Supreme Court of Ohio Clerk of Court - Filed September 04, 2015 - Case No. 2015-1371

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *ex rel.*	)	**Case No. 2015-1371**
RENEE WALKER, *et al.*,	)	
	)	
Relators,	)	
	)	
v.	)	
	)	
JON HUSTED,	)	
	)	
Respondent.	)	

BRIEF OF AMICI CURIAE OHIO OIL AND GAS ASSOCIATION AND OHIO GAS ASSOCIATION IN SUPPORT OF THE SECRETARY'S DECISION TO INVALIDATE THE PROPOSED ATHENS, FULTON, AND MEDINA COUNTY CHARTER PETITIONS

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INTRODUCTION TO AMICI CURIAE

The Ohio Oil and Gas Association (the "OOGA") and the Ohio Gas Association (the "OGA") are trade organizations, whose members participate in oil and gas activities throughout the State of Ohio. The OOGA's 3,100 members engage in all aspects of the exploration, production, and development of oil and natural gas resources within the State of Ohio. The OOGA exists to protect, promote, foster, and advance the common interest of its members and those engaged in all aspects of the oil and natural gas industry. As a trade organization, the OGA's membership includes over 30 local distribution companies and cooperatives, the vast majority of intra- and inter-state gas transmission firms, and over 10 natural gas commodity marketers whose customers include residential, commercial and industrial gas users. The OGA functions as an information exchange for technical and operational support and to promote customer satisfaction, public safety and public awareness. The member companies of the OGA serve over 3.6 million customers in Ohio.

The OOGA, the OGA, and their members are interested parties to this mandamus action because Relators seek to place on the November ballot petitions to enact county charters, which purport to limit and even prevent the membership from engaging in lawful oil and gas drilling and operations. Fulton and Medina County make it illegal to engage in certain new oil and gas exploration. (Exhibits A and B to Relators' Verified Complaint for Writ of Mandamus, filed Aug. 19, 2015, at Article II.) Athens, Fulton, and Medina all make it illegal to engage in activities that are part of the drilling and operation of oil and gas wells. (Exhibits A, B, and C to Relators' Verified Complaint for Writ of Mandamus, filed Aug. 19, 2015 (hereinafter "Petitions"), at Article II.)

PRELIMINARY STATEMENT

Secretary of State Jon Husted (the "Secretary") acted within his authority and fulfilled his statutory obligations when he invalidated the charter petitions submitted by Athens, Fulton and Medina counties (the "Petitions"). As the chief election official in the State, the Secretary is entrusted with the authority to determine whether initiative petitions, like the Petitions, may lawfully be enacted by the county electorate, and he has the responsibility to prevent unlawful ballot petitions from reaching the electorate. He did just that.

The Petitions seek to enact legislation that is outside the scope of the peoples' initiative power, as authorized by the Ohio Constitution, because they expressly exempt Athens, Fulton and Medina counties from state and federal preemption, as well as the rulings of this Court And, Petitions, with their Community Bills of Rights, failed to propose a form of government recognized by Ohio law. They do not provide for a county executive as required by R.C. 302.02 and R.C. 302.14. For these reasons, the Secretary was required to invalidate the Petitions.

Under these circumstances, Relators' writ should be denied. The Relators have not established that the Secretary has a clear legal duty to approve the defective petitions, nor that they have a clear legal right to have their defective petitions appear on the ballot.

STATEMENT OF FACTS

A. THE PETITIONS PROPOSE CHARTERS VESTING THE COUNTY GOVERNMENTS WITH UNPRECEDENTED AUTHORITY.

Relators and their respective petitioner committees in Athens, Fulton, and Medina Counties circulated petitions which propose to alter the form of county government in each of the counties by adopting a charter attached to and incorporated into the petition (collectively, the "Petitions"). Each petition seeks to pose the following question on the November ballot: "Shall the attached county charter be enacted?" (Petitions, at paragraph 1.)

The Petitions proclaim that the citizens of Athens, Fulton and Medina counties "deem it necessary to alter the current County government" to provide certain rights the petitioners believe to be "presently unavailable to the residents under the statutory form of County government." (Petitions, at Preamble, paragraph 1.) Each Petition explains that the proposed Charter is a "home rule Charter" through which the powers vested in home rule municipalities will be conferred upon the County and the people of the County. (*Id.*, at Preamble, paragraphs 3-4)

The Charters purport to secure to the citizens of Athens, Fulton and Medina counties "the power to articulate and protect fundamental rights ***free from preemption by other levels of government***." (Emphasis added.) (Petitions, at Preamble, paragraph 3.) The Petitions seek to "elevate the consent of the governed ***above administrative dictates and preemptions*** that serve special privileges rather than general rights." (Emphasis added.) (Petitions, at Preamble, paragraph 4.) In that vein, the rights of the people, as secured by each charter, "***shall not be limited, infringed, or abridged by any law, judicial ruling, preemption, regulation, process, permit, license, Charter, or delegation of privilege or authority***." (Emphasis added.) (Petitions, at Art. I, Section 1.02.)

