**ORIGINAL**

SUPREME COURT OF OHIO

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| STATE EX REL. GARY D. ZEIGLER, STARK COUNTY TREASURER<br><br>Relator<br><br>vs.<br><br>ALEXANDER A. ZUMBAR<br><br>Respondent | CASE NO. 10-1570<br><br>ORIGINAL ACTION IN *QUO WARRANTO* |

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# MERIT BRIEF OF RELATOR GARY D. ZEIGLER


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NOW COMES Relator Gary D. Zeigler ("Relator"), by and through undersigned counsel, and hereby submits to this Honorable Court, his Merit Brief, pursuant to S. Ct. Prac. R. 10.8.

## I. STATEMENT OF FACTS

This action concerns the pure question of law of whether on its face, R.C. 321.38 violates Article II, Section 38 of the Ohio Constitution. The issue before this Court arises from the honest and diligent work of Relator, a man who faithfully served the citizens of Stark County, Ohio for more than nine (9) years and was in the infancy of his third term as the duly elected County Treasurer when he was unconstitutionally ousted from office.[1] Relator, was unfairly and unconstitutionally removed from office by the Stark County Board of County Commissioners ("County Commissioners") for purely political reasons. Namely, the County Commissioners took advantage of an unconstitutional statute for their own political gain.

The present matter stems from an action instituted pursuant to R.C. 321.37,[2] whereby the Prosecuting Attorney for Stark County sought to recover funds missing from the county treasury due to the highly publicized thefts by former deputy treasurer, Vincent Frustaci ("Recovery Action"). (Relator's Complaint at ¶ 12). The Recovery Action is styled as *Stark County Treasurer, ex rel. John D. Ferraro, et al. v. Vincent Frustaci, et al.* and assigned Case

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[1] While the parties have stipulated to the authenticity of exhibits for purposes of providing the Court with background information, none of those exhibits are relevant to this Court's determination of Relator's facial challenge to the constitutionality of R.C. 321.38, as the same must hinge solely upon the text of that statute. R.C. 321.38 and Article II, Section 38 of the Ohio Constitution are attached hereto respectively as Appendix ("Appx.") pages 1 and 2.

[2] R.C. 321.37 reads in its entirety as follows: If the county treasurer fails to make a settlement or to pay over money as prescribed by law, the county auditor or board of county commissioners shall cause suit to be instituted against such treasurer and his surety or sureties for the amount due, with ten per cent penalty on such amount, which suit shall have precedence over all other civil business. Appx. page 3.

No. 2010 CV 02773. Despite acknowledging that Relator was cleared of any malfeasance or neglect of duty, the Stark County Prosecutor nevertheless instituted suit against Relator.[3] (Joint Stipulated Exhibit ("JT Stip. Ex.") A, Correspondence from Stark County Prosecutor to Relator).[4] Due to the politically charged nature of the case, in order to avoid even the appearance of conflict or impropriety, retired Judge H.F. Inderlied was appointed by this Court to hear the matter.

Following the filing of the Recovery Action, the County Commissioners publicized their intention to invoke R.C. 321.38[5] to remove Relator from office, providing only a cursory letter to Relator stating that a meeting would be held to address the Treasurer's Office.[6] (JT Stip. Ex. B, Notice of Special Meeting Set for August 2, 2010). Perhaps hoping to capitalize on this political scandal during an election year, the County Commissioners openly provided statements to the press of their intention to remove Relator at this meeting. Relator immediately moved the court in the Recovery Action for a temporary restraining order and preliminary

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[3] It is important to understand that Relator was not the party responsible for the theft of county funds, but rather, Relator is a victim of the same crime. Despite Relator's lack of involvement in the crime, he has been persecuted for his inability to account for funds lost due to factors beyond his control. While the financial loss to the citizens of Stark County is apparent, it is completely irrelevant to the current matter before this Court. The Relator has been removed from office, not based upon financial concern, but rather, by unconstitutional means due to political motivations.

