The Supreme Court of Ohio

CASE ANNOUNCEMENTS

August 8, 2024

[Cite as *08/08/2024 Case Announcements #2*, 2024-Ohio-3025.]

MOTION AND PROCEDURAL RULINGS

2024-1047. State ex rel. Brown v. Yost.

In Mandamus. On relators' motion to expedite. Motion denied.

Kennedy, C.J., concurs, with an opinion joined by DeWine and Deters, JJ.

Brunner, J., dissents, with an opinion joined by Donnelly, J.

KENNEDY, C.J., joined by DEWINE and DETERS, JJ., concurring.

{¶ 1} I concur in the majority's decision to deny the motion to expedite filed by relators, Cynthia Brown, Carlos Buford, and Jenny Sue Row (collectively "Brown"). I write separately to address the fuss raised by the dissent, which accuses the majority of "los[ing] sight of the bigger picture," dissenting opinion, ¶ 20, 25. But the bigger picture includes the fact that scheduling decisions are committed to the chief justice's discretion—a fact that was true under my predecessors as well, *see, e.g.*, *State ex rel. Cunnane v. LaRose*, case No. 2022-0918 (July 28, 2022) (entry by O'Connor, C.J., ruling on motion to expedite); *State ex rel. Vrable II, Inc. v. Eighth Dist. Court of Appeals*, case No. 2010-1664 (Sept. 29, 2010) (entry by Brown, C.J., ruling on amended motion to expedite)—and the fact that no one has sought to amend the Rules of Practice of the Supreme Court of Ohio to limit that discretion and make all cases involving an election subject to expedited treatment. And one cannot look at the bigger picture without seeing that the sound judicial policy to ensure fast action on motions to expedite supports the court's current practice.

{¶ 2} The Rules of Practice require filing deadlines in original actions to be expedited in only two types of cases: expedited election cases, *see* S.Ct.Prac.R. 12.08, and expedited adoption and termination-of-parental-rights cases, *see* S.Ct.Prac.R. 12.09.

{¶ 3} S.Ct.Prac.R. 12.08 is most relevant here and provides the procedure for expedited election cases—that is, original actions related to a pending election that are filed within 90 days prior to that election. Expedited election cases skip the motion-to-dismiss stage of litigation, *see* S.Ct.Prac.R. 12.08(A)(3), and require the respondent to file an answer to the complaint within three days after service of the summons, S.Ct.Prac.R. 12.08(A)(1). Unless otherwise ordered by the court, the relator must file any evidence and a merit brief within three days after the filing of the answer, the respondent must file any evidence and a merit brief within three days after the filing of the relator's merit brief, and the relator may file a reply brief within three days after the filing of the respondent's merit brief. S.Ct.Prac.R. 12.08(A)(2)(a) through (c). Unless otherwise ordered by the court and assuming that the relator has not filed an amended complaint or a request to file rebuttal evidence and that no other motion has been filed, an expedited election case may be ripe for decision in 12 days at the latest. *See* S.Ct.Prac.R. 12.08(A).

{¶ 4} Before filing this case, Brown filed another original action, *State ex rel. Brown v. Yost*, case No. 2024-0409 ("*Brown I*"), seeking to submit a constitutional amendment at the November 2024 general election. Brown filed that mandamus action in March 2024, which was more than 90 days before the November 2024 election. For this reason, *Brown I* did not qualify as an expedited election case and was not entitled to automatic expedited treatment under the Rules of Practice. So nothing in the rules required this court to accelerate filing deadlines—or entry of its ultimate decision—in *Brown I*. The process followed in *Brown I* is exactly what the rules provide for.

{¶ 5} *Brown I* was filed on March 20, 2024. The respondent in that case (and in this one), Ohio Attorney General Dave Yost, filed a motion to dismiss on April 19, and that motion was ripe for decision on April 29. On May 20, while a decision on this motion was pending, Brown inexplicably applied to dismiss her case, which this court granted. *See* 2024-Ohio-1959. Had she not applied for dismissal of *Brown I*, this court might have issued a preemptory writ the very next day in Brown's favor, granting her immediate relief. Or we might have denied the motion to dismiss and issued an alternative writ instituting our standard briefing schedule:

- the answer would have been due within 14 days of the entry granting the

alternative writ;

- any evidence would have been due within 20 days of the entry;
- Brown's merit brief would have been due within 30 days of the entry;
- the attorney general's merit brief would have been due within 20 days of the filing of Brown's merit brief; and
- Brown's reply brief would have been due within 7 days of the filing of the attorney general's merit brief.

