

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, EX REL.)	CASE No. 22-0850
BRIAN M. AMES)	
)	
Relator,)	Expedited Election Matter
)	Pursuant to S.Ct.Prac.R. 12.08
v.)	
)	
OHIO SECRETARY OF STATE, <i>et al.</i>)	ORIGINAL ACTION IN
)	MANDAMUS
)	
Respondent.)	

RESPONDENT SUMMIT COUNTY BOARD OF ELECTIONS'
AMENDED ANSWER BRIEF

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Now comes Respondent, Summit County Board of Elections (“SCBOE”), by and through undersigned counsel, and respectfully move this Court to deny the instant Writ.

MEMORANDUM IN SUPPORT

I. BACKGROUND

The Ohio Secretary of State possesses the authority and duty to “issue instructions by directives ... to members of the boards [of elections] as to the proper methods of conducting elections.” R.C. 3501.05(B). As a result of litigation regarding redistricting in Ohio, this Court and the United States Court for the Southern District have issued several decisions and orders bearing on the conduct of elections in 2022. *See, e.g. State ex rel. DeMora v. LaRose*, -- , 2022-Ohio-2173, -- N.E.3d --; *Gonidakis v. LaRose*, -- F.Supp3d ---, 2022 WL 1175617 (S.D. Ohio, April 20, 2022). Consequently, in 2022 we have two separate statewide primaries.¹ One found codified in Ohio law and the other ordered by a Federal Court. The fact that they were arrived at by separate and distinct methods does not make them one election as argued by Relator.

Specifically, on May 28, 2022, Respondent LaRose issued Secretary of State Directive 2022-34 which is included in Relator’s Evidence. In Directive 2022-34 it is clear there is a separate primary election to held on August 2nd for the offices of State Representative, State Senator, and Member of the State Central Committee. See Relator’s Brief, Ex. 14. Further, this Court in *State ex rel. DeMora v. LaRose*, -- , 2022-Ohio-2173, -- N.E.3d – held that that August 2nd primary election is a separate primary election from the primary held on May 3, 2022, as deadlines for each were separate and distinct by operation of Ohio law.

¹ May 3rd and August 2nd.

II. LAW AND ARGUMENT

A. Writ of Mandamus is not appropriate in this case as the Summit County Board of Elections has followed applicable directives from the Secretary of State.

To be entitled to a writ of mandamus, a relator must prove, by clear and convincing evidence, that (1) he has a clear legal right to the requested relief; (2) there is a clear legal duty on the part of respondents to provide it; and (3) there is a lack of an adequate remedy in the ordinary course of the law. *State ex rel. Dunn v. Plain Local School Dist. Bd. of Education*, 159 Ohio St.3d 139, 2020-Ohio-339, 149 N.E.3d 460 (2020).

In the instant matter, Relator has failed to demonstrate, and cannot demonstrate, that he has a clear legal right to the requested relief. Nor can Relator demonstrate a clear legal duty on the Respondents' part to provide it. Thus, mandamus is not appropriate. Furthermore, if Relator disagreed with the Federal Court order, he could have intervened in that forum at that time. Thus, Relator had a remedy available, which he opted not to pursue. His failure to act does not implicate mandamus relief.

B. Relator Ames' Claim is Barred by Laches.

"Extreme diligence and promptness are required in election-related matters," and if a party "seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches may bar the action." *State ex rel. Comm. for the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, 776 N.E.2d 1041, ¶ 16 (quotations omitted); see also *State ex rel. Carberry v. Ashtabula*, 93 Ohio St.3d 522, 523, 757 N.E.2d 307 (2001); *State ex rel. Hills Communities, Inc. v.*

Clermont Cty. Bd. of Elections, 91 Ohio St.3d 465, 467, 746 N.E.2d 1115 (2001). Thus, a delay in filing expedited election claims may constitute laches, thereby “precluding a consideration of the merits of the claims.” *State ex rel. Valore*, 87 Ohio St.3d 144, 146, 718 N.E.2d 415.

