attempt to make the permitting, location, and spacing of oil and gas wells and production operations unlawful.<sup>2</sup> Accordingly, this Court should deny Relator’s request for a writ.

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<sup>2</sup> Even the dissenting opinions in *State ex rel. Morrison v. Beck Energy Corp.* suggest that outright bans on oil and gas-related activities by local governments are preempted.

### III. CONCLUSION

For the reasons set forth above, this Court should dismiss Secretary of State Jon Husted from this case and additionally deny Relators' request for a writ of mandamus in its entirety.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Respondent Secretary of State's Brief* was served by electronic mail on September 13, 2015, upon the following:

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