[4] Joint Stipulated Exhibits were filed with this Court on December 20, 2010. The Court is respectfully referred to that filing.

[5] R.C. 321.38 reads in its entirety as follows: ***Immediately on the institution of the suit*** mentioned in section 321.37 of the Revised Code, ***the board of county commissioners may remove such county treasurer*** and appoint such person to fill the vacancy created. The person so appointed shall give bond and take the oath of office prescribed for treasurers. (Emphasis added). Appx. page 1.

injunction to prevent the County Commissioners from removing him, asserting that R.C. 321.38 on its face, violates Article II, Section 38 of the Ohio Constitution[7] because the statute does not provide for "complaint and hearing." Despite Respondent's repeated contentions otherwise, **at no time has Relator, here or in any other action, asserted that R.C. 321.37 is unconstitutional, and Relator does not assert that now.** (See Relator's Complaint; Respondent's Answer at ¶ 23). In the Recovery Action, the County Commissioners objected to Relator's Motion for Preliminary Injunction, claiming that they had not requested Relator's removal from office as part of their Complaint, and that any ruling on Relator's motions might constitute an advisory opinion.[8]

At the Preliminary Injunction Hearing/Status Conference conducted on August 13, 2010, by agreement of the parties, since the County Commissioners had scheduled a second meeting for that day to remove Relator, the temporary restraining order prohibiting Relator's removal was extended,[9] and Relator agreed to file a separate declaratory judgment action directly challenging the constitutionality of R.C. 321.38 and seeking provisional remedies. (See, JT Stip.

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[6] With regard to this first scheduled meeting, this is the only purported "notice" received by Relator and the same does nothing more than notify Relator of a meeting to address the monies stolen by Frustaci.

[7] Article II, Section 38 of the Ohio State Constitution provides as follows: Laws shall be passed providing for the prompt removal from office, ***upon complaint and hearing***, of all officers, including state officers, judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment and other method of removal authorized by the Constitution. (Emphasis added). Appx. page 2.

[8] This point is particularly interesting since despite their previous assertion, the County Commissioners have subsequently argued that the Recovery Action Complaint is the constitutionally required complaint giving notice to Relator of their intent to remove him from office.

Ex. D, Transcript of August 13, 2010 Proceeding). Relator did so by instituting the action styled as *Gary D. Zeigler, Stark County Treasurer v. Stark County Board of Commissioners*, bearing Case No. 2010 CV 03025 ("Declaratory Judgment Action"). (See Respondent's Answer at ¶ 22). The parties further agreed to have the Declaratory Judgment Action consolidated with the Recovery Action for the purpose of having Judge Inderlied hear all of the cases, and in recognition of the fact that expedience was crucial to all parties and the remaining Stark County Common Pleas judges were conflicted due to the highly politicized nature of the case. (*Id.*) It was widely understood that the Recovery Action and Declaratory Judgment Action were separate and distinct, and that a decision in one, did not affect the other.

After consolidation, Judge Inderlied decided all of the claims in the Declaratory Judgment Action, when he denied injunctive relief and declared that: R.C. 321.38 did not violate the Ohio or Federal Constitution; and Relator could not obtain relief through a preliminary injunction. (See Relator's Complaint; Respondent's Answer at ¶ 11). In light of the fact that the County Commissioners had scheduled a third removal meeting for August 23, 2010,[10] Relator made an oral request to extend the temporary restraining order to permit Relator to seek a stay of the trial court's Order. Judge Inderlied denied this request. Relator refused to attend the meeting of the County Commissioners on August 23, 2010. Relator made the County Commissioners aware of his position through a letter from his counsel, explaining the enabling statute the County Commissioners intended to rely upon was unconstitutional on its face and Relator was unwilling to participate in this unconstitutional exercise. (See, JT Stip. Ex. F, Correspondence from

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[9] The County Commissioners had scheduled a second meeting for Friday, August 13, 2010. (JT Stip. Ex. C, Notice of Special Meeting Set for August 13, 2010).