B. CITIZENS PROTESTED AND THE SECRETARY UPHELD THE PROTESTS, INVALIDATING THE PETITIONS.

The Athens, Fulton and Medina county boards of elections each certified the Petitions for the November ballot. But, citizens in each of the counties questioned those decisions. On August 3, 2015, the County Boards of Elections for Athens, Fulton, and Medina County delivered to the Secretary protests they received to the Petitions. In connection with these protests, the Secretary requested amicus briefing by interested parties. This allowed the Secretary to consider matters not raised by the protests in determining the validity of the

Petitions. R.C. 307.95(C) ("The secretary may determine whether to permit matters not raised by protest to be considered in determining such validity . . . .").

On August 13, 2015, the Secretary issued his decision upholding the protests and declaring the Petitions to be invalid. Pursuant to his authority under R.C. 307.95, the Secretary determined that the Petitions failed to comply with the minimum statutory requirements for forming an alternative, charter form of county government and were, thus, invalid. Similarly, the Secretary held that the Petitions sought to legislate on matters that were outside the scope of the electorate's initiative power under Article X, Section 3 of the Ohio Constitution. Relators responded on August 19, 2015, by filing this mandamus action (the "Action").

C. THE PETITIONS STEM FROM A COMMUNITY BILL OF RIGHTS INITIATIVE ORIGINATING WITH A PENNSYLVANIA ENVIRONMENTAL GROUP.

The Petitions stem from the "Community Bill of Rights" initiative, sponsored by the Community Environmental Legal Defense Fund ("CELDF"), a Pennsylvania environmental activists' organization. CELDF seeks to regulate "corporate harms" by asserting "democratic control directly over corporations."[1] CELDF's founder's goal is to reboot American democracy.[2] The Petitions were drafted by CELDF. With multi-million dollar support, CELDF

[1] Community Environmental Legal Defense Fund, *History*, http://www.celdf .org/history (accessed Sept. 4, 2015).

[2] Community Environmental Legal Defense Fund, *Press Release: Ohio Citizens Protest Against Secretary of State for Denying Their Constitutional Right to Vote*, http://www.celdf.org/press-release-ohio-citizens-protest-against-secretary-of-state-for-denying-their-constitutional-right-to-vote- (accessed Sept. 4, 2015); Jackie Stewart, *Lifting the Curtain on the Pennsylvania Group Behind Ohio's "Local" Anti-Fracking Campaigns*, *available at* http://energyindepth.org/national/lifting-the-curtain-on-the-pennsylvania-group-behind-ohios-local-anti-fracking-campaigns/ (accessed Sept. 4, 2015).

and its Ohio organizers have set out "to alter, reform or abolish the current government" of Ohio.[3]

ARGUMENT

I. RELATORS' PETITION FOR MANDAMUS SHOULD BE DENIED BECAUSE THE SECRETARY DOES NOT HAVE A CLEAR LEGAL DUTY TO VALIDATE THESE DEFECTIVE PETITIONS.

Under Section 307.95 of the Ohio Revised Code: "The secretary of state . . . shall determine the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures" whenever a protest is filed against a county charter petition. R.C. 307.95(C). In carrying out this duty, the Secretary, as the chief election official, properly considered whether the Petitions, that were the subject of a protest, complied with all requirements of law.

A. The Secretary of State's Duty to Determine the Validity of the Petitions Requires that He Consider their Legal Sufficiency Which Is Not Limited to the Question Presented and the Signatures.

Neither section R.C. 307.95, nor any other provision of the Ohio Constitution or Revised Code limits the Secretary's authority to reviewing only the procedural sufficiency of a petition form as Relators claim. Rather, R.C. 307.95(C)'s mandate that the Secretary assess the validity or invalidity of the petitions is a directive to consider their legal sufficiency. Black's Law Dictionary defines "validity" as the term "used to signify legal sufficiency, in contradistinction to mere regularity." *Black's Law Dictionary* Online (2d Ed.), www.thelawdictionary.org/validity/

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[3] *See* Community Environmental Legal Defense Fund, *Press Release*. CELDF has sought to place its pre-packaged ordinances on the ballots in Colorado, New Mexico, and New York. Enactment of CELDF's "bill of rights" has resulted in serious problems for at least one New Mexico county. Mora County adopted a CELDF proposal in 2013. Since then, Mora has been entangled in litigation in federal court, the end result of which was the "bill of rights" was revoked, and hundreds of thousands of dollars were spent in attorney's fees. *See Swepi, LP v. Mora County*, D.N.M. No. CIV 14-0035, 2015 U.S. Dist. LEXIS 13496 (Jan. 19, 2015); Rob Nikolewski, *Rejected fracking ban may cost NM county 'hundreds of thousands' in legal fees*, *available at* http://watchdog.org/195799/fracking-ban-new-mexico/ (accessed Sept. 4, 2015).