See S.Ct.Prac.R. 12.05. *E.g., State ex rel. Howard v. Willoughby Hills Police Dept.*, 2024-Ohio-2781; *State ex rel. Ware v. Akron Police Dept.*, 2024-Ohio-2781; *State ex rel. Huwig v. Dept. of Health*, 2024-Ohio-2781. That briefing schedule could last as long as 57 days, so *Brown I* could have been ripe for decision in mid-July. (It could have been ripe sooner, if Brown did not take the full 30 days to file a merit brief.)

{¶ 6} But rather than allow *Brown I* to run its ordinary course, Brown dismissed the action. She then sought relief in the federal courts. *See Brown v. Yost*, 104 F.4th 621, 622 (6th Cir. 2024). After the United States Court of Appeals for the Sixth Circuit agreed to hear the case en banc, she filed a new summary of the proposed constitutional amendment with the attorney general. And after her summary was rejected by the attorney general, she filed a new original action in this court on July 19, 2024—121 days after the filing of *Brown I* and 473 days before the November 2025 general election. If we were to quickly grant the motion to expedite filed in this case and apply the expedited briefing schedule set forth in S.Ct.Prac.R. 12.08, it still would be August 2024—at the earliest—before this court would issue a decision. So Brown might have been afforded relief on her mandamus claim sooner if she had allowed *Brown I* to run its course as a nonexpedited case.

{¶ 7} Obviously, this is all counterfactual. But the fact that Brown took such a circuitous route to bringing the current case before the court cuts against her claim that expedited relief is essential to protecting any First Amendment right that she may have to place a proposed constitutional amendment on the ballot.

{¶ 8} But more importantly, proponents of a constitutional amendment have no right to have it submitted at the election of their choosing. Getting a summary approved—a statutory requirement, R.C. 3519.01(A), not one that appears in the Ohio Constitution—is not the only hurdle that a proponent must clear to place a proposed amendment on the ballot. For example, a

proponent must also obtain valid signatures representing 10 percent of the electors of the state, Ohio Const., art. II, § 1a, from 44 of the 88 counties in the state, Ohio Const., art. II, § 1g. That is not a given, so at this stage of the process, any claim Brown has for her proposed constitutional amendment to appear on the November 2025 general-election ballot is premature at best.

{¶ 9} Further, the Ohio Constitution provides a specific deadline that must be met before a proposed constitutional amendment may appear on a ballot: the proponent must file the petition at least 125 days before the election at which the proposed amendment will be submitted to the people. Ohio Const., art. II, § 1a. The Constitution also prescribes other deadlines: when the secretary of state must validate signatures (not later than 105 days before the election), when challenges to the petition must be filed (not later than 95 days before the election), and when this court must rule on those challenges (not later than 85 days before the election). Ohio Const., art. II, § 1g. Other deadlines apply when the proponent of a constitutional amendment files additional signatures. *See id.* But the important takeaway is that there are no deadlines that require this court to take expedited action in a case 473 days before the relevant election.

{¶ 10} Having reviewed the motion to expedite, it is manifest that Brown has not established that there is any emergency or contingency that would justify expedited briefing and consideration of this original action.

{¶ 11} The dissent points to this court's rulings on motions in *Brown I*, *State ex rel. Dudley v. Yost*, case No. 2024-0161, and *State ex rel. Shubert v. Breaux*, case No. 2024-0675, and our ruling on the motion to expedite in this case and contends that these cases have received disparate treatment. However, the procedural postures of *Shubert* and this case differed from those of *Brown I* and *Dudley*.

{¶ 12} As the court's public docket reveals, in *Brown I* and in *Dudley*, motions to expedite accompanied the filing of the complaints. And a review of those motions shows that they presented a scheduling issue. No dispositive motions had been filed. Deadlines were set for the respondent in each case to file their responses to the motions to expedite, *see* 2024-Ohio-1038, 2024-Ohio-362, and the motions were disposed of quickly and efficiently, *see* 2024-Ohio-1131, 2024-Ohio-426.

