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In the Supreme Court of Ohio

STATE OF OHIO *ex rel.* ONE PERSON ONE VOTE, *et al.,*	:	**Case No. 2023-0630**
Relators,	:	
	:	**Original Action in Mandamus**
v.	:	**Expedited Elections Case**
OHIO SECRETARY OF STATE FRANK LAROSE,	:	
Respondent.	:	

MERIT BRIEF OF RESPONDENT FRANK LAROSE

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I. INTRODUCTION

Realtors' Complaint is an assault on a central tenant of our state's legal system: "the Ohio Constitution embodies the supreme law of Ohio and reflects the will of the people, who hold the ultimate political power in the state." *UAW, Local Union 1112 v. Brunner*, 182 Ohio App.3d 1, 2009-Ohio-1750, 911 N.E.2d 327, ¶ 23 (10th Dist.), citing *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County* (1852), 1 Ohio St. 77, 85; *State ex rel. Weinberger v. Miller* (1912), 87 Ohio St. 12, 99 N.E. 1078; *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St. 3d 386, 2007 Ohio 3780, P30. They claim that the General Assembly can chip away at its own authority granted in the Ohio Constitution by enacting laws that contravene that authority. They say that through such lawmaking, the legislature can confine its own express powers. While our Constitution delegates to the General Assembly express legislative authority, when it is beyond doubt that a statute is clearly incompatible with a constitutional provision, the constitution controls.

This mandamus action invites this Court to elevate statutory law above an unambiguous constitutional delegation based on a fallacious and tortured interpretation of statutes that provide for the setting of special elections by political subdivisions and taxing authorities. Indeed, Realtors contend that the controlling case on this issue is no longer applicable because "the relevant statutory provisions have been substantially amended in the half-century since *Foreman* was decided." Relator's Br. at 14; *State ex rel. Foreman v. Brown*, 10 Ohio St.2d 139, 226 N.E.2d 116 (1967). But as *Foreman* long ago recognized, the General Assembly is authorized to set a special election by joint resolution by Article 16, Section 1 of the Ohio Constitution, and requires no other permission to do so. The statutory scheme does not control the outcome here—the Ohio Constitution does.

The statutes advanced by the Realtors as limitations of the General Assembly's constitutional authority do not apply to the General Assembly, nor can they prevent the lawful exercise of its power under Article XVI, Section 1. But even if R.C 3501.01, R.C. 3501.02, and R.C. 3501.22 apply to the General Assembly, and if they conflict with the General Assembly's broad authority under Article XVI, Section 1, those statutes must fail. The General Assembly cannot legislate away its constitutional prerogative, and any enactments so designed are wholly incapable of wresting from that body the authority to submit to the electors proposed amendments "at either a special or a general election as the General Assembly may prescribe." That authority is designated to the General Assembly by the plain language of the Ohio Constitution. Thus, Relators are not entitled to a writ to prevent what the General Assembly may do, or compel the Secretary of State to do what he should not. This Court should deny the Realtor's requested relief in its entirety.

II. BACKGROUND

On March 22, 2023, Senate Joint Resolution 2 ("SJR 2") was introduced in the Ohio Senate, which proposed a special election "to be held on August 8, 2023, such election being prescribed pursuant to the authority provided by Section 1 of Article XVI of the Constitution of the State of Ohio[.]" 2023 Bill Text OH S.J.R. 2. The special election was set "for the purpose of submitting to the electors of the state a proposal to amend Sections 1b, 1e, and 1g of Article II and Sections 1 and 3 of Article XVI of the Constitution of the State of Ohio[.]" *Id.* Among the proposed amendments is the requirement that any future proposed amendment submitted to the electors obtain at least sixty percent approval to be adopted, and if an initiative petition's original signatures are found to be insufficient, no additional signatures may be filed. *Id.* The joint resolution was adopted by both chambers of the General Assembly on May 10, 2023. *See* https://www.legislature.ohio.gov/legislation/135/sjr2/status (last visited on May 21, 2023).