(accessed Aug. 30, 2015). Similarly, the Oxford Dictionary defines validity as "The state of being legally or officially binding or acceptable." Oxford Dictionaries, *valid*, http://www.oxforddictionaries.com/us/definition/american _english/validity (accessed Sept. 3, 2015); *accord* Merriam-Webster Online, *valid*, http://www. merriam-webster.com/dictionary/valid (accessed Sept. 3, 2015) (valid – "having legal efficacy or force; *especially*: executed with the proper legal authority and formalities").

In fact, in looking at the validity of a petition, the Secretary is permitted to exercise quasi-judicial authority: "The secretary of state . . . shall determine the validity or invalidity of the petition and . . . may determine whether to permit matters not raised by protest to be considered . . . and may conduct hearings." *See* R.C. 307.95(C)); *Barton v. Butler County Bd. of Elections*, 39 Ohio St.3d 291, 291, fn.1, 530 N.E.2d 871 (1988) (finding that quasi-judicial authority is authorized by law where the legislature confers the authority to "[r]eview, examine, and certify the sufficiency and validity of petitions and nomination papers."). While the Secretary does not have the authority to exercise a purely judicial function, R.C. 307.95(C) does grant him the authority to look beyond the purely procedural aspects of the petition in assessing the validity or invalidity of a ballot petition. *State ex rel. LetOhioVote v. Brunner*, 125 Ohio St.3d 420, 2010-Ohio-1895, 916 N.E.2d 462 (2009) (this Court has "consistently defined quasi-judicial authority as 'the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial.'") (citing *State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008 Ohio 5093, 895 N.E.2d 177, ¶ 16).

1. Ohio Case Law Is Clear: The Substance Must Be Considered to Determine the Validity or Invalidity of the Petitions.

This Court and other Ohio courts have routinely held that the Secretary's authority to determine the validity or invalidity of an initiative petition is **not limited** merely to looking at the

procedural validity of the petition form. Recently, this Court recognized the Secretary's authority to review the substance of a proposed ballot initiative to determine whether it was authorized by the people's initiative power under the Ohio Constitution. *State ex rel. City of Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, 978 N.E.2d 157. To assess whether the ballot initiative addressed legislative or administrative matters so as to be the proper subject of an initiative, the Secretary and this Court reviewed the specific contents of the initiative. *Id.* (upholding the Secretary's decision concluding that it was a proper exercise of initiative power); *accord State ex rel. Carter v. Celebrezze*, 63 Ohio St.2d 326, 410 N.E.2d 1249 (1980) (upholding the secretary of state's review of the contents to two part-petitions finding them not identical; consequently signatures for one could not be counted for the other). *See also Ohioans for Wildlife Conservation v. Taft*, 10th Dist. Franklin No. 98AP-1008, 1998 Ohio App. LEXIS 4274 (Sept. 16, 1998) (approving the secretary of state's review of the substance of a proposed ballot initiative amending a revised code section to determine if all requirements of law were met).

B. The Secretary Properly Considered the Entire Petition, Not Just the Question Presented and the Signatures.

The Relators are misguided in their assertion that the charters themselves are off limits from the Secretary's review of the protests. The "petition" is the entire packet of documents presented for authentication. *State ex rel. Burgstaller v. Franklin Co. Bd. of Elections*, 149 Ohio St. 193, 195, 78 N.E.2d 352 (1948) (holding that all forms filed are regarded as the "petition"); *Carter* at 328 (finding that the secretary of state is required to review the entire content of part-petitions to determine the accuracy and identicalness of the petitions).

In this case, the proposed charter is part of each Petition. It is incorporated expressly: "Shall the attached county charter be enacted?" (Petitions, at paragraph 1.) Each of the proposed charters is printed in its entirety directly below the question. It is incorporated by

reference: "We hereby designate the following persons as a committee to represent the petitioners in all matters relating to ***this petition*** or its circulation." (Emphasis added.) (Petitions, at committee certification) (referring to the entire petition including the proposed charter). The proposed charters are an integral part of Petitions – it is what the electorate is being asked to enact – and the Secretary was bound to review them for compliance with all relevant requirements of law.

C. Case Law Cited by Relators Agrees: The Secretary Should Do a Substantive Review of the Petitions' Content and Substance.