[10] See JT Stip. Ex. E, Resolution of County Commissioners setting meeting for August 23, 2010.

Attorney Matthew Nakon to Board of County Commissioners). Within hours of Judge Inderlied's ruling, the County Commissioners met and removed Relator from office. (See JT Stip. Ex. G, County Commissioners' August 23, 2010 Resolution removing Relator). In the resolution removing Relator, the County Commissioners state, in part, that:

> ***Although Treasurer Zeigler committed no crime or malfeasance, his failure to appear and be heard about what procedures he has implemented to restore the public's confidence that their tax dollars are protected in the future. Now, therefore, be it hereby resolved by the Board of Stark County Commissioners that, pursuant to R.C. 321.38, we remove Stark County Treasurer Gary D. Zeigler from the position of Stark County Treasurer, effective immediately.***

(See JT Stip. Ex. G-2). Thus, it appears that Relator's refusal to attend the meeting played a role in his termination. Nothing in R.C. 321.38 allows for a decision to terminate to be made based on failure to attend a meeting.[11]

At no time was Relator served with any notice consisting of anything that could arguably serve as a "complaint" setting forth any basis for his potential dismissal, until the County Commissioners, being made aware of the constitutional deficiencies of R.C. 321.38, attempted to create a notice purporting to give such information. That attempted curative "notice" was served only four days prior to the meeting that ultimately ended in the removal of the Relator. (See, JT Stip. Ex. E).[12]

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[11] Following Judge Inderlied's August 23, 2010 Order, Relator timely filed a Notice of Appeal to the Fifth District, as a determination as to the constitutionality of R.C. 321.38 is paramount to the issue of whether Relator, a duly elected public official, has been unconstitutionally removed from elected office. Presently, the Court of Appeals stayed the appeal until this Court issues a ruling in this matter. (JT Stip. Ex. H, December 8, 2010 Judgment Entry).

[12] Note, however, that Respondent and County Commissioners have not contended that this third "notice" constituted the constitutionally required notice or complaint. Rather,

Following Relator's unconstitutional removal from office, Jamie Allbritain was appointed by the County Commissioners as acting Stark County Treasurer. (Respondent's Answer at ¶ 33). On September 20, 2010, Kenneth Koher was subsequently appointed to the position of Stark County Treasurer. (*Id.* at ¶ 32). Eventually, following an election held on November 2, 2010, Alexander A. Zumbar was elected to the position of Stark County Treasurer, was sworn in and currently holds this position. (See JT Stip. Ex. I-4, Election Summary Report of Stark County, Ohio General Election date November 2, 2010). Pursuant to Civ. R. 25(D), Mr. Zumbar has now been substituted as the proper Respondent in this action.

Respondent incorrectly asserts that the County Commissioners were acting pursuant to R.C. 321.38 when they "gave notice". R.C. 321.38 does not provide for or require any notice, "complaint" or "hearing." Thus, it is impossible to be acting pursuant to a statute that does not provide for or require the action one is taking.

If R.C. 321.38 is facially flawed, it can not be cured by the County Commissioners belated "resolution," which they claim to provide notice of "complaint and hearing." Plainly stated, through their actions, the County Commissions made a futile effort to cure what cannot be cured.

Relator maintains that his removal was unconstitutional. The statute relied upon by the County Commissioners to remove him is a nullity, as the same conflicts with Article II, Section 38 of the Ohio Constitution.

For the reasons detailed herein, this Court should determine that R.C. 321.38 is unconstitutional <u>on its face</u> as it fails to measure up to the constitutionally required removal

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Respondent has continually asserted that the Recovery Action Complaint, which seeks only monetary relief from Relator, constituted the complaint required by Article II, Section 38.

mandates instituted by Article II, Section 38 of the Ohio Constitution, thereby ruling in Relator's favor in this *quo warranto* action and reinstating him to his rightful position as Stark County Treasurer.