The elements of laches are as follows: (1) an unreasonable delay or lapse of time in asserting a right; (2) the absence of an excuse for the delay; (3) the knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. See *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995). Further, Relator has the burden of establishing that he “acted with the requisite diligence in extraordinary writ cases involving elections.” *State ex rel. Manos v. Delaware Cty. Bd. of Elections*, 83 Ohio St.3d 562, 564, 1998-Ohio-712, 701 N.E.2d 371.

Relator’s delay in seeking relief is unreasonable, and without excuse. What is more, Relator had actual knowledge of the perceived injury, yet he failed to act. The Federal District Court issued an Order on May 27, 2022, directing “Secretary of State Frank LaRose to push back Ohio’s state primaries to August 2, 2022, and to implement Map 3 for this year’s elections *only*.” Exhibit A. On April 20, 2022, the U.S. District Court for the Southern District of Ohio issued an opinion, in which it stated that, “if the State does not act before May 28, we will order the primary to be moved to August 2 and Map 3 be used for only the 2022 election cycle.” *Gonidakis I*, at *30. On May 27, 2022, this same court followed through on its decision. Relator waited until July 8, 2022, to file the instant action.

In addition to the decisions in *Gonidakis I*, Secretary LaRose also issued publicly available Directives repeatedly confirming the need for a second primary election. On

March 23, 2022, SOS Dir. 2022-31 was issued setting forth a revised form of the ballot because “offices and candidates for the Ohio House, Ohio Senate, or State Central Committee will not appear on the ballot. This is the only currently lawful and reasonable option to continue to move forward toward the May 3, 2022, Primary Election at this unprecedented point in time.” See Relator’s Brief, Exhibit 11.

On April 1, 2022, Secretary LaRose issued SOS Dir.2022-32, which stated:

The federal court decided that they would not intervene at this time to select new Ohio House and Senate district plans, nor would the court move the primary election date for all other races not affected by General Assembly redistricting so there could be a single primary date. Thus, this Directive provides instructions to proceed with the May 3, 2022 Primary Election without the offices of Ohio House, Ohio Senate, and State Central Committee on the ballot.

Exhibit B. On May 28, 2022, the Secretary of State issued Directive 2022-34, providing instructions for the August 2, 2022 primary election based on the Federal Court’s May 27, 2022 Order previously discussed herein. See Relator’s Brief, Ex. 14.

Relator had ample opportunity as of March 23, 2022 to attempt to challenge the removal of the offices of Ohio House, Ohio Senate, and State Central Committee from the May 2, 2022 primary. Thus, under his theory that only one primary election is permitted, he should have sought relief prior to the May primary. Rather, Relator stood back while the May primary was held and waited over 2 months to challenge rules surrounding the August primary. What is more, Relator’s own evidence (July 8, 2022 email communications from Secretary LaRose’s Office and the Portage County Board of Elections) only serves to underscore his delay on questions, which were apparent months earlier. See Relator’s Complaint, Exhibits 1 and 2.

Finally, when considering the doctrine of laches, “[p]rejudice to the other party must be material before laches will bar relief.” *Jones v. LaRose*, Slip Opinion No. 2022-

Ohio-2445, ¶16 citing *State ex rel. Pennington v. Bivens*, 166 Ohio St.3d 241, 2021-Ohio-3134, 185 N.E.3d 41, ¶ 26. As stated above, Relator waited until Friday, July 8, 2022, to file his complaint. Any changes in process and rules at this late stage of the election will have a material, negative impact on, and unfairly prejudice Respondents, as well as voters.

C. CONCLUSION

Accordingly, Respondent respectfully requests that this Court deny Relator's Complaint for the issuance of a Writ of Mandamus and any alternative relief requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2022, the foregoing Amended Answer Brief of Respondent Summit County Board of Elections was filed electronically and served by electronic mail upon the following:

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