Even the cases cited by Relators support the Secretary's authority to consider substance and content to determine whether the Petitions complied with all requirements of law, such as whether the Petitions were the proper subject of the people's initiative power. As pointed out by the Relators, the cases they cite stand for the proposition that the Secretary or other election official should not review the legality or constitutionality of a proposed law before it is enacted; such an analysis would be premature prior to enactment. Nonetheless, in the very cases on which Relators rely, this Court upheld the authority to engage in a substantive analysis to assess compliance with either the local, statutory, or constitutional requirements necessary to place the petitions on the ballot. Whether there is authority to place the petitions on the ballot and whether the substance of the initiative is constitutional are two different questions. The former is the analysis that the secretary must – and did – do.

Relator's cases are in accord with this Court's rulings in *Brecksville* and *Carter*, as well as the analogous board of election cases addressed *infra*. For example, in *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St. 3d 184, 2012-Ohio-4310, 977 N.E.2d 590, the Court affirmed the board of election's determination that the substance of the petition did not trigger the Ohio Constitution's "separate-vote" requirement (Article XVI, Section 1, Ohio Constitution)

or the Akron Charter's "single subject" requirement. *Id*. at 188-89. This Court's decision in *State ex rel. Citizen Action v. Hamilton County Bd. of Elections*, 115 Ohio St. 3d 437, 2007-Ohio-5379, 875 N.E.2d 902 (2007), involved significant analysis of the substance and content of the initiative provision to determine whether the board of elections correctly concluded that the provision was outside the scope of the municipality's initiative power. *Id.* at 442-46. The case of *DeBrosse* is no different. *See State ex rel. DeBrosse v. Cool*, 87 Ohio St. 3d 1, 716 N.E.2d 1114 (1999) (engaging in a review of the initiative petition's substance to determine its compliance with statutory and constitutional prerequisites, as well as the people's authority to enact the petition pursuant to their initiative powers).

In reaching his decision, the Secretary embraced the rules set down in the cases discussed above. He relied on *Durell v. Celebrezze* when he assessed the propriety of the Petitions. 10th Dist. Franklin No. 80AP-656, 1980 Ohio App. LEXIS 13399 (Oct. 21, 1980) (enjoining the secretary of state from placing an initiative petition on the ballot where the petition attempted to classify property for purposes of levying different rates of taxation which was not permitted by the Ohio Constitution). After looking at the totality of the Petitions, the Secretary invalidated them because the Petitions themselves did not meet the requirements of law.

D. This Court Has Routinely Held that When Other Election Officials Are Called on To Assess the Validity of a Petition, they Must Review the Petition's Substance and Content.

The Secretary's review of the substance of the Petitions to determine whether they complied with the statutory and constitutional requirements necessary to appear on the ballot is consistent with this Court's rulings in other election contexts. This Court has routinely held that the statutory grant of authority to the board of elections to review the validity or invalidity of a petition allows, and may even require, a review of the petition's substance and content to determine whether the petition may lawfully be enacted by the electorate.

Recently, in *State ex rel. Ebersole v. Del. County Bd. of Elections*, this Court considered and upheld a board of election's decision to invalidate a city initiative petition based on the fact that the substance of the petition was outside the scope of the city's initiative power under Article II, Section 1f. In upholding the board's discretion, this Court found that the statutory duty to "review, examine, and certify the sufficiency and validity of petitions" creates "an affirmative duty to review the content of proposed referenda and initiatives." 140 Ohio St. 3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶¶ 44, 46. Where the substance or content exceeds the people's initiative power, this Court has "made clear that in such cases, the board of elections is 'required to withhold the initiative and referendum from the ballot.'" *Id.* at ¶ 30.

Similarly, in *State ex rel. Flynn v. Bd. of Elections*, this Court upheld the board of election's decision to invalidate a nominating petition for a municipal judge. The nominee did not satisfy the statutory qualifications for the office, even though his nominating petition satisfied all procedural requirements. 164 Ohio St. 3d 193, 196-98, 129 N.E.2d 623 (1955). The relator in that case claimed that the board of elections "has authority only to review, examine and certify the sufficiency and validity of petitions and nominating papers and that it is not empowered to determine the professional qualifications of a candidate for judge." *Id.* at 198. The Court rejected relator's contention and upheld the board of election's decision to keep the relator's nominating petition from appearing on the ballot. The statutory authority to determine the validity or invalidity of a candidate's nominating petition necessarily included "the authority to determine the facts which will disclose whether the candidate may lawfully be elected to the office he seeks." *Id.* at 200-02.

In *State ex rel. Shumate v. Portage County Bd. of Elections*, this Court concluded that the board of elections had an affirmative duty to consider whether the candidate was a lawful

candidate. 64 Ohio St.3d 12, 16, 591 N.E.2d 1194 (1992) (citing *Flynn*, 164 Ohio St. 193, 129 N.E.2d 623). In *Flynn*, this Court has recognized the authority of the board to undertake the analysis; in *Shumate* it imposed an obligation to do so.