Consistent with SJR 2, a special election has been set for August 8, 2023 by the Ohio Secretary of State, Frank LaRose. *See* https://www.ohiosos.gov/elections/voters/current-voting-schedule/2023-schedule/ (last visited on May 21, 2023). Then, on May 12, 2023, Relator's initiated this Mandamus action seeking to prevent the August 8 special election.

III. LAW AND ANALYSIS

A. Standard of Review – Mandamus

Relators seek a writ of mandamus compelling the removal of the proposed amendment from the August 8, 2023 special election ballot.[1] *See* Compl. at 12. The purpose of a writ of

[1] They also ask that Secretary LaRose rescind Directive 2023-07, which instructed the 88 county boards of elections to proceed with preparations for the August 8, 2023 special election. *See* Compl. at 12. However, because the Relators fail to establish the legal right to removal of the proposed amendment from the August 8, 2023 special election ballot, their claim must fail.

mandamus is to compel a public officer to perform an act the law requires him or her to do. *See State ex rel. Husted v. Brunner*, 123 Ohio St.3d 119, 2009-Ohio-4805, 914 N.E.2d 397, ¶ 17. In order to be entitled to an extraordinary writ, the Relators must establish: (1) a clear legal right to have the proposed amendment removed from the August 8, 2023 special election ballot; (2) a clear legal duty owed by Secretary LaRose to remove the Amendment from the August 8, 2023 special election ballot; and (3) that they lack an adequate remedy at law. *See State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 18, citing *State ex rel. Marsalek v. S. Euclid City Council*, 111 Ohio St. 3d 163, 2006-Ohio-4973, 855 N.E.2d 811, ¶ 8. Relators have the burden of demonstrating entitlement to mandamus relief by clear and convincing evidence. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 55. Relators have not carried their burden here.

B. The General Assembly Has the Constitutional Authority to Set the August 8, 2023 Special Election.

Relators are not entitled to a writ of mandamus because the General Assembly has the constitutional authority, pursuant to Article XVI, Section 1 of the Ohio Constitution ("Article XVI, Section 1"), to present the proposed amendment to Ohio's electors at the August 8, 2023 special election via a joint resolution. *See State ex rel. Foreman v. Brown*, 10 Ohio St. 2d 139, 141, 226 N.E.2d 116 (1967) (Article XVI, Section 1 "clearly authorize[s] the General Assembly to prescribe that an amendment to the Constitution, proposed by the General Assembly pursuant to that section, be submitted at a special election on a certain date.").

Article XVI, Section 1 states, in relevant part,

> Either branch of the general assembly may propose *amendments to this constitution*; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be filed with the secretary of state at least ninety days before the date of the election at which they are to be submitted to the electors,

> for their approval or rejection. They *shall be submitted on a separate ballot* without party designation of any kind, *at either a special* or a general *election as the general assembly may prescribe*.

(Emphasis added).

This case can be decided by a straight-forward analysis of the plain language of Article XVI, Section 1. The cardinal rule of constitutional interpretation is that when the "language of a statute or constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written." *City of Rocky River v. State Empl. Rels. Bd.*, 43 Ohio St. 3d 1, 15, 539 N.E.2d 103 (1989), citing *Bernardini v. Bd. of Edn.*, 58 Ohio St. 2d 1, 387 N.E. 2d 1222 (1979). Here, there is no reason to reinvent the wheel because this Court's decision in *Foreman* resolves this case.

This Court held that Article XVI, Section 1 is clear and unambiguous and allows the General Assembly to submit a proposed constitutional amendment to the voters at a special election on a date of its choosing via a joint resolution. *See Foreman*, 10 Ohio St. 2d at 141. In *Foreman*, this Court dealt with a nearly identical issue as the one here; whether the General Assembly, via a joint resolution, may authorize a special election to be held on a specific date for the purposes of voting on a proposed constitutional amendment. *See id.* The *Foreman* Court needed little convincing to hold that this provision was clear and unambiguous and answered the question in the affirmative. *Id.* ("These words *clearly authorize* the General Assembly to prescribe that an amendment to the Constitution, proposed by the General Assembly pursuant to that section, be submitted at a special election on a certain date.") (emphasis added).

