IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* One Person One Vote, *et al.*, **Relators,** **v.** **Frank LaRose, in his official capacity as Ohio Secretary of State,** **Respondent.**	**Case No. 2023-0630** Original Action in Mandamus Pursuant to Article XVI, Section 1 of the Ohio Constitution Expedited Election Case Pursuant to Supreme Court Rule of Practice 12.08 Peremptory and Alternative Writs Requested

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INTRODUCTION

The August 8 election is unlawful because it violates unambiguous provisions of the Revised Code, which allow elections on constitutional amendments only in November, May, or March. Those provisions are not unconstitutional under Article XVI, Section 1 of the Ohio Constitution. They are directly authorized by it—they are the means by which the General Assembly has prescribed when elections on constitutional amendments may be held. And they cannot be superseded by a mere joint resolution like S.J.R.2.

The Secretary has no answer to this. His arguments about the Revised Code ignore its plain text and contradict his testimony supporting statutory revisions enacted just five months ago. The Secretary praised those revisions then for abolishing statewide August elections; he argues now that they did no such thing. And he fails to explain how Article XVI's authorization for the General Assembly to prescribe dates for constitutional amendment elections could possibly make statutes unconstitutional for doing just that.

Because Relators are correct on the merits, and because the Secretary does not dispute that the other criteria for mandamus are satisfied, the Court should grant the writ.

ARGUMENT

I. The Revised Code renders the August 8 election illegal.

The submission of the Amendment at an August 8 election violates the Revised Code. The Revised Code unambiguously prohibits *all* statewide elections in August. It authorizes elections on amendments only in March, May, and November. And it prohibits officials from conducting elections except as the Revised Code allows. The Secretary's contrary arguments ignore the plain text of the relevant statutes and the relationships between them.

A. Sections 3501.01(D) and 3501.022 prohibit statewide August special elections.

Start with Section 3501.01(D). That provision defines "special election" as "*any* election

other than those elections defined in other divisions of this section"—that is, other than general, municipal, and state elections in November, and primary elections in March or May. R.C. 3501.01(D) (emphasis added); *see also* R.C. 3501.01(A), (B), (C), (E). It then provides that special elections "may be held *only*" in May, in November, in August "in accordance with section 3501.022 of the Revised Code," on the day authorized for a local primary election, or in March in a presidential year.

It is impossible to read Section 3501.01(D)'s limitation on when special elections may be held as covering only local elections, as the Secretary urges. LaRose Br. 9–10. The limitation expressly applies to *all* special elections, providing that "[a] special election may be held only" on the dates that follow. R.C. 3501.01(D). It immediately follows the broad statutory definition of "special election" as comprising "any election other than those elections defined in other divisions of this section." *Id.* And the phrases the Secretary cites in urging a narrower reading unambiguously modify only particular dates when elections may be held, rather than the scope of the limitation as a whole. The Secretary ignores the overall structure of the statute to argue that it applies only to local elections.

Specifically, Section 3501.01(D)'s limitation on special elections consists of a series of options for when special elections may be held, each set off by commas:

> A special election may be held only **[1]** on the first Tuesday after the first Monday in May or November**, [2]** on the first Tuesday after the first Monday in August in accordance with section 3501.022 of the Revised Code**,** or **[3]** on the day authorized by a particular municipal or county charter for the holding of a primary election**, [4]** except that in any year in which a presidential primary election is held, no special election shall be held in May, except as authorized by a municipal or county charter, but may be held on the third Tuesday after the first Monday in March.

Id. (emphasis added). Because of that punctuation and structure, the references to "section 3501.022 of the Revised code" and to dates "authorized by a municipal or county charter" on

which the Secretary relies, LaRose Br. 9, unambiguously restrict only the circumstances in which special elections may be held under the second option (August) or the third (on other dates authorized by a local charter). They do not restrict the scope of the limitation as a whole, which otherwise restricts special elections to May, November, and March in presidential years.