E. Conclusion: The Relators Have Not Presented Any Evidence or Legal Authority to Support their Contention that the Secretary Had a Clear Legal Duty To Do Anything Other than the Analysis He Did.

When the Secretary assessed the Athens, Fulton and Medina county Petitions, he considered whether they met the minimum requirements of law. In doing so, he properly exercised the authority granted him by the Ohio Revised Code, as recognized in a long line of this Court's and other courts' decisions. The Relators' petition for mandamus must be denied because they do not establish that the Secretary had a clear legal duty to approve the defective petitions to appear on the ballot. To the contrary, statutory authority and case law from across the state establish that the Secretary has a clear legal duty to reject the Athens, Fulton and Medina county petitions.

II. THE RELATORS' DO NOT HAVE A CLEAR LEGAL RIGHT TO HAVE THE CHARTERS APPEAR ON THE BALLOT BECAUSE THEY DO NOT SATISFY THE MINIMUM STATUTORY REQUIREMENTS FOR AN AUTHORIZED, ALTERNATIVE FORM OF COUNTY GOVERNMENT.

A. The Petitions Claim to Establish an Alternative Form of County Government.

Each Petition makes clear that the intent of the Charters is to "alter the current County government" to provide certain rights "presently unavailable to residents under the statutory form of County government." (Petitions, at Preamble, paragraph 1.) Consequently, it is disingenuous of the Relators to claim, as they do in their merits brief, that "The proposed Charters need not, and **do not**, purport to establish an alternative form of government." (Emphasis added.) (Relators' Merit Brief, filed Sept. 1, 2015, at 9). Because the proposed alternative form of County government included in each Petition fails to comply with the basic

dictates of the Ohio Revised Code and the Ohio Constitution, the Secretary correctly concluded that the Petitions are invalid.

B. The General Assembly Imposed Requirements for Statutory Counties and Alternative Forms of County Government.

Ohio counties may exercise only those powers affirmatively granted by the General Assembly. *Geauga County Board of Commissioners v. Munn Road Sand and Gravel*, 67 Ohio St. 3d 579, 583, 621 N.E.2d 696 (1993) ("[I]n the absence of a specific statutory grant of authority, a board of county commissioners is powerless to enact legislation."); *Schaffer v. Board of Trustees of Franklin Cty. Veterans Memorial*, 171 Ohio St. 228, 230, 168 N.E.2d 547 (1960) ("Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them."). The Ohio Constitution dictates: "The General Assembly shall provide by general law for the organization and government of counties." Article X, Section 1, Ohio Constitution.

1. Ohio Counties Can Opt to Become an Alternative, Home-Rule Charter County.

Ohio counties have the option to enact an alternative form of county government, distinct from the statutorily proscribed form outlined by R.C. 301, *et seq.* All alternative forms of county governance are required to comply with the mandatory provisions of R.C. 302, *et seq.* R.C. 302.01 ("The electors of any county may adopt an alternative form of county government authorized by the provisions of [this Chapter]."). One type of alternative county government is the home-rule county charter form of government.[4] "The people of any county may frame and adopt or amend a charter as provided in [Article X.]" Article X, Section 3, Ohio Constitution.

[4] A non-charter, alternative form of county government is established by picking and choosing from the various permissive provisions of R.C. 302, *et seq*.

The characteristic that distinguishes a charter county from other, alternative forms of county government is the grant of home-rule authority the county government receives from the county's municipal governments. *Compare* Article X, Section 3, Ohio Constitution *with* R.C. 302, *et seq.* The home-rule county charter form of government is but one form of alternative county governance.

Home-rule county charter governments are not exempt from the requirements of R.C. Chapter 302. *See Blacker v. Wiethe*, 16 Ohio St.2d 65, 69, 242 N.E.2d 655 (1968) ("[W]e find nothing in Article X of the Ohio Constitution which will support a reasonable conclusion that Sections 3 and 4 thereof constitute a limitation on the power of the General Assembly under Section 1 thereof by general laws to provide for the government of counties and for alternative forms of county government . . . .") (internal quotations omitted); Article X, Section 3, Ohio Constitution ("Every [county] charter shall . . . provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.").

2. Only Two Ohio Counties Have Enacted Alternative, Home-Rule County Governments.

Of the 88 counties in Ohio, only two – Summit County and Cuyahoga County – operate as alternative, home-rule charter counties. *See Toledo Edison Co. v. Bd. of Defiance County Comm'rs*, 2013-Ohio-5374, 4 N.E.3d 458, ¶ 20, fn.4 (3rd Dist.) (noting that only Cuyahoga and Summit Counties have adopted a charter pursuant to Article X, Section 3 of the Ohio Constitution); *Greene v. Cuyahoga County*, 195 Ohio App.3d 768, 2011-Ohio-5493, 961 N.E.2d 1171, ¶¶ 10-19 (8th Dist.) (discussing Cuyahoga County's adoption of an alternative form of county government by enacting a county home-rule charter); *State ex rel. Strategic Capital Investors v. McCarthy*, 126 Ohio App.3d 237, 244, 710 N.E.2d 290 (9th Dist.1998), fn. 3

(stating, "Summit County has adopted an alternative form of county government" subject to the requirements, duties, and obligations imposed by R.C. 302, *et seq.*).