The *Foreman* Court also noted that other constitutional provisions require acts to be done "'by law,' *i.e.*, by enactment of a statute." *Id.*, citing Ohio Const. Art. I, Sec. 16; Art. II, Sec. 21; Art. II, Sec. 22; Art. II, Sec. 27; Art. III, Sec. 4; Art. IV, Sec. 8; Art. VI, Sec. 3; Art. XIII, Sec. 3;

Art. XV, Sec. 2; Art. XV, Sec. 3; Art. XV, Sec. 8; Art. XVI, Sec. 6; Art. XVII, Sec. 2; and Art. XVIII, Sec. 14. But Article XVI, Section 1 does not contain this language. Rather, Article XVI, Section 1 provides that the General Assembly may "prescribe" a special election to be held. When words are not defined by statute or constitutional provision, courts use their plain and ordinary meaning. *See, e.g.*, *State v. Bertram*, 2023-Ohio-1456, ¶ 13. "In determining the plain and ordinary meaning of a word, courts may look to dictionary definitions of the word[.]" *Id.*, citing *Rancho Cincinnati Rivers, L.L.C. v. Warren Cty. Bd. of Revision*, 165 Ohio St.3d 227, 2021-Ohio-2798, 177 N.E.3d 256, ¶ 21. Merriam-Webster defines "prescribe" as "to lay down a rule: DICTATE." *Dictionary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/prescribe (last visited May 18, 2023). Moreover, "prescribe" is defined in Black's Law Dictionary as "[t]o lay down authoritatively as a guide, direction, or rule." *Black's Law Dictionary* 1183 (6th Ed. 1991). Nothing in the definition of "prescribe" requires enacting a statute. Instead, all that "prescribe" requires is that the General Assembly "lay down" or "dictate" what they were doing. And this can be accomplished via a joint resolution. *Foreman* at 141. In other words, "prescribe" is broader than "by law." This Court cannot read "prescribe" to mean "by law" as that phrase is missing from Article XVI, Section 1. *Id.*; *see also State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, ¶ 21 ("a court cannot read words into a statute but must give effect to the words used in the statute.").

Next, the *Foreman* Court explained how the prior version of Article XVI, Section 1 did not have the "prescribe" language. *Foreman* at 142. The prior version, which was in place until 1912, provided that a constitutional amendment proposed by the General Assembly could only be placed before the voters at "the next election for Senators and Representatives." *Id.* (internal quotations

omitted). Another canon of statutory or constitutional interpretation is that "'that every amendment of a statute [or constitutional provision] is made to effect some purpose[.]'" *Prof'ls Guild of Ohio v. Lucas Cty. Corr. Treatment Facility Governing Bd.*, 10th Dist. Franklin No. , 2019-Ohio-2522, ¶ 18, quoting *Lytle v. Baldinger*, 84 Ohio St. 1, 8, 95 N.E. 389 (1911). Thus, before 1912, the Ohio Constitution did not clothe the General Assembly with the authority to set special elections for proposed constitutional amendments. However, with the 1912 amendment, the General Assembly now has the unrestricted power to set special elections for its own proposed constitutional amendments. This amendment cannot simply be ignored.