## II. LAW AND ARGUMENT

### A. STANDARD OF REVIEW

This is a facial challenge to the constitutionality of R.C. 321.38. A facial challenge is meritorious when the challenging party shows that no set of circumstances exist under which the statute would be valid. *See Harrold v. Collier* (2005), 107 Ohio St.3d 44, 2005-Ohio-5334, *citing*, *United States v. Salerno* (1987), 481 U.S. 739, 745. This is distinct from an "as-applied" constitutional challenge, where a statute that is constitutional on its face may be unconstitutional as applied to a certain set of facts. *Harrold*, 107 Ohio St.3d at 50, *citing*, *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329. Thus, for purposes of determining the matter before it, while the facts and referenced exhibits provide background so the Court understands how this challenge came before it, any conduct taken by the County Commissioners, or any other party for that matter, outside of the facial requirements of R.C. 321.38 is not relevant to a facial challenge to the constitutionality of that statute. See, *Global Knowledge Training, L.L.C. v. Levin* (2010), 127 Ohio St.3d 34, 2010-Ohio-4411; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229. This Court has specifically stated that "only the text of the statute itself may be considered when evaluating a 'facial' challenge." *Global Knowledge Training, L.L.C.*, 127 Ohio St.3d at 38-39, citing, *Cleveland Gear Co.*, 35 Ohio St.3d at 231. Similarly, the United State Supreme Court has stated that "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about

'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party* (2008), 552 U.S. 442, 450; *See also, United States v. Raines* (1960), 362 U.S. 17, 22.

Thus, the only thing this Court need consider in determining this action is the text of R.C. 321.38. The facts giving background to this specific matter may best be described as a concrete example of the injustice created by this unconstitutional statute. No set of facts exists under which this statute could be constitutionally applied. A statute must be declared unconstitutional where it appears "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at syllabus. Such is the case here.

**B. R.C. 321.38 IS FACIALLY UNCONSTITUTIONAL**

"Ohio law disfavors the removal of duly elected officials." *In re Removal of Sites et al.* (2006), 170 Ohio App. 3d 272, 2006-Ohio-6996, citing, *2,867 Signers v. Mack* (1979), 66 Ohio App. 2d 79, 82 citing, *State ex rel. Corrigan v. Hensel* (1965), 2 Ohio St. 2d 96, 100. Such proceedings are quasi-penal in nature and should be strictly construed. See, *In re Removal of Kuehnle et al.* (2005), 161 Ohio App. 3d 399, 419 citing, *2,867 Signers*, 66 Ohio App. 2d 79. As such, elected officials should not be removed from office absent substantial reasons and the conclusion that their continued presence harms the public welfare. See, *State ex rel. Corrigan v. Hensel* (1965), 2 Ohio St. 2d 96.

Article II, Section 38 of the Ohio State Constitution addresses removal from office and provides as follows:

> Laws shall be passed providing for the prompt removal from office, ***upon complaint and hearing***, of all officers, including state officers, judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to

> impeachment or other method of removal authorized by the Constitution.

(Emphasis added.) 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. *Cincinnati, Wilmington & Zanesville R.R. Co. v. Commrs. of Clinton Cty.* (1852), 1 Ohio St. 77, 85; *State ex rel. Weinberger v. Miller* (1912), 87 Ohio St. 12; *State ex rel. Ohio Gen. Assembly v. Brunner* (2007), 114 Ohio St. 3d 386.

The statute which presents the sole issue in this case is R.C. 321.38. This statute reads in its entirety as follows:

> ***Immediately on the institution of the suit*** mentioned in section 321.37 of the Revised Code, the board of county commissioners ***may remove such county treasurer and appoint some person to fill the vacancy created.*** The person so appointed shall give bond and take the oath of office prescribed for treasurers.