C. All Alternative Forms of County Government Must Provide for a County Executive.

Alternative forms of county government are required to elect or appoint a county executive:

> An alternative form of county government ***shall*** include either an **elective county executive** as provided for by section 302.15 of the Revised Code **or** an **appointive county executive** as provided by section 302.16 of the Revised Code, and all those provision of section 302.01 to 302.24, inclusive, of the Revised Code, which have not been specifically designated as applicable only to the elective county executive plan or the appointive county executive plan.

R.C. 302.02. (Emphasis added). *See also* R.C. 302.14 ("There **shall** be a county executive, who shall be the chief executive officer of the county. He **shall** be either an elective county executive as provided for in section 302.15 of the Revised Code, or an appointive county executive as provided for in section 302.16 of the Revised Code."). (Emphasis added.)

D. The Petitions Fail to Provide for a County Executive.

By failing to provide for a county executive, the Petitions fail to meet the requirements of R.C. 302.02 and 302.14. Consequently, the Petitions do not propose a lawful form of county government. *See* Article X, Section 3, Ohio Constitution ("Every [county] charter shall provide the form of government of the county and . . . shall provide for the exercise of all powers vested in, and the performance of all duties ***imposed upon counties and county officers by law***." (Emphasis added.)); R.C. 302.01 ("[A]ny county may adopt an alternative form of county government authorized by the provisions of [this Chapter].").

Sections 3.01 and 4.01 of the Petitions maintain the status quo without providing for the election or appointment of any new officer(s).[5] But neither Athens, Fulton, nor Medina County have an executive currently.[6] Each Petition provides that the powers of the respective county "shall be exercised and enforced by ordinance or resolution of the County Commissioners." (Petitions, at Art. III, Section 3.01.) Section 4.01 of each Petition further clarifies the lack of change:

> The **offices and duties of those offices**, as well as the manner of election to and removal from County offices, and every other aspect of county government not prescribed by the Charter, or by amendments to it, **shall be continued without interruption or change** in accord with the Ohio constitution and the laws of Ohio that are in force at the time of the adoption of this Charter and as they may subsequently be modified or amended.

E. Conclusion: The Relators Have Not Presented Any Evidence or Legal Authority to Support their Contention that they Have a Clear Legal Right To Have their Petitions on the Ballot.

The Relators' petition for mandamus should be denied because they do not have a clear legal right to have their defective petitions appear on the November ballot. The Secretary exercised his authority and fulfilled his duty to assess whether the Petitions were lawful. Like

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[5] As way of comparison, both Cuyahoga County and Summit County, the only counties in Ohio to enact charter forms of county government, devote an entire Article of their charters to defining the role of, compensation for, election of, and duties and powers of the county executive. *See generally*, Cuyahoga County Charter, Art. II, *available at* http://council.cuyahogacounty.us/en-US/charter-cuyahogacounty.aspx (accessed Sept. 4, 2015); Summit County Charter, Art. II, *available at* http://www.conwaygreene.com/Summit/lpext.dll?f=templates&fn=main-j.htm&2.0 (accessed Sept. 4, 2015).

[6] *See generally*, Athens County Local Government, *Departments: Commissioner's Office*, http://co.athensoh.org/commissioner-s-office.html (accessed Aug. 6, 2015) (naming County Commissioners without reference to a County Executive); Fulton County Government, *County Commissioners*, http://www.fultoncountyoh.com/index.aspx?nid=210 (accessed Aug. 6, 2015) (naming County Commissioners without reference to a County Executive and stating, the "board is the legislative body and its members are the community's decision makers."); Medina County Commissioners, *Elected Officials*, http://www.co.medina.oh.us/commiss/commiss.htm (accessed Aug. 6, 2015) (naming County Commissioners without reference to a County Executive and stating that the Board of Commissioners is the county-wide, legislative governing body).

the elections officials who assessed the qualifications of the judicial candidates, the Secretary concluded that the Petitions are lacking the necessary elements to establish a lawful government if enacted. Consequently, the Secretary found them to be invalid. That decision should not be disturbed.

III. THE PETITIONS EXCEED THE PEOPLE OF ATHENS, FULTON, AND MEDINA COUNTIES' INITIATIVE POWER AND, THEREFORE, ARE INVALID AND CANNOT APPEAR ON THE BALLOT.