Relators concede that the General Assembly has the power to schedule a special election for the purposes of submitting a proposed constitutional amendment to Ohio's voters. *See* Relators' Brief at 16 ("Article XVI, Section 1 authorizes the General Assembly to submit a proposed amendment at 'either a special or a general election[.]'"). However, they errantly claim that Article XVI, Section 1 does not authorize the General Assembly to set the date for August. *Id.* Relators argue that the General Assembly has "prescribed" that constitutional amendments proposed by the General Assembly may only be submitted on the day of either a general or primary election. *Id.* at 15. This is where Relators ignore the key difference between "by law" and "prescribe." Again, if Article XVI, Section 1 included the phrase "by law," then the *only* way in which the General Assembly could set an August special election would have been by legislative enactment. *See Foreman*, 10 Ohio St. 2d at 142 ("Of course, the General Assembly could not prescribe, in its resolution proposing a constitutional amendment, that it be submitted at a special election on a certain date, if Section 1 of Article XVI of the Constitution did not state that such amendment 'shall be submitted * * * at * * * a special or a general election as the General Assembly may prescribe.'"). But "prescribe" is broader than "by law" and it does not require that

the General Assembly pass a law before it can perform an act. Rather, as explained above, all the General Assembly need do is lay down in writing a special election on a certain date. In the case of the proposed amendment, the General Assembly chose a joint resolution, which is permitted by Article XVI, Section 1. *See generally Foreman*.

Because the clear and unambiguous language of Article XVI, Section 1 permits the General Assembly to set an August special election for the consideration of a proposed constitutional amendment by way of joint resolution, Relators cannot establish a clear legal right to the requested relief. For that same reason, Secretary LaRose does not owe Relators a duty to remove the proposed amendment from the August 8, 2023 special election ballot. Accordingly, Relator is not entitled to the extraordinary writ of mandamus. *See generally State ex rel. Combs v. Greene Cty. Bd. of Elections*, 158 Ohio St. 3d 70, 2019-Ohio-4110, 140 N.E.3d 555 (finding that a petitioner was not entitled to a writ of mandamus when he could not establish a clear legal right to the requested relief).

C. Statutes for Setting Special Elections Cannot Restrict the General Assembly's Clear Constitutional Authority.

The Ohio Constitution is paramount law in this state. *Link v. Public Utilities Commission of Ohio*, 102 Ohio St. 336, 131 N.E. 796 (1921). "The Ohio Constitution embodies the supreme law of Ohio and reflects the will of the people, who hold the ultimate political power in the state." UAW, Local Union 1112 v. Brunner, 182 Ohio App.3d 1, 2009-Ohio-1750, 911 N.E.2d 327, ¶ 23 (10th Dist.), citing *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 85 (1852); *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 99 N.E. 1078 (1912); *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St. 3d 386, 2007-Ohio-3780, ¶30. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such

government must be, that an act of the legislature, repugnant to the constitution, is void." *Xenia v. Schmidt*, 101 Ohio St. 437, 441-42 (1920) quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180, 2 L.Ed. 60 (1803); *see also Cincinnati v. Trustees of Cincinnati Hospital*, 66 Ohio St. 440, 450 (1902). "The Constitution is the supreme law; it is the expression of the will of the people, subject to amendment only by the people, and neither the Legislature by legislative enactment, nor the courts by judicial interpretation, can repeal or modify such expression or destroy the plain language and meaning of the Constitution, otherwise there would be no purpose in having a Constitution." *Hoffman v. Knollman*, 135 Ohio St. 170, 181 (1939).

1. On their faces, the Special Election Statutes restrain the setting of special elections by political subdivisions and taxing authorities - not the General Assembly.

Relators spend most of their time in a tortured interpretation of R.C. 3501.01(D), 3501.022, 3501.02, and 3501.40 ("Special Election Statutes"), which they claim absolutely barred the General Assembly from setting the August 8, 2023 special election. Relators' Brief at 6-14. But the plain language of the Special Election Statutes shows that none of the restrictions contained therein apply to the General Assembly. Take, for example, R.C. 3501.01(D). That sub-section broadly defines a special election as "any election other than those elections defined in other divisions of this section." The second sentence of R.C. 3501.01(D), however, sets restrictions on the setting of special elections "in accordance with section 3501.022 of the Revised Code" and also sets exceptions to those restrictions "as authorized by a municipal or county charter." R.C. 3501.022 narrowly applies to a "political subdivision or taxing authority" that is under fiscal emergency. Both statutes exclusively reference local authorities i.e., political subdivisions, taxing authorities and municipal or county charters. And neither of those statutes reference the General

Assembly, let alone attempt to restrict its ability to set special elections under Article XVI, Section 1.