The Secretary also argues that Section 3501.01(D)'s limitation cannot apply to special elections on constitutional amendments because, he says, Section 3501.01(D) would allow such an election to be set only in May or November, while Section 3501.02(E) allows March special elections in presidential years. LaRose Br. 12. But Section 3501.01(D), too, provides for March special elections in presidential years: the last listed option provides that "in any year in which a presidential primary election is held, no special election shall be held in May . . . but *may be held on the third Tuesday after the first Monday in March*." R.C. 3501.01(D) (emphasis added). The Secretary appears to have simply overlooked this part of the statute.

As for Section 3501.022, it indeed authorizes only local August special elections, as the Secretary says. LaRose Br. 9. But that is Relators' point. Section 3501.01(D) provides that August special elections may be held only "in accordance with section 3501.022 of the Revised Code," and Section 3501.022, by its plain terms, authorizes only *local* special elections. As a result, the only reasonable reading of this statutory scheme is that *statewide* special elections are *not* allowed in August. Thus, contrary to the Secretary's argument, Sections 3501.01(D) and 3501.022 together unambiguously prohibit statewide special elections in August and allow them only in November, May, or (in presidential years) March.

The context in which Sections 3501.01(D)'s and 3501.022's discussions of August special elections were enacted confirms that they prohibit statewide special elections in August. The General Assembly enacted those provisions just five months ago. Relators' Br. 2. Eliminating

statewide August elections was their entire purpose. Relators' Br. 2–3. The Secretary himself testified in support of the legislation, explaining that he favored it *because* it would eliminate statewide elections in August. Relators' Br. 2–3. His argument that the provisions have nothing to say about statewide August elections is a stunning about-face.

B. Sections 3501.02(E), 3501.40, and 3509.01 require elections on constitutional amendments to be held in March, May, or November.

Section 3501.02(E) confirms that elections on constitutional amendments may not be held in August. It expressly addresses such elections and provides that they may be held during the November general election or during a May or March primary. The Secretary argues that this provision is a mere grant of "permissive authority." LaRose Br. 10–11. But he ignores Relators' argument that the provision's introductory clause—providing that elections "*shall* be held as follows"—shows that the options that follow are the only permissible ones, and he ignores the negative-implication canon, which prevents the General Assembly from scheduling an election on a constitutional amendment outside of the list of options that Division (E) lays out. *See* Relators' Br. 9–10. Both those arguments are directly responsive to the Secretary's construction, which hinges on the use of the word "may" in Division (E). Yet his brief never even acknowledges either argument, let alone refutes them.

Moreover, despite the Secretary's emphasis on reading and construing statutes "*in pari materia*," LaRose Br. 11, his argument that Section 3501.02(E) is merely permissive fails to account for the broader statutory scheme. Several provisions of the Revised Code make clear that elections may be held only as the Revised Code authorizes. *See* R.C. 3501.40, 3509.01.

Most directly, Section 3501.40 expressly prohibits any public official from "caus[ing] an election to be conducted other than in the time, place, and manner prescribed by the Revised Code." That prohibition applies "notwithstanding any other contrary provision of the Revised

Code," and it applies to "*any* elected or appointed officer, employee, or agent of the state" or local government. R.C. 3501.40. Even if Section 3501.02(E) were merely permissive, holding an election on a date other than those authorized in that provision would openly violate Section 3501.40.

The Secretary has no answer to Section 3501.40. He calls the provision "irrelevant" because he says the General Assembly had constitutional rather than statutory authority to set the election for August. LaRose Br. 12. But the Secretary's reliance on extra-statutory authority does not help him under Section 3501.40's plain text, which prohibits conducting elections "other than in the time, place, and manner prescribed *by the Revised Code*." Unless Section 3501.40 is unconstitutional—and for the reasons given below, it is not—it unambiguously prohibits the Secretary from conducting an election except as the Revised Code authorizes. And the Secretary's reliance on constitutional rather than statutory authority effectively concedes that the August election violates the Revised Code.

Section 3509.01 leads to the same conclusion. It authorizes the provision of absentee ballots at primary elections, general elections, and "special election[s] to be held on the day specified by division (E) of section 3501.01 of the Revised Code for the holding of a primary election, designated by the general assembly for the purpose of submitting constitutional amendments proposed by the general assembly to the voters of the state." Its failure to account for August statewide special elections is a strong indication that the Revised Code does not authorize such elections. *See* Relators' Br. 11. The Secretary ignores this argument, too.