A. The Proposed County Charters Exempt the Counties from Federal and State Preemption.

While the Charters do nothing to alter the way county government operates, the Petitions attempt to create new bills of rights applicable only to the citizens of Athens, Fulton and Medina counties. Under these new bills of rights, the county governments of Athens, Fulton and Medina counties are conferred superpowers – no longer will they be governed by state or federal statutory or common law. The dictates of this Court or of the U.S. Supreme Court would, under the charters, have no force or effect if the county government prefers not to be bound by this Court's decisions.

The Petitions and the charters addressed in the Petitions propose granting "power to articulate and protect fundamental rights ***free from preemption by other levels of government***," (Petitions, at Preamble, paragraph 3), the power "to elevate the consent of the governed ***above administrative dictates and preemptions***," (Petitions, at Preamble, paragraph 4), and the power to legislate without "limit[ation], infring[ment], or abridge[ment] by ***any law, judicial ruling, preemption, regulation, process, permit, license, Charter, or delegation of privilege or authority,***" (Petitions, at Art. I, Section 1.02). They also attempt to "modify the rights, powers, privileges, immunities, or duties of corporations that act within the County," (Petitions, at Art. I, Section 1.11), by deeming that corporations are not persons and have no "legal rights, powers,

privileges, immunities, or duties that would interfere with the rights enumerated," (Petitions, at Art. I, Section 1.12).

As the Petitions are drafted, if any of these counties decide they do not want to follow the rulings handed down by this Court or by the U.S. Supreme Court or by state or federal statute, they can proceed undeterred in crafting their county ordinances. They can decide that no person in the county is permitted to own or possess any guns. They can decide that they do not need to abide by state or federal educational standards. They can decide to post 25 m.p.h. speed limits on every state and federal roadway in the county.

B. The Secretary Correctly Concluded that the Petitions Seek to Enact Legislation Outside the Scope of the Electorate's Initiative Power.

1. The People's Initiative Power is Limited.

As the Secretary correctly concluded, the people of Athens, Fulton and Medina counties do not have the power to control by legislative action the matters addressed in the charters. They exceed the scope of the electorate's initiative power under Article X, section 3 of the Ohio Constitution.

Citizens of an Ohio county cannot exercise more initiative power than is granted them under the Ohio Constitution. *See Ebersole*, 140 Ohio St.3d at 491, 20 N.E.3d 678 (interpreting municipal initiative power). The Ohio Constitution grants to the people of Athens, Fulton, and Medina counties – and of all Ohio counties – the right of initiative "on all matters which such county may now or hereafter be authorized to control by legislative action."[7] Article X, Section 3, Ohio Constitution.

[7] The Petitions' transfer of home-rule authority from the municipalities to the county does not change this analysis because municipal initiative power is also limited by the Ohio Constitution. Art. II, Section 1f, Ohio Constitution ("The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action.").

2. County Citizens Do Not Have Initiative Power to Put Themselves Above State or Federal Law.

The citizens of Athens, Fulton and Medina counties have not been authorized to control whether they are exempt from federal or state preemption through legislative action. Under the United States Constitution and Ohio Constitution, the citizens of Athens, Fulton, and Medina counties are required to adhere to general federal and state laws. *Cook v. Moffat & Curtis*, 46 U.S. 295, 308, 12 L. Ed. 159 (1847) ("The constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States."); the Supremacy Clause, U.S. Constitution, Article VI, cl. 2; Article XVIII, Section 3, Ohio Constitution ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.") (Emphasis added.); Article IV, Section 1, Ohio Constitution ("Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power.")

The only way to exempt Athens, Fulton, and Medina counties from state and federal authority would be to amend the U.S. and Ohio constitutions. Article II Section 1a of the Ohio Constitution and Article V of the United States Constitution establish the proper procedural means by which each Constitution may be amended. The adoption of a county charter is not a proper procedural means to amend either constitution.

C. Conclusion: The Relators Have Not Presented Any Evidence or Legal Authority Showing they Have a Clear Legal Right to Exempt Themselves from Federal or State Law.

Where initiative petitions exceed the authority granted in Article X, Section 3 of the Ohio Constitution, they must be withheld from the ballot. *See State ex rel. Upper Arlington v.*

Franklin Cty. Bd. of Elections, 119 Ohio St.3d 478, 2008-Ohio-5093, 895 N.E.2d 177 (holding that the board of elections abused its discretion by placing a petition on the ballot that exceeded the electorate's initiative power); *State ex rel. Rhodes v. Lake Cty. Bd. of Elections*, 12 Ohio St.2d 4, 230 N.E.2d 347 (1967) (holding that an initiative petition to control the President of the United States decisions in the conduct of war exceeded the people's initiative by relating to a question the municipality was not authorized by law to control through legislative action). Since the Petitions exceed the initiative power granted to the citizens of Athens, Fulton and Medina counties, the Secretary was correct to invalidate the Petitions. His decision to withhold them from the November 3, 2015 election should be upheld.

