

Requiring Meaningful Review for Keeping an Initiative Off the Ballot

Schmitt v. Husted

(Edmund A. Sargus, Jr., S.D. Ohio 2:18-cv-966)

As an election approached, a district judge enjoined local election-board discretion—reviewable only by a writ of mandamus—to keep an initiative off the ballot. The court of appeals, however, concluded that mandamus relief was not so insurmountable as to require federal judicial intervention.

Subject: Ballot measures. *Topics:* Ballot measure; getting on the ballot; attorney fees.

Two “drafters and circulators of initiatives calling for reductions of penalties in local ordinances in Ohio for those charged with possessing marijuana” and a signer of one of their initiatives filed a federal complaint in the Southern District of Ohio on August 28, 2018, challenging the discretion of local elections boards to act as gatekeepers in deciding what initiatives to accept for the ballot.¹ Named as defendants were three members of a county board of elections and Ohio’s secretary of state.² With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.³ Judge Edmund A. Sargus, Jr., held a telephone conference on the following day.⁴

Judge Sargus set the case for oral argument on September 17.⁵ At argument, Judge Sargus and the parties agreed that a decision by September 19 would not be too late for any remedy the judge provided to be effective.⁶

On September 19, Judge Sargus issued a temporary restraining order provisionally placing on two municipal ballots the plaintiffs’ initiatives.⁷ Ohio had not justified providing initiative proponents with no avenue for review of ballot denial but the high burden of mandamus relief.⁸

Following an October 4 telephonic status conference, Judge Sargus converted the temporary restraining order to a preliminary injunction to run

1. Complaint, *Schmitt v. Husted*, No. 2:18-cv-966 (S.D. Ohio Aug. 28, 2018), D.E. 1; *Schmitt v. Husted*, 363 F. Supp. 3d 842, 847 (S.D. Ohio 2019); *Schmitt v. Husted*, 341 F. Supp. 3d 784, 788 (S.D. Ohio 2018).

2. Complaint, *supra* note 1.

3. Motion, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Aug. 28, 2018), D.E. 3; *Schmitt*, 363 F. Supp. 3d at 847; *Schmitt*, 341 F. Supp. 3d at 788.

4. Docket Sheet, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Aug. 28, 2018).

5. Order, *id.* (Aug. 29, 2018), D.E. 9; Notice, *id.* (Aug. 31, 2018), D.E. 15; *see Schmitt*, 341 F. Supp. 3d at 788; Minutes, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Sept. 17, 2018), D.E. 21.

6. Transcript at 26–29, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Sept. 17, 2018, filed Apr. 23, 2019), D.E. 52.

7. *Schmitt*, 341 F. Supp. 3d at 792–93; Order, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Oct. 3, 2018), D.E. 26; *Schmitt v. LaRose*, 933 F.3d 628, 636 (6th Cir. 2019); *see Dave O’Brien, Judge Orders Marijuana Issues on Portage County Ballots*, Akron Beacon J., Sept. 23, 2018, at B10.

8. *Schmitt*, 341 F. Supp. 3d at 791.

through the election, and he set oral argument on how the case should proceed after that for December.⁹ The initiative failed in one municipality and passed in the other, in addition to passing in other municipalities in the state.¹⁰

“At the December 19, 2018 hearing, the parties stipulated that Plaintiffs’ motion for injunctive relief is ripe for review because Plaintiffs intend to submit identical initiative petitions in upcoming voting cycles.”¹¹

On February 11, 2019, Judge Sargus granted the plaintiffs permanent relief.¹²

In the ballot initiative process, . . . the State of Ohio has not provided Plaintiffs an adequate review process. Instead, the gatekeeping function enables a board of elections—an executive body—to make legal determinations without providing denied petitioners a right to review. The only possibility of review requires an aggrieved petitioner to convince a court of appeals or the Supreme Court of Ohio to exercise its discretion under heightened standards.¹³

The court of appeals vacated the injunction on August 7, determining that mandamus relief was not a severe enough burden to invalidate the board’s discretion.¹⁴

It is reasonable to conclude that the cost of obtaining legal counsel and seeking a writ of mandamus disincentivizes some ballot proponents from seeking to overturn the board’s decision, thereby limiting ballot access. As a result, the burden imposed by the Ohio ballot-initiative process is somewhere between minimal and severe . . .¹⁵

The court observed,

Plaintiffs have identified no case in which the Ohio Supreme Court questioned the legal determination of a board of elections but nevertheless deferred to its discretion. Rather, the cases show that notwithstanding the stated standard of review, the court considers the proposed initiative and makes an independent reasoned determination whether it is within the Ohio Constitution’s grant of legislative authority. . . .

9. Order, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Oct. 4, 2018), D.E. 28; Notice, *id.* (Oct. 6, 2018), D.E. 33 (resetting oral argument for December 19); *Schmitt*, 933 F.3d at 636; *Schmitt v. Husted*, 363 F. Supp. 3d 842, 847 (S.D. Ohio 2019); see Docket Sheet, *supra* note 4 (minutes, D.E. 36); Notice, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Oct. 4, 2018), D.E. 27 (setting oral argument for December 18).

10. See Michael Sangiacomo, *Marijuana Reform Passed, but . . .*, Cleveland Plain Dealer, Nov. 19, 2018, at A1.

11. *Schmitt*, 363 F. Supp. 3d at 847; Transcript at 3, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Dec. 19, 2018, filed Apr. 23, 2019), D.E. 53 (“THE COURT: . . . So we all understand then that at least at this stage, you’re all agreeing that there is an issue of repetition here and it is an election case so we’ll go forward on the merits.”); see Order, *id.* (Apr. 15, 2019), D.E. 50, 2019 WL 1599040 (clarifying relief).

12. *Schmitt*, 363 F. Supp. 3d 842; *Schmitt*, 933 F.3d at 637.

13. *Schmitt*, 363 F. Supp. 3d at 849.

14. *Schmitt*, 933 F.3d 628, *cert. denied*, 590 U.S. ___, 140 S. Ct. 2803 (2020).

15. *Id.* at 641.

... We also note that because Ohio Supreme Court rules provide for expedited briefing and decision in election cases, aggrieved citizens who challenge an adverse decision are able to seek timely redress.¹⁶

The court of appeals determined, moreover, that it was proper for the elections boards to determine whether the proposed initiatives were for valid legislation and not merely administrative proposals in light of state law on the use of marijuana.¹⁷

On June 15, 2021, the court of appeals affirmed Judge Sargus's December 4, 2019, denial of a fees award.¹⁸

16. *Id.* at 639–40.

17. *Id.* at 641.

18. Opinion, *Schmitt v. LaRose*, No. 20-4025 (6th Cir. June 15, 2021), D.E. 15, 2021 WL 4592524 (“The rejection of a party’s key legal argument on appeal counts at a minimum as a special circumstance justifying a district court’s decision to deny fees.”), *aff’g* Opinion, *Schmitt v. Husted*, No. 2:18-cv-966 (S.D. Ohio Dec. 4, 2019), D.E. 71, 2019 WL 6527976, *cert. denied*, 595 U.S. ___, 142 S. Ct. 466 (2021); *see* Opinion, *Schmitt*, No. 2:18-cv-966 (S.D. Ohio Sept. 21, 2020), D.E. 79, 2020 WL 5626891 (denying reconsideration).