In sum, Revised Code Sections 3501.01(D), 3501.02(E), and 3501.40 unambiguously prohibit the submission of the Amendment at the August 8 election. Unless those restrictions are invalid, the election cannot be held.

II. *Foreman* and Article XVI do not authorize the Secretary to conduct an election that the Revised Code prohibits.

Nothing in this Court's precedents or the Ohio Constitution authorizes the Secretary to conduct an election that the Revised Code prohibits. This Court's decision more than fifty years ago in *State ex rel. Foreman v. Brown*, 10 Ohio St.2d 139, 226 N.E.2d 116 (1967), is not controlling because it concerned a very different statutory scheme. And Article XVI's grant of authority to the General Assembly to "prescribe" elections on constitutional amendments *authorizes* the Revised Code provisions governing the scheduling of elections on proposed amendments; it does not *prohibit* them.

A. *Foreman* does not control.

The Secretary's reliance on *Foreman* is misplaced because that case involved a very different statutory scheme. LaRose Br. 13. The principal holding in *Foreman* was that there was "no conflict between any statute" in force at the time and the General Assembly's action calling a special election by joint resolution, 10 Ohio St.2d at 142, so the election could go forward. As Relators' opening brief explained, Relators' Br. 14, and as the foregoing discussion confirms, such a holding is impossible in this case, where three separate provisions of the Revised Code now prohibit the August 8 election.

Foreman also held that Article XVI standing alone gave the General Assembly the authority to schedule a special election by joint resolution, even "without enacting a statute." *Foreman*, 10 Ohio. St.2d at 139. But that ruling does not control either. The question here is not whether the General Assembly may call a special election by joint resolution where statutes are silent. Rather, the question is whether such an election may occur where it violates three separate statutes the General Assembly has enacted.

The Secretary seems to recognize this, and so purports to find a second constitutional

"ruling" in *Foreman*: that "a conflicting statute must yield to Article XVI, Section 1 authority." LaRose Br. 13–14 (citing *Foreman*, 10 Ohio St.2d at 142). But there was no such "ruling." *Foreman* went out of its way to make clear that it was *not* settling the question whether such a statue would be invalid, explaining that "[i]n the instant case, it is not necessary for us to make . . . a holding of unconstitutionality because there is no conflict between any statute" and the joint resolution calling the special election. *Foreman*, 10 Ohio St.2d at 142. The majority's speculation that such a holding would be "require[d]" in a case presenting the issue, *id.*, is pure *dicta*, and therefore "has no binding effect on this court's decision in this case," *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 70 Ohio St.3d 281, 284, 638 N.E.2d 991 (1994).

B. The Revised Code provisions are authorized by Article XVI, not inconsistent with it.

Here, unlike in *Foreman*, the Revised Code clearly prohibits the election that the General Assembly purported to schedule by joint resolution. But there is still no constitutional problem, because the conflict is only between the Revised Code and the *joint resolution*; there is no conflict between the Revised Code and *Article XVI itself*. Article XVI is a grant of authority to the General Assembly, not a restriction on it. And the governing statutory provisions are themselves valid exercises of the General Assembly's Article XVI authority to prescribe election dates for constitutional amendments.

The Secretary points out that Article XVI authorizes the General Assembly to "prescribe," not just "prescribe by law," election dates for proposed amendments. LaRose Br. 5–6. And the Secretary argues that "[n]othing in the definition of 'prescribe' requires enacting a statute." LaRose Br. 6. But nothing in the definition of 'prescribe' forbids enacting a statute, either. The Secretary wants the Court to read into Article XVI a limitation that is not there—that a special election may be prescribed only by joint resolution. Because Article XVI allows the General Assembly to enact

statutes to prescribe the submission of constitutional amendments, Article XVI authorizes Sections 3501.01(D), 3501.01(E), and 3501.40 of the Revised Code, so there is no conflict between those provisions and the Constitution.[1]

The lack of any conflict between the Revised Code provisions and Article XVI means the Court has no need or basis to invalidate those statutes, as the Secretary urges. *See* LaRose Br. 6–7, 13–14. Acts of the General Assembly are "entitled to a strong presumption of constitutionality," and so will not be invalidated unless the challenger establishes the unconstitutional nature of the statute "beyond a reasonable doubt." *State v. Hochhausler*, 76 Ohio St.3d 455, 458, 668 N.E.2d 457 (1996). Statutes are unconstitutional only if they are "incompatible with" the Ohio Constitution. *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2932, 951 N.E.2d 405, ¶ 44. And there is no incompatibility here: Article XVI authorizes the General Assembly to prescribe election dates, and the statutes in question do just that.