IV. AMICI CURIAE ARE INTERESTED IN THIS MATTER BECAUSE THE PROPOSED CHARTER PETITIONS PURPORT TO UNLAWFULLY RESTRICT OR PROHIBIT THEIR MEMBERS' BUSINESS INTERESTS.

The OOGA, the OGA and their members are concerned about the Petitions because they purport to limit and even prevent the membership from engaging in lawful oil and gas drilling and operations. Fulton and Medina County make it illegal to engage in certain new oil and gas exploration. Article II, Fulton and Medina Petitions. Athens, Fulton, and Medina all make it illegal to engage in activities that are part of the drilling and operation of oil and gas wells. Article II, Athens, Fulton and Medina Petitions.

But, pursuant to the comprehensive, statewide regulatory scheme found in Ohio Revised Code Chapter 1509, the Ohio Department of Natural Resources (the "ODNR") has the exclusive authority to regulate oil and gas drilling and operations in the State of Ohio. The Athens, Fulton, and Medina County efforts to regulate oil and gas drilling and operations conflict with the comprehensive statewide regulatory scheme found in R.C. 1509, *et seq.*

If these charters appear on the ballot and are enacted, the OOGA and OGA's members and Athens, Fulton and Medina County will likely experience needless, repetitive litigation as

the OOGA and OGA members reassert rights that have time and again been confirmed by Ohio Courts: R.C. 1509, *et seq.* established a general law of the state of Ohio, and local efforts to prohibit or limit oil and gas operations in conflict with R.C. 1509, *et seq.* are preempted and unenforceable. *See, e.g.*, *Morrison v. Beck Energy*, 2015-Ohio-485, ¶34 (2015); *Bass Energy v. City of Broadview Heights*, Cuyahoga C.P. No. CV-14-828074 (Mar. 11, 2015) (holding a charter provision nearly identical to the Medina proposal is an unenforceable exercise of home-rule authority).

With the decision in *Morrison*, this Court recognized that Article II, Section 36 of the Ohio Constitution vests the General Assembly with the power to pass laws providing for the "*regulation* of methods of mining, weighing, measuring and marketing coal, *oil, gas and all other minerals.*" (Emphasis in original.) *Morrison*, 2015-Ohio-485, at ¶34 (quoting Article II, Section 36, Ohio Constitution). The General Assembly exercised that authority by enacting the comprehensive regulatory scheme found in R.C. Chapter 1509, *et seq*. Pursuant to whatever home-rule authority they possess,[8] Ohio charter counties may lawfully regulate oil and gas drilling and operations only to the extent of enacting police regulations that are not in conflict with or do not unfairly impede or obstruct activities permitted by R.C. 1509.02. *See id.*

The Petitions' provisions regarding oil and gas drilling and operations are an invalid exercise of their initiative power. The counties do not have the authority to control by legislative

[8] As discussed in Section II.B.1, the people of a county are constitutionally permitted to enact a county charter authorizing the county to exercise all or any of the designated powers "vested by the constitution or laws of Ohio in municipalities." Article X, Section 1, Ohio Constitution. However, a municipality can only transfer those powers it has under the Ohio Constitution. *Id.* ("Municipalities and townships shall have authority, with the consent of the county, to transfer to the county *any of their powers*...." (Emphasis added).) The Ohio Constitution vests municipalities with the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are **not in conflict with general laws**." (Emphasis added.) Article XVIII, Section 3, Ohio Constitution.

initiative that which conflicts with R.C. 1509.02 et seq. Moreover, if enacted, they will be unenforceable as an invalid exercise of home rule authority. *See Morrison*, 2015-Ohio-485, at ¶ 34; *Bass Energy*, Cuyahoga C.P. No. CV-14-828074 (Mar. 11, 2015) (holding a nearly identical charter provision was an unenforceable exercise of a city's home-rule authority).

Because a county charter could only be effective to transfer power held by the municipalities to the county, and because municipalities do not have the power to enforce a blanket prohibition of or limitations on drilling or operations of certain kinds of oil and gas wells, the Athens, Fulton, and Medina charter petitions are invalid (as they relate to oil and gas drilling and operations).

CONCLUSION

For the foregoing reasons, amici curiae request that this Court affirm the Secretary's decision to uphold the protests filed against the Petitions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Brief of Amici Curiae Ohio Oil and Gas Association and Ohio Gas Association in Support of the Secretary's Decision to Invalidate the Proposed Athens, Medina, and Fulton County Charter Petitions* was filed with the Supreme Court of Ohio this 4th day of September 2015 and was served via electronic mail upon the following:

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