Local authorities and the General Assembly have the power to set special elections. Yet, R.C. 3501.01(D) and 3501.022 *only* reference the former, not the later. "Under the general rule of statutory construction expression *unius est exclusion alterius*, the expression of one or more items of a class implies that those not identified are to be excluded." *State v. Droste*, 83 Ohio St.3d 36, 39, 697 N.E.2d 620 (1998), *cert. denied*, 526 U.S. 1145 (1999). "It is a basic doctrine of construction that the express enumeration of specific classes of persons in a statute implies that the legislature intended to exclude all others." *Fort Hamilton-Hughes Mem. Hosp. Ctr. v. Southard*, 12 Ohio St.3d 263, 265, 466 N.E.2d 903 (1984); *Accord Indep. Ins. Agents of Ohio, Inc. v. Fabe*, 63 Ohio St.3d 310, 314, 587 N.E.2d 814 (1992). Thus, the restrictions on setting special elections found in these statutes do not apply to the General Assembly.

On the other hand, R.C. 3501.02(E), the only special elections statute that references the General Assembly, is not a restriction at all. In fact, that sub-section expresses the General Assembly's *permissive authority* to set special elections. R.C. 3501.02(E) states in relevant part, "[p]roposed constitutional amendments submitted by the general assembly to the voters of the state at large *may* be submitted at a special election on the day in any year specified by division (E) of section 3501.01 of the Revised Code for the holding of a primary election, when a special election on that date is designated by the general assembly in the resolution adopting the proposed constitutional amendment." (emphasis added.) The use of the word "may" is not nugatory and its importance should not be disregarded. "Ordinarily, the word, 'shall,' is a mandatory one, whereas 'may' denotes the granting of discretion." *Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574 (1956). "In statutory construction, the word 'may' shall be construed as permissive

and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage." *Dorrian v. Scioto Conservancy Dist*., 27 Ohio St.2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1)*; accord State ex rel. City of Niles v. Bernard*, 53 Ohio St.2d 31, 34, 372 N.E.2d 339 (1978). Thus, R.C. 3501.02(E) simply clears the path for a primary election and a special election set by the General Assembly under Article XVI, Section 1 to occur on the same day.

What is more, Relators' reading of the Special Elections Statutes dishonors the bedrock principle that statutes concerning the same subject matter must be construed *in pari materia*. *In re C.W*., 104 Ohio St.3d 163, 2004-Ohio-6411, 818 N.E.2d 1176, at ¶7*; accord State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622, 716 N.E.2d 204 (1999); *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 29, 697 N.E.2d 610 (1998). "All statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all statutes." *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 (1995). Again, when the Special Elections Statutes are construed *in pari materia*, they actually work in harmony. For example, not one of the restrictions on special elections contained therein speaks to the General Assembly. *See* R.C. 3501.01(D) and 3501.022. At the same time, all of the restrictions speak exclusively to political subdivisions and taxing authorities. *Id.* And, the one statute that references the General Assembly, R.C. 3501.02(E), simply clarifies that a primary election and a special election set by the General Assembly for a proposed constitutional amendment can occur on the same day. The last sentence of R.C. 3501.02(E) further proves the pattern that restrictions on special elections only apply to non-General Assembly entities. It states, "No special election shall be held on a day other than the day of a general election, unless a law or charter provides

otherwise, regarding the submission of a question or issue to the voters of a county, township, city, village, or school district." The *Foreman* Court found that a materially similar version of that sentence "applies only to a submission 'to the voters of a county, township, city, village, or school district'" and not to a constitutional amendment proposed by the General Assembly at a special election set by joint resolution under Article XVI, Section 1. *Id*. at 143. Finally, R.C. 3501.40 is simply irrelevant because the General Assembly's authority to set the August 8, 2023 special election derives from Article XVI, Section 1, and not the Revised Code.

Indeed, Relators get hung up in their overly blinkered, tangled analysis of the Special Election Statutes when they argue that both R.C. 3501.01(D) and 3501.02(E) apply to the General Assembly. Following Relators' logic, if R.C. 3501.01(D) applies to the General Assembly, then it can *only* set a special election "on the first Tuesday after the first Monday in May or November" and nothing more. *See* Relators' Brief at 6-8. But, R.C. 3501.02(E), which unquestioningly applies to the General Assembly, refers to the setting of a special election by the General Assembly in March. Thus, applying both statutes to the General Assembly, as Relator urges, makes them simultaneously redundant *and* contradictory to each other. This is certainly an absurd and unreasonable result. "When the General Assembly enacts a statute, it does not intend to produce an absurd result." *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 152 Ohio St.3d 163, 167, 2017-Ohio-8714, 94 N.E.3d 498, at ¶22 (citation omitted).

At bottom, the Special Elections Statutes restrain the setting of special elections by entities other than the General Assembly. The Special Elections Statutes sets no restrictions on the General Assembly's authority to set a special election. The General Assembly's authority to set the August 8, 2023 special election is derived exclusively from Article XVI, Section 1 of the Ohio Constitution without regard to the Revised Code.

2. If the Special Elections Statutes conflict with Article XVI, Section 1 then the statutes must yield.

To be sure, as discussed above, the General Assembly's constitutional authority to set special elections as it "may prescribe" is not synonymous with those constitutional provisions where the General Assembly is authorized to act only "by law". *See Foreman* at 141 ("Unlike in many other parts of the Ohio Constitution, Section 1 of Article XVI does not require that this action be 'by law," i.e., by enactment of a statute."). Thus, the General Assembly's authority is derived exclusively from that constitutional provision and the Court's analysis should end there. But, even if this Court finds that one of the Special Elections Statutes conflicts with the General Assembly's constitutional authority to set the August 8, 2023 special election by a joint resolution, that statute must yield. A law that is incompatible with the Ohio Constitution is "unconstitutional on its face." *Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶44. "What the Constitution grants, no statute can take away." *Ziegler* at ¶39 citing *State ex rel. Hoel v. Brown*, 105 Ohio St. 479, 488 (1922). "No legislative act can in any wise modify or restrict the power conferred by constitutional provision, and therefore any provision of the statute inconsistent with the constitutional provision conferring such power must fall." *Link* at 338. "Any other course would lead to the destruction of the constitution, which is the supreme law written by the supreme power of the state, the people themselves." *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 26-27 (1912).

Foreman is instructive and controlling on this point too. There, the Court made two straightforward rulings: (1) that Article XVI, Section 1 *standing alone* gives the General Assembly the authority to set a special election by joint resolution even "without enacting a statute"; and (2) that a conflicting statute must yield to Article XVI, Section 1 authority. *Id.* at 118. The Court reasoned that, "if action taken by the General Assembly pursuant to Section 1 of Article XVI and

authorizing a special election on a certain day, does conflict with an unrepealed existing statute, the action so taken pursuant to specific constitutional authority would require a holding that the statute was unconstitutional so far as it conflicted with such action." *Id*.