(Emphasis added.) Because the removal statute contains none of the due process requirements of the Ohio Constitution, these two provisions when read together are incompatible, as no set of facts could make R.C. 321.38 consistent with Article II, Section 38 of the Ohio Constitution. The Ohio State Constitution requires "complaint and hearing," while R.C. 321.38 permits immediate removal at the discretion of the County Commissioners, without any constitutional due process safeguards. Thus, R.C. 321.38 is unconstitutional on its face and any action taken pursuant to it is invalid.

### 1. This Court's Holding In *State ex rel. Hoel v. Brown* (1922), 105 Ohio St. 479 Mandates A Finding That R.C. 321.38 Is Unconstitutional.

This Court has already determined that a General Code provision, which provided for the same hasty method of removal of county treasurers as that employed by the County

Commissioners here, violated Article II, Section 38 of the Ohio Constitution. *State ex rel. Hoel v. Brown*, (1922), 105 Ohio St. 479.

In 1912, the people of Ohio enacted Article II, Section 38, and at that time the General Code contained § 2713 (which provided that county commissioners were to remove a county treasurer from office if it appeared from a report of examiners that embezzlement had occurred.) General Code § 2713 did not provide for a complaint or hearing, and thus the provision conflicted with the amendment to the Ohio Constitution.

In 1922, *State ex rel. Hoel v. Brown*, (1922), 105 Ohio St. 479 came before this Court. In *Brown*, a county treasurer was removed from office by county commissioners, absent complaint or hearing, on the basis that a report of the State Bureau of Inspection suggested the treasurer likely embezzled funds. The treasurer refused to leave office on the grounds that the county commissioners lacked authority to remove him and that the removal statute was unconstitutional in light of Article II, Section 38. After losing in the trial court and appellate court, the county commissioners took the matter to this Court, which likewise held that the constitutional enactment . . . "plainly provided that such removal be made only upon complaint and hearing." *Id.* at 479.

In further addressing the import of Article II, Section 38, this Court noted:

> ***In plain phrase, this section provides for 'complaint and hearing' before removal, and.... any statute failing to measure up to the requirements for removal is plainly faulty and must fail as a constitutional enactment.***

*Id.* at 483 (emphasis added).

* * *

> ...this section clearly and concretely recognizes Ohio's obligation to the cardinal doctrines included in the phrase, 'due process of law.' It must have been clearly intended that a 'complaint and hearing' should be allowed to all officers.

* * *

> It may be said that this is not a criminal trial. True. ***But it is no less a condemnation...followed by a penalty, the ousting of a man from public office by three men, servants of the people it is true, but hardly qualified to put out of office without a hearing a public official who has been put into office by the majority of votes of the sovereign people.***

*Id.* at 487 (emphasis added).

Accordingly, this Court deemed that General Code § 2713, granting removal authority to the county commissioners, was unconstitutional and had been repealed by the enactment of Article II, Section 38. In 1928, the Ohio Attorney General issued a consistent opinion, where he surmised that under the provisions of Article II, Section 38, laws may be passed providing for the removal of a county officer only upon complaint and hearing, ***and a statute providing for the summary removal of a county officer without a complaint and opportunity to be heard, would be unconstitutional.*** 1928 *OAG* 2167. Relator submits that any statutory authority enacted subsequent to the enactment of Article II, Section 38, which has the same constitutional deficiencies as General Code § 2713, is unconstitutional on its face.

Without addressing the deficiencies which resulted in General Code § 2713 being repealed by the Court, the General Assembly enacted R.C. 321.38 in 1953, providing again that: "***Immediately upon the institution of the suit*** mentioned in section 321.37 of the Revised Code, the board of county commissioners may remove such county treasurer and appoint some person to fill the vacancy created." (Emphasis added). Just as with the unconstitutional General Code section, the legislature did not require any notice, complaint or hearing to the public official subject to removal pursuant to R.C. 321.38. It is this statute that the County Commissioners relied upon to oust Relator. Relator submits that the statutory authority under R.C. 321.38 is

facially unconstitutional for the same reasons General Code § 2713 was found unconstitutional. Furthermore, the County Commissioners acted beyond their powers when they proceeded to remove Relator from office, purportedly pursuant to this statute. R.C. 321.38 is a nullity and could not provide the basis to remove him or any county treasurer in this state, because it fails to measure up to the constitutional mandates of Article II, Section 38. This Court has already declared...as common sense dictates...that: "[w]hat the Constitution grants, no statute may take away." *Brown*, 105 Ohio St. at 487. This principle has been universally recognized by the Courts. As stated in *Hinslea ex rel. v. The Council of the City of Lakewood* (1928), 27 Ohio N.P.(N.S.) 185, 1928 WL 3322:

> It will therefore, be noted that it is the settled law of Ohio that the provisions of the constitution of the State of Ohio are not only mandatory, but that they are also exclusive, and it is therefore the settled law of Ohio that where the constitution speaks upon any subject matter, that which is provided in the constitution is not only mandatory, but is sole and exclusive, as to such subject matter.

*Id.*

*Brown* remains direct authority and represents the law as pronounced by this Court. Since deciding *Brown*, this Court has twice upheld it. The first case was *State ex rel. Hackley v. Edmonds* (1948), 150 Ohio St. 203, where the respondent argued that Article II, Section 38, prohibits a city charter provision that allows a recall from office by vote. *Hackley*, 150 Ohio St. at 209. This Court ruled that the provisions of the city charter do not violate Article II, Section 38, while also upholding *Brown*, finding that the *Brown* case is not applicable to a recall provision in a city charter, adopted pursuant to Article XVIII, § 7 of the Ohio Constitution. *Id.* at 211, 218. In essence, the separate constitutional removal method complied with Article II, Section 38, because it was also in accordance with constitutional mandates.

This Court further stated that the *Brown* case concerned removal of a treasurer elected under state laws, finding that the decision:

> [V]ery properly held that, under Section 38, Article II of the Constitution, no such removal could be accomplished without a complaint and hearing. We do not see, however, that Section 38, Article II, can have any bearing upon the present case. Here we have a situation which does not involve a removal of an officer for cause, which is an essential element in the operation of Section 38, Article II, but we have, on the other hand, the functioning of the machinery provided by the charter of the city of Hamilton for the operation of a condition concerning the restricted two-year term of a member of its counsel.

*Hackley,* 150 Ohio St. at 217. This matter revolves directly around the removal of a treasurer elected under state law. In *Hackley,* this Court referenced that the *Brown* Court: "very properly held that, under Section 38, Article II of the Constitution, no such removal could be accomplished without a complaint and hearing." *Id.* at 217.

The only other reference by this Court to *Brown,* which came following the enactment of R.C. 321.38, was *State ex rel. Trago v. Evans* (1957), 166 Ohio St. 269. There, a county sheriff was incarcerated serving a one year sentence in the jail of another county. After the sheriff was absent for 90 days, the county commissioners declared his position as sheriff vacant, and appointed a new sheriff to fill the position. The sheriff instituted an action in quo warranto to have a judgment of ouster declared against the new appointee, contending that R.C. 305.03 "conflicts with the Ohio Constitution in that the former does not provide for the filing of a complaint giving notice thereof or make any provision for a trial..." *Id.* at 272. This Court distinguished the *Brown* case because in *Brown* the treasurer "was clearly entitled under the constitutional provision to the filing of a complaint and a hearing, so that he might defend against the claim that he had embezzled." *State ex rel. Trago,* 166 Ohio St. at 273. In contrast, this Court noted that the county commissioners had a duty to fill the vacant position and appoint a

new sheriff, not because he was removed from office, but because there was a vacancy in the office brought about by his incarceration. Therefore, there was no need for a hearing before his removal from office because he was not being removed; instead, the position was vacant due to his incarceration. *Id.* at 275. In each of these instances, the high court re-affirmed its holding in *Brown.*

**2. Respondent's Anticipated Reliance On *Stebbins v. Rhodes* (1978), 56 Ohio St.2d 239, Is Misplaced As It Is Inapplicable To This Matter.**

In advancing a Motion for Judgment on the Pleadings before this Court, Respondent wrongfully relied upon this Court's ruling in *Stebbins v. Rhodes* (1978), 56 Ohio St.2d 239, as support for the conclusion that this Court found no constitutional error in a statute that allows removal of a gubernatorial appointee by his appointing officer. However, it is clear in that case that this Court never reached the constitutionality issue. *Stebbins*, 56 Ohio St.2d at 242. This Court found that:

> We decline to reach [Stebbins] contention concerning constitutional due process because the record unequivocally establishes that he was fully accorded his rights in that regard. [Stebbins] was removed for cause upon complaint and after notice and hearing, and he was not prejudiced by that which he argues is a flaw in the statute.

*Id.* at 242.

It appears in *Stebbins* that this Court's determination was limited to the unique facts in that case. In *Stebbins*, the appellant was appointed to the Industrial Commission of Ohio by the governor, acting with the advice and consent of the Ohio Senate. *Id.* *Stebbins* further involved a party who was being removed for cause and consented to, and in fact demanded, and stayed his constitutional challenge to the statute at issue, so long as he was provided a complaint and hearing before the Ohio Senate. *Stebbins*, 56 Ohio St.2d at 240-241. In *Stebbins*, the

appellant was provided notice of hearings "in the matter of his removal, and that they would be held in a manner which would afford appellant his right to due process." *Id.* at 241. Furthermore, the appellant was voluntarily in attendance at the hearings and represented by four attorneys. *Id.* at 241.

This Court in *Stebbins*, seemed further moved by the fact that the appellant was an appointee, being removed for cause by the person who appointed him. This Court stated "the power to remove is ordinarily concomitant of the power of appointment." *Id.* at 243. In addition, the appellant in *Stebbins* was removed ***only after cause was found to exist***, namely inefficiencies in office, neglect of duty in office, malfeasance, misfeasance and nonfeasance in office. *Id.*

However, these are not the facts of the present case. In the case at bar, the County Commissioners acknowledge that Relator ***did not*** engage in any wrongdoing. Relator did not consent to any action by the County Commissioners. Relator was not served with a notice or complaint detailing a basis for removal. In fact, the first two "notices" stated only that a special meeting was being held to consider the status of the Treasurer's office in light of the "pending action." (JT Stip. Exs. B and C). This further emphasizes the facial unconstitutionality of R.C. 321.38. Here, for example, if not faced with a temporary restraining order, the County Commissioners would have acted to remove Relator following the issuance of these first two "notices" which provide nothing more than the date, time and location of a meeting. If R.C. 321.38 is found constitutional, any county treasurer in the State of Ohio would likewise be subject to such unchecked action to county commissioners. Here, only the final notice, made after the County Commissioners seemingly acknowledged the deficiencies of R.C. 321.38, gave Relator any information regarding the true purpose of this meeting. However, this attempt, or

any attempt to give notice, is not curative of the fact that the statute does not require or provide for one. This attempted remedial measure does not make the statute constitutional.

Furthermore, here the Court is not dealing with the removal of an appointee. In this case, the County Commissioners, who had no hand in Relator's election to office, have summarily and unconstitutionally removed him from that office. The sovereign people placed Relator in office and only through them should he have been removed. This is exactly the basis for which Article II, Section 38 was enacted, and for which the General Assembly enacted R.C. 3.07-3.10. Appx. pages 4-6.

Moreover, it appears that this Court's decision in *Stebbins*, if found to stand for the proposition that a statute which does not provide for the constitutional mandates of complaint and hearing, may be "fixed" by subsequent actions, would be at odds with long standing precedent of this Court dictating: "any statute failing to measure up to the requirements for removal is plainly faulty and must fail as a constitutional enactment" *State ex rel. Hoel v. Brown* (1922), 105 Ohio St. 479, 483), and that "if a statute is unconstitutional, it...is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 196. Thus, at a minimum, since this Court has found that a statute which does not provide for complaint and hearing is unconstitutional, and further held that unconstitutional statutes confer no rights, there is clarification needed to reconcile what Respondent contends is the holding in *Stebbins*.

In order to reconcile *Stebbins* with other Supreme Court precedent, it must be strictly applied to the facts of that case, where: the challenging party specifically consented to and demanded the due process found to have been conferred upon him; and further that the officer

involved was appointed to office and removed, for cause, by those found to have the concomitant power to do so. *Stebbins* should not be applied to the facts of the case at bar, where Relator ***did not*** engage in any wrongdoing, did not consent to any subsequent attempts to cure the constitutional deficiencies of the enabling statute at issue, and was a duly elected official, rather than a political appointee and the authority that removed him did not have the concomitant power to do so.

### 3. Public Policy Further Dictates A Finding That R.C. 321.38 Is Unconstitutional.

R.C. 321.38 does not contemplate the finding of cause for removal, nor does it require any finding by county commissioners whatsoever. With regard to removal, R.C. 321.38 places politics in a superior position to "cause" under the law. These are not the principles expounded by this Court, the Ohio Constitution or public policy. County commissioners should not have the power to idly overturn a decision of the people that their elected official serve in his position until valid grounds are conclusively determined for his removal.

What R.C. 321.38 effectively allows is the removal of a public officer elected by the people, upon the uninhibited discretion of a body that did not place him in his position. An even more damaging effect of this statute is that if deemed constitutional, it allows the removal of a duly elected official upon the whim of the county commissioners, regardless of whether they find cause for removal. Here, it would not matter if the amount of money sought to be recovered was three dollars as opposed to three million. The statute at issue does not contemplate repayment of the funds or recovery from other liable sources. Rather, this statute permits the removal of an officer, even if he completely fulfilled his duty to provide for the missing funds after suit was initiated under R.C. 321.37. If R.C. 321.38 passes constitutional muster, once a suit is filed to recover money, the County Commissioners have complete and unchecked

discretion to remove a public official, ***even without cause***. The dangerous and damaging effect of this unconstitutional statue is clear as ***here, the County Commissioners removed an official they found to have committed no wrong or act of malfeasance.*** Such an act is not consistent with the public policy of this State that public officers should be removed only when their continued presence represents a harm to the citizenry.

Furthermore, it is important to remember that "Ohio law disfavors the removal of duly elected officials" and as such ***elected officials should not be removed from office absent substantial reasons and the conclusion that their continued presence harms the public welfare.*** *In re Removal of Sites et al.* (2006), 170 Ohio App.3d 272, 2006-Ohio-6996, citing, *2,867 Signers v. Mack* (1979), 66 Ohio App.2d 79, citing, *State ex rel. Corrigan v. Hensel* (1965), 2 Ohio St.2d 96. R.C. 321.38 requires none of these safeguards and as an example, here, the removal of Relator was done with no findings or substantial reasons for his removal. There was no conclusion that his continued presence was harmful to the public welfare. ***In fact, Relator was specifically found to have engaged in no wrong, and committed no act of malfeasance.*** Thus, R.C. 321.38 can provide for the removal of an elected official without even the slightest consideration that there is a harm to the public. No set of facts makes this statute constitutional.

Any removal pursuant to R.C. 321.38 is made in contravention of these principles of law, and further circumvents the public policy of this State and the General Assembly's enactment of removal procedures made specifically to comply with Article II, Section 38. *See,* R.C. 3.07-3.09. Appx. pages 4-6.

### 4. R.C. 321.37 Does Not Provide The Requisite "Complaint" Required By Article II, Section 38 of the Ohio Constitution.

In declaratory judgment and injunctive relief matters before the lower courts, the County Commissioners argued that institution of a recovery suit under R.C. 321.37 provided the requisite "complaint" required by the Ohio Constitution to remove Relator from office. Complaint and hearing for the purposes of recovering money cannot stand as satisfaction of the constