IN THE COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

BELINDA WARD, ET AL.,	
Plaintiffs,	Case No. 2011-CVH-1847
vs.	JUDGE MCBRIDE
JOHN R. KASICH, ET AL.,	
Defendants.	

MOTION TO DISMISS SUBMITTED BY DEFENDANTS-INTERVENORS OHIOANS FOR FAIR DISTRICTS AND DAVID A. LANE AND DEFENDANTS OHIO DEMOCRATIC PARTY AND CHRIS REDFERN

Defendants-Intervenors Ohioans For Fair Districts and David A. Lane ("Defendants-Intervenors") and Defendants Ohio Democratic Party and Chris Redfern ("Defendants ODP") hereby move the Court to dismiss Plaintiff Belinda Ward's ("Plaintiff") and Plaintiff-Intervenor Hon. Steven Latourette's ("Plaintiff-Intervenor") Complaints as Plaintiff's and Plaintiff-Intervenor's claims are premature, i.e., not ripe, as well as moot. The bases for this Motion are set forth in the accompanying Memorandum.

Respectfully submitted,

Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072398)
MCTIGUE & MCGINNIS LLC
545 East Town Street
Columbus, OH 43215
Tel: (614) 263-7000
Fax: (614) 263-7078
dmctigue@electionlawgroup.com
mmcginnis@electionlawgroup.com
ccolombo@electionlawgroup.com
Counsel for Defendants-Intervenors Ohioans For Fair Districts and David A. Lane and Defendants Ohio Democratic Party and Chris Redfern

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. Facts and Introduction

On September 26, 2011, Ohio Governor John Kasich signed and filed Substitute House Bill 319 ("H.B. 319") with the Ohio Secretary of State's Office. H.B. 319 reapportions the State into 16 Congressional districts based upon the 2010 decennial census data. However, contrary to the Ohio Constitution, the General Assembly sought in the legislation to give the new districts an immediate effective date and prevent citizens from exercising their right of referendum on the new districts. On October 14, 2011, the Ohio Supreme Court unanimously ruled in *State ex rel. Ohioans for Fair Districts v. Husted*, 2011-Ohio-5333, that the provisions of H.B. 319 creating the new districts are subject to referendum, and that under the Ohio Constitution the sections creating the districts do not become effective until 90 days after the bill was filed by the Governor in the Office of the Secretary of State. Three days later, on October 17, 2011, Plaintiff filed the Complaint in the pending action.

Although the Ohio Supreme Court ruled that H.B. 319 is subject to referendum, no such referendum petition has yet been filed. The deadline for filing the referendum petition is not until December 25, 2011 yet Plaintiff filed her Complaint in this case a full sixty-nine days before this date and approximately one hundred days before the legal sufficiency of a referendum petition would be determined.

II. Argument

A. Claims are Premature/ Not Ripe

"[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985).

Plaintiff's and Plaintiff-Intervenor's claims are premature and would not become "ripe" until and unless a referendum petition on H.B. 319, containing sufficient valid signatures of 231,147 Ohio electors, is actually filed with the Secretary of State and validated by Ohio's county board of elections. This process entails the Secretary of State's Office sorting and delivering the applicable part-petitions to each respective county board of elections for each board's review. The boards are given a specified period of time, generally two to four weeks, to review the validity of the signatures and to certify the number of valid signatures to the Secretary of State's Office. The Secretary of State would then issue a letter of sufficiency if there are at least 231,147 valid signatures and at least 44 counties have valid signatures in excess of 3% of votes cast at the previous gubernatorial election. It is fairly common for these thresholds to not be met on the first attempt, as was the situation with the H.B. 194 referendum petition in recent months, in which case the Secretary of State would issue a letter of deficiency and grant petitioners an additional ten days to collect supplemental signatures. The petitioners could then file supplemental part-petitions and signatures with the Secretary of State's Office. Once again, the Secretary of State's Office would sort and deliver part-petitions to the applicable boards of elections for review. The boards, in turn, would report the results of their validation of the supplemental signatures to the Secretary of State. The Secretary of State would then issue a new letter of sufficiency or deficiency. All told, this process would not be complete until at least the third or fourth week of January 2012, at the earliest. Plaintiff and Plaintiff-Intervenor's cases would not be ripe at the earliest <u>until and unless</u> a referendum petition on H.B. 319 is filed and determined to have sufficient valid signatures to place the issue on the ballot.