This Court has consistently followed the principles espoused in *Foreman*. For example, in *Zeigler*, 129 Ohio St.3d at ¶¶ 1-9, the Stark County Commissioners ousted the Stark County Treasurer pursuant to R.C. 321.38, which permits the immediate removal of a county treasurer for certain kinds of misconduct. Notwithstanding R.C. 321.38, Section 38, Article II of the Ohio Constitution authorizes the General Assembly to pass laws for the "prompt removal from office" of officers "upon complaint and hearing." *Id.* at ¶31. The Treasurer filed a quo warranto action to oust his replacement claiming that his removal, while proper under R.C. 321.38, violated Article II, Section 38 because it was not made upon complaint and hearing. *Id.* at ¶9. The Court agreed. "We hold that because R.C. 321.38 does not require a complaint and hearing before authorizing a board of county commissioners to remove a county treasurer, it is incompatible with Section 38, Article II of the Ohio Constitution, and thus is unconstitutional on its face." *Id.* at ¶44. *See also State ex rel. Ohio Acad. Of Trial Lawyers v. Sheward*, 86 Ohio St. 45, 490, 715 N.E.2d 1065 (1999) (General Assembly may not limit the constitutional jurisdiction of common pleas courts.).

Just like the General Assembly cannot legislate away an individual's constitutional rights, it also cannot legislate away its own constitutional powers. Thus, any conflicting statute passed by this General Assembly or by a preceeding General Assembly that purportedly constrains its authority to set a special election as it "may prescribe" under Article XVI, Section 1 is unconstitutional on its face and must yield. Because the General Assembly properly set the August 8, 2023 by joint resolution pursuant to Artivle XVI, Section 1, Relators are not entitled to mandamus relief.

3. Attempts to impugn the General Assembly's knowledge and motives for adopting S.J.R. 2 are improper and irrelevant.

Relators attached copies of Sub. S.B. 92 and H.B. 144, which are unsuccessful bills to amend R.C. 3501.022. *See* Relators' Brief at 3; Relators' Evid. at 0119-0126. Relators allege that these bills "confirm that [the General Assembly] understood that it must amend the Revised Code to authorize such an election. *Id.* at 17. Relators also urge this Court to infer that the General Assembly was aware that it lacked authority to set the August 8, 2023 election because such an action has not occurred since 1967. *Id.* at 10, fn 4.

Relators' speculation on the alleged knowledge and motivations of the General Assembly is wholly irrelevant and improper as a matter of law. First, the unsuccessful bills offer nothing with respect to what "the General Assembly" as a whole "understood" about its constitutional authority to adopt S.J.R. 2. Indeed, the General Assembly went on to adopt S.J.R. 2 and set the August 8, 2023 special election under its constitutional authority, not the Revised Code. Relators offer nothing to prove, as they suggest, that the General Assembly's adoption of S.J.R. 2 was really an admission that it lacks the authority to do so under the Revised Code. In any event, such speculation before this Court in this judicial forum is improper and should be wholly rejected. In *Billington v. Cotner*, 25 Ohio St.2d 140, 267 N.E.2d 410 (1971), this Court considered whether a city's oversight in designating the actual date of a special election where electors would vote on a proposed charter amendment was merely perfunctory or violative of applicable provisions of the Ohio Constitution. There, a party urged the court to take judicial notice of other ordinances as a basis for the court to discern the city council's intentions for setting a special election for the disputed ordinance. Id. at 150. The Court rejected that approach ruling, "[w]e have not discovered any authority for resorting to ordinances providing for other special elections as a means of evidencing compliance with mandatory constitutional requirement; nor do we favor such a

suggestion. It must be kept in mind that we are not seeking to discover the legislative intent of Council but to determine whether the requirements of the Constitution have been met." *Id*.

This Court should follow the *Billington* Court's rationale and reject Relators' parol evidence of the unsuccessful bills and historical data of past proposed constitutional amendments because it improperly speculates on the motivations of individual lawmakers in adopting S.J.R. 2, which is wholly irrelevant to whether the General Assembly possessed the constitutional authority to adopt S.J.R. 2.

IV. CONCLUSION

For the foregoing reasons, Secretary LaRose respectfully asks this Court to enter judgment in his favor and dismiss the Complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2023, the foregoing was filed electronically using the Court's e-filing system. I further certify that the foregoing was served via electronic mail upon the following:

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