{¶ 13} In *Shubert*, in addition to filing a complaint, the relator filed a motion for the expedited issuance of a writ or, in the alternative, for an order directing an expedited response to

the complaint. We ordered the respondent to file an accelerated response to the relator's motion for the expedited issuance of a writ as well as an answer to the complaint or a motion to dismiss, *see* 2024-Ohio-1859, and the respondent chose to file a motion to dismiss rather than a response to the motion. The merits of the action were therefore ripe for review. In addition, the relator filed a motion for leave to file a supplemental and amended complaint. So unlike in *Brown I* and *Dudley*, other substantive motions in addition to the request for an expedited response were ripe for decision in *Shubert*; the motions filed in that case did not present a question solely of scheduling, and all of the motions were ruled on in the same entry. *See* 2024-Ohio-2087.

{¶ 14} This court followed the same practice under my predecessor in 2022. *Compare Cunnane*, case No. 2022-0918 (July 28, 2022) (entry by O'Connor, C.J., ruling on motion to expedite), *with McKitrick v. LaRose*, case No. 2022-1346 (Nov. 7, 2022) (entry by O'Connor, C.J., ruling on motion to expedite along with motion to seal election results).

{¶ 15} The procedural posture of the case currently before us is also different from *Brown I* and *Dudley*. Following this court's denial of the motions to expedite in *Brown I* and *Dudley*, a panel of the United States Court of Appeals for the Sixth Circuit issued a decision suggesting that this court's decision not to expedite the review of *Brown I* contributed to a restriction on core political speech. *See Brown v. Yost*, 103 F.4th 420, 445 (6th Cir. 2024). Although the Sixth Circuit granted en banc review of *Brown v. Yost*, 104 F.4th at 622, it has not yet released a decision on the merits of that case. Brown's claim in this case that "[t]he lack of an expedited schedule in an election matter . . . is itself a violation of the First Amendment" is therefore plausible. Relator's Motion to Expedite at 2 (July 19, 2024). For this reason, Brown's motion to expedite does not present a question solely of scheduling. If the panel of the Sixth Circuit in *Brown v. Yost* is correct, a ruling on the motion to expedite in this case would have constitutional implications. Because this motion presents a question of substantive law, a decision by this court is needed.

{¶ 16} There is therefore nothing inconsistent in how *Brown I*, *Dudley*, *Shubert*, and the instant case have been handled by this court; the procedural posture of each case dictated its treatment. Consequently, the dissent's complaints are unjustified.

{¶ 17} For these reasons, I concur in the majority's decision to deny the motion to expedite filed in this case.

BRUNNER, J., joined by DONNELLY, J., dissenting.

{¶ 18} The majority's decision to deny the motion to expedite briefing and consideration of this case filed by relators, Cynthia Brown, Carlos Buford, and Jenny Sue Row, springs from unfortunate roots in the past. After relators found themselves engaged in numerous battles with respondent, Ohio Attorney General Dave Yost, they turned to this court, filing an original action in mandamus. *See State ex rel. Brown v. Yost*, case No. 2024-0409 ("*Brown I*"). The administrative wheels of the court turned, and unguided by a full-court vote, the chief justice issued an order denying the relators' request to expedite briefing and consideration of that case. *See* 2024-Ohio-1131.

{¶ 19} Another original action was filed in this court on February 1, 2024, involving the same petition process. *See State ex rel. Dudley v. Yost*, case No. 2024-0161. The full court also did not vote on the motion to expedite filed by the relators in *Dudley*. *See* 2024-Ohio-426 (denying the relators' motion for an expedited scheduling order). But compare the court's handling of *Brown I* and *Dudley* with our handling of *State ex rel. Shubert v. Breaux*, case No. 2024-0675. As is true of this case, *Shubert* did not require expedited briefing under S.Ct.Prac.R. 12.08 or 12.09.[1] But following a vote by the full court on the relator's motion,[2] the court imposed an expedited schedule for briefing and the presentation of evidence, *see* 2024-Ohio-2087, even though Shubert did not seek expedited briefing of the case. Shubert also made his motion on First Amendment grounds, just as Brown did here.

{¶ 20} Although "we have delegated authority to the chief justice to issue administrative orders in certain instances," *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-548, ¶ 10 (Kennedy, J., dissenting), it is not a "fuss," concurring opinion, ¶ 1, to question apparent inconsistencies in how and whether these matters are voted on to reach the resulting orders in these cases. The concurring opinion loses sight of the bigger picture, namely, ensuring consistency and transparency of these decisions to promote public confidence in the courts and to ensure the fair treatment of all litigants. It may seem logical to characterize some matters as scheduling matters and others as something else, but in the end, post hoc explanations

1. On August 6, 2024, the standing committee overseeing proposed revisions to the Rules of Practice of the Supreme Court of Ohio was presented with a proposal to create a new rule that would apply to cases seeking expedited treatment that do not otherwise fall within the purview of S.Ct.Prac.R. 12.08 or 12.09. The proposed rule would allow for expedited treatment of such cases on a discretionary basis.

2. Relator's motion was entitled, "Relator's motion for immediate issuance of preemptory writs of mandamus and prohibition or, alternatively, for an order directing the respondent to file an expedited response to the complaint."

provide little constructive resolution to the apparent inconsistencies that are susceptible to negative public perception. The words in our opinions—the very tools of our craft as members of the judiciary—should be used with a respectful, objective, and nonaccusatory tone to help members of the public understand the decisions we make and to help them perceive that those decisions have been made with their best interests in mind.

{¶ 21} To continue with the matter at hand, I point out that following this court's refusal to expedite review of *Brown I*, the relators were granted a voluntary dismissal of that action, *see* 2024-Ohio-1959, and they then turned to the federal courts to seek relief. They obtained an order from the Sixth Circuit Court of Appeals that required the Ohio Attorney General to certify their initiative petition and send it to the Ohio Ballot Board for next steps. *See Brown v. Yost*, 103 F.4th 420, 447 (6th Cir. 2024). The Ohio Attorney General sought and was granted en banc review by the Sixth Circuit, *see Brown v. Yost*, 104 F.4th 621, 622 (6th Cir. 2024), which further delays resolution of the parties' issues.

{¶ 22} Now relators have filed a new petition with the Ohio Attorney General, who is apparently still not satisfied that they have met the requirements necessary to proceed with their ballot effort. Relators have not yet begun to obtain the signatures needed to get their proposed constitutional amendment on the November 2025 general-election ballot, and they are asking this court for "an order expediting this case and adopting an expedited case schedule," citing First Amendment concerns. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

{¶ 23} While relators are aiming to place their proposed constitutional amendment on the November 2025 general-election ballot, it must be remembered that petition circulation for more than 400,000 valid signatures may not begin until the matter has been certified. *See* Ohio Const., art. II, § 1a and § 1g; *Voter Turnout in Gubernatorial Election Years*, https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-gubernatorial-election-years/ (accessed July 26, 2024) [https://perma.cc/8TDF-P6LC]. Moreover, without expediting the briefing schedule and our consideration of this matter, it is unlikely that relators will obtain a decision of this court before the end of this year, given the internal deadlines assigned to nonexpedited cases in this court. And the likelihood that relators

may obtain ballot access in 2025 begins to diminish as we deny expedited consideration of their claims.

{¶ 24} While this case may not require an expedited briefing schedule and consideration under S.Ct.Prac.R. 12.08, the First Amendment concerns for granting relators' motion to expedite are compelling. And there is no prohibition against granting relators' motion. Granting the motion would help to ensure that, having been denied expedited briefing and consideration by us when they sought to have their proposed constitutional amendment placed on the November 2024 general-election ballot, *see* 2024-Ohio-1131, relators may at least be in a position for this mandamus action to be resolved, obviating any further delay of their efforts to circulate petitions with the aim of getting their proposed constitutional amendment placed on the November 2025 general-election ballot.

{¶ 25} When we *sometimes* apply the rules of practice to exclude what is not prohibited but other times apply the rules to allow it under the rubric of "scheduling," we lose sight of the bigger picture and could be seen as sitting under a pine tree and saying we do not know where the pinecones dropped from. Accordingly, I dissent.