H.B. 319 is scheduled to take effect on December 26, 2011, ninety days after September 26, 2011, i.e., the date that the bill was filed by the Governor in the office of the Secretary of

State. *See State ex rel. Ohioans for Fair Districts v. Husted*, 2011-Ohio-5333 (*citing* Ohio Constitution, Article II, Section 1(c)). If a referendum petition is not filed, or filed with an insufficient number of signatures, then the new congressional districts outlined in H.B. 319 will automatically take effect on December 26, 2011. To demonstrate that these claims are premature, what would be the relevance of this lawsuit if no referendum petition is filed on or before December 25, 2011 or if a petition is filed but fails to qualify for the ballot? There would be nothing for the Court to decide. This illustrates that the entire lawsuit is contingent upon the occurrence of future events, which would need to include both the filing of and certification of the validity of a referendum petition. In short, Plaintiff's and Plaintiff-Intervenor's claims of violations of the constitutional rights of voters requiring the protection of this Court are entirely based upon speculation about events that may or may not occur in the future.

Plaintiff's action is premature even without the "threat" of a referendum petition being filed. Plaintiff is acting under the mistaken premise that the Ohio Supreme Court issued a stay of H.B. 319 and that the congressional districts established in 2001 are in effect for the 2012 congressional elections. Plaintiff, for example, states that "the effective date of [H.B. 319] is stayed until at least January 12, 2012." (Plaintiff's Complaint ¶8). This is simply not true as the Ohio Supreme Court did not issue a stay of H.B. 319, which would have kept the districts established in 2001 in place, but rather held that Sections 1 and 2 of the Act are subject to referendum. This is illustrated by the fact that all candidates that filed by the December 7, 2011 deadline did so pursuant to the districts established by H.B. 319 and no candidates did so under the 2001 districting plan.

Plaintiff's Complaint asks for the following in her prayers for relief:

> (a) Declare that the current Congressional Districts [are] invalid for failure to comply with the requirements of the United States Constitution;
>
> (b) Enjoin Defendants from using the current Congressional Districts in any future primary or general election(s);
>
> (c) Redraw the current Congressional Districts. . .

(Plaintiff Complaint, pp. 11-12).

Similarly, Plaintiff-Intervenor asks for the Court to make a series of declarations about: the congressional districts that are set to be replaced by H.B. 319; about the legality of H.B. 319 which has yet to take effect; and events that will not occur with any certainty. (Plaintiff-Intervenor Complaint, pp. 16-17).

These prayers for relief are premature as Defendant state officials have not attempted to utilize the congressional districts implemented in 2001, which were based upon the 2000 census data, but rather the General Assembly adopted and the Governor signed H.B. 319 to create new congressional districts. These new districts will go into effect well in advance of both the March and June primaries, unless a sufficient referendum petition is filed. Accordingly, it was and is premature for the Plaintiff to request the Court to intervene to redraw congressional districts as the General Assembly has already engaged in that process. Further, it was and is premature for the Plaintiff-Intervenor to request the Court to issue advisory opinions about H.B. 319, which is a bill that does not take effect until December 26, 2011.

It must be a matter of last resort to invoke judicial remedies in a redistricting dispute because the redistricting process is a quintessential legislative process. Courts should not intervene in the process where a legislative solution is available. The Court should not intervene in this matter since the Ohio General Assembly has already adopted a redistricting plan, H.B. 319, which will naturally take effect on its own unless some undetermined, speculative event

occurs in the future. In *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982)(*citing White v. Weiser*, 412 U.S. 783, 794-795), the United States Supreme Court stated:

> From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment. . . . Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'

Additionally, this Court should not intervene when further legislative action is still possible before a referendum petition may be filed and even after a referendum petition is filed. For example, the General Assembly recently illustrated the ability to quickly react to even the prospect of a referendum petition being filed. The Ohio Supreme Court had ruled on October 14, 2011 that H.B. 319 was subject to referendum. In response, the General Assembly passed Sub. H.B. 318 only seven days later, on October 21, 2011, which moved the primary date for candidates of the United States House of Representatives from March 6, 2012 to June 12, 2012. The passage of H.B. 318 illustrates that, even if a referendum petition is filed on H.B. 319, the General Assembly has the ability to promptly enact changes to the redistricting schedule and plan. The passage of H.B. 318 also provides a new window of time until March 14, 2012, which is the filing deadline for congressional candidates, for the General Assembly to further resolve any redistricting issues. The obvious reason the General Assembly moved the Congressional

primary date was to allow for additional time for it, the General Assembly, to enact a new or revised redistricting plan in the event that a sufficient referendum petition is filed. Yet, the Plaintiffs in this case, seek to take that option away from the General Assembly and give it to the Court.

For these reasons, it was improper for Plaintiff and Plaintiff-Intervenor to file Complaints based upon speculation of events that have not yet and may not occur. The pending litigation is premature and must be dismissed.

B. Plaintiff-Intervenor's Claims are Moot

An Ohio Court of Appeals recently summarized the Doctrine of Mootness as follows:

> The doctrine of mootness is rooted in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint. While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question. It is not the duty of the court to answer moot questions, so if during the course of a proceeding an event occurs, without the fault of either party, which renders it impossible for the court to grant any relief," the court will refuse to rule on the moot question.

Bradley v. Ohio State Department of Jobs & Family Servs., 2011- Ohio- 1388 (10th Dist.)(citations omitted).

Plaintiff-Intervenor requests for this Court to "Declare, under R.C. 2721.03, that: . . . Sections 1 and 2 of Sub. H.B. 319 are presently in effect. . ." (Plaintiff-Intervenor Complaint, p. 16). This is a moot issue as the Ohio Supreme Court already squarely decided the effectiveness of H.B. 319 in *State ex rel. Ohioans for Fair Districts v. Husted*, 2011-Ohio-5333. The Supreme Court stated that "Unless a valid referendum petition is timely filed with the secretary of state, these sections of H.B. 319 will become effective 90 days from the September 26, 2011 date the bill was filed by the governor in the office of the secretary of state." *Id.* at ¶1.

Further, Plaintiff-Intervenor requests a declaration that candidates must file their declaration of candidacy by December 7, 2011. (Plaintiff-Intervenor Complaint, p. 16). That date has already passed as of the date of the filing of this motion and is now moot.

III. Conclusion

For the reasons stated above, Defendants-Intervenors' and Defendants ODP's Motion to Dismiss should be granted, and the Court should grant all other relief it may deem just and equitable including the award of attorneys' fees to Defendants-Intervenors and Defendants ODP.

Respectfully submitted,

Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072398)
McTigue & McGinnis LLC
545 East Town Street
Columbus, OH 43215
Tel: (614) 263-7000
Fax: (614) 263-7078
dmctigue@electionlawgroup.com
mmcginnis@electionlawgroup.com
ccolombo@electionlawgroup.com

Counsel for Defendants-Intervenors Ohioans For Fair Districts and David A. Lane and Defendants Ohio Democratic Party and Chris Redfern

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served by electronic mail on this the 9th day of December, 2011, upon the following:

Joseph J. Braun, Esq.
Strauss& Troy
The Federal Reserve Building
150 East Fourth Street
Cincinnati, OH 45202

John H. Burtch, Esq.
E. Mark Braden, Esq.
Robert J. Tucker, Esq.
Baker & Hostetler, LLP
65 E. State Street, Suite 2100
Columbus, OH 43215

Pearl M Chin, Esq.
Aaron D. Epstein, Esq.
Assistant Attorney General
Ohio Attorney General's Office
30 E. Broad Street
Columbus, OH 43215

Richard N. Coglianese, Esq.
Erick D. Gale, Esq.
Assistant Attorney General
Ohio Attorney General's Office
30 E. Broad Street
Columbus, OH 43215

Mary Lynne Birck, Esq.
Prosecutor's Office
Clermont County
101 E. Main Street, 2nd Floor
Batavia, Ohio 45103

David R. Langdon, Esq.
Langdon Law LLC
11175 Reading Road, Suite 104
Cincinnati, OH 45241

Ohio Republican Party
211 South Fifth Street
Columbus, OH 43215

Kevin DeWine
Chairman, Ohio Republican Party
211 South Fifth Street
Columbus, OH 43215

Donald J. McTigue (0022849)

TRANSMISSION VERIFICATION REPORT

TIME : 12/09/2011 15:14
NAME : COMPLETE
FAX : 6144471400
TEL : 6143372244
SER.# : 000L8J458001

DATE,TIME	12/09 15:11
FAX NO./NAME	15137327050
DURATION	00:02:47
PAGE(S)	10
RESULT	OK
MODE	STANDARD ECM

FACSIMILE FILING COVER PAGE

RECIPIENT INFORMATION:

NAME OF COURT: Clermont County Court of Common Pleas

FAX NUMBER: (513) 732-7050

SENDING PARTY INFORMATION:

NAME: Donald J. McTigue

SUPREME COURT REGISTRATION NUMBER (if applicable): 0022849

OFFICE/FIRM: McTigue + McGinnis LLC

ADDRESS: 545 E. Town Street, Columbus, OH 43215

TELEPHONE NUMBER: (614) 263-7000

FAX NUMBER: (614) 263-7078

E-MAIL ADDRESS (if available): dmctigue@electionlawgroup.com

CASE INFORMATION:

TITLE OF THE CASE: Ward vs. Kasich; et al

CASE NUMBER: 2011-CVH-1847

TITLE OF THE DOCUMENT: MOTION TO DISMISS BY OHIOANS FOR FAIR DISTRICTS, DAVID A. LANE, OHIO DEMOCRATIC PARTY AND CHRIS REDFERN