Far from supporting the Secretary, *Zeigler* illustrates the point. In that case, this Court held that Revised Code Section 321.38 was facially unconstitutional. Section 321.38 provided that "[*i*]*mmediately* upon institution" of a recoupment suit against a county treasurer, "the board of county commissioners may remove [the] county treasurer" named in the suit. *Id.* ¶ 30 (quoting the statute) (emphasis added). The problem was Article II, Section 38 of the Constitution, which provides that "[l]aws shall be passed providing for the prompt removal from office, *upon complaint and hearing*, of all officers . . . for any misconduct involving moral turpitude or for other cause

[1] Moreover, and unlike under the relators' argument in *Foreman*, the Revised Code provisions here leave the General Assembly free to prescribe a special election date by joint resolution, not just a general election date. The General Assembly just has to pick one of the special election dates the Revised Code allows—either March or May, depending on the year. *See* R.C. 3501.02(E). So even if the Court inferred from Article XVI and *Foreman* that the General Assembly must be free to choose either a general or special election date by joint resolution, there would still be no conflict between the Revised Code and Article XVI.

provided by law." (Emphasis added.) The Court held that Section 321.38 was invalid because it did not require the constitutionally mandated complaint and hearing. *Id.* ¶ 33. In *Zeigler*, the constitutional text thus made explicit that any law providing for prompt removal from office had to provide for notice and a hearing as well, and Section 321.38 contained no such provision. And *Ziegler*'s statement that "[w]hat the Constitution grants, no statute can take away" addressed the grant of a procedural right to a private citizen, which the General Assembly could not strip by statute. *Id.* ¶ 39 (quoting *State ex rel. Hoel v. Brown*, 105 Ohio St. 479, 488, 138 N.E. 230 (1922)).

Here, in contrast, Article XVI does not say that "the General Assembly shall prescribe the submission of amendments at either a special or a general election by joint resolution," or words to that effect. It just says that the General Assembly "may prescribe" the manner of submission, without further restriction. The General Assembly did so in the Revised Code; there is no incompatibility. Thus, to the extent *Zeigler* is pertinent, it supports Relators.[2]

The Secretary is also wrong to suggest that Relators' argument entails the General Assembly improperly "legislat[ing] away its constitutional prerogative" to prescribe special election dates. LaRose Br. 2. The prerogative that the 1912 amendment conferred on the General Assembly, *see* LaRose Br. 6–7, was to submit constitutional amendments to the people at special as well as general elections. Before the 1912 amendment, such amendments could be submitted only at general elections—no matter what the governing statutes said. The 1912 amendment left the General Assembly free to prescribe special election dates by either statute or joint resolution,

[2] The Secretary also cites *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062, in passing, LaRose Br. 14, but does not explain how it supports his argument. Underdeveloped arguments are waived. *State ex rel. Cox v. Youngstown Civ. Serv. Comm'n*, 165 Ohio St.3d 240, 2021-Ohio-2799, 177 N.E.3d 267, ¶ 28. And *Ohio Academy*, which concerned a legislative intrusion on judicial authority, sheds no light on Article XVI, which grants authority to the General Assembly itself.

and the General Assembly exercised that authority when it enacted the relevant provisions of the Revised Code. In *Zeigler*'s terms, the grant at issue was a grant of power *to* the General Assembly, which the General Assembly exercised—no one, and no statute, took it away. *Zeigler*, 2011-Ohio-2932 ¶ 39. Nothing the Secretary cites supports the conclusion that the General Assembly may elect to exercise its constitutional prerogative by duly enacting statutes, then simply ignore those statutes.

III. S.J.R. 2 does not supersede the Revised Code sections that render the August 8 election legal.

Several provisions of the Revised Code unambiguously prohibit the August 8 election, and Article XVI does not supersede that prohibition or provide any basis to invalidate those provisions. Thus, the only remaining issue is how to resolve the conflicting mandates that S.J.R. 2 and the Revised Code impose on the Secretary with regard to the August 8 election. For two reasons, the Court should resolve that conflict in favor of the Revised Code and hold that the August 8 election is illegal.

First, all the Court's relevant precedents treat statutes as superior to joint resolutions when the two conflict. Relators rely on these precedents in their opening brief, Relators' Br. 16–17, and yet again the Secretary elects not to engage at all. To briefly reiterate: *State v. Kinney* established well over a century ago that the provisions of the Revised Code "can neither be repealed nor amended by a joint resolution of the general assembly." 56 Ohio St. 721, 724, 47 N.E. 569 (1897). And *Cleveland Terminal & Valley Railroad Co. v. State ex rel. Attorney General* considered the precedence of statutes over joint resolutions so self-evident as to "not need the citation of authorities." 85 Ohio St. 251, 294, 97 N.E. 967 (1912). The Secretary cannot and does not distinguish these controlling precedents.

Second, the structure of the Ohio Constitution itself gives statutes precedence over joint

resolutions and so confirms this Court's longstanding jurisprudence. Article II, Section 15(D) mandates that "[n]o law shall be . . . amended unless the *new act* contains . . . the section or sections amended, and the section or sections amended *shall be repealed*." (Emphasis added.) Thus, the General Assembly may not repeal a statute by joint resolution, only by a "new act"—which helps to explain the efforts to enact Senate Bill 92 and House Bill 144.[3] Similarly, Article II imposes an array of requirements to enact statutes that do not apply to joint resolutions, chief among them presentment and the possibility of referendum. *Compare* Ohio Constitution, Article II, Sections 1c, 15(E), 16 *with* Article II, Section 15(F). These additional requirements to enact statutes provide a clear constitutional basis to treat duly enacted statutes as superseding joint resolutions with which they conflict.

IV. Because the August 8 election is illegal, all the criteria for a writ of mandamus are satisfied.

The Secretary contests only whether Relators are correct about the underlying questions of law in this case, conceding that Relators' entitlement to relief is entirely dependent on the merits. That is for good reason. This Court has repeatedly "granted writs of mandamus to compel the Secretary of State to strike proposed constitutional amendments from the ballot" in cases that "involved challenges to constitutional amendments proposed by joint resolution of the General Assembly to be submitted to electors" because the Ohio Supreme Court has "exclusive, original jurisdiction" to "determine the propriety of the placement on the ballot of the constitutional

[3] Contrary to the Secretary's brief at 15, Relators do not speculate improperly about the General Assembly's knowledge and motives; they only note that the General Assembly's actions were consistent with Relators' plain-text argument. In any event, *Billington v. Cotner*, 25 Ohio St.2d 140, 267 N.E.2d 410 (1971), is beside the point. *See id.* (holding only that parol evidence cannot establish "compliance with a mandatory constitutional requirement" and noting that the question at issue did not involve "seeking to discover . . . legislative intent").

amendment proposed by joint legislative resolution." *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶¶ 25–26; *see also State ex rel. Minus v. Brown*, 30 Ohio St.2d 75, 283 N.E.2d 131 (1972) (granting a writ of mandamus to compel the Secretary of State to strike a legislatively proposed constitutional amendment from the ballot); *State ex rel. Roahrig v. Brown*, 30 Ohio St.2d 82, 282 N.E.2d 584 (1972) (same). *Amicus curiae* Joseph Platt's argument that mandamus is improper does not address and cannot overcome this long line of authority.

Thus, if the Court concludes that the August 8 election is illegal, the Court should mandate that the Secretary remove the Amendment from the August ballot, rescind the directive authorizing the county boards to proceed with the election, and instruct the boards that the election should not go forward.

CONCLUSION

For the foregoing reasons, and those in their complaint and merit brief, Relators ask that this Court issue their requested writ of mandamus.

Dated: May 25, 2023

Respectfully submitted,

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I hereby certify that the foregoing was sent via email this 25th day of May 2023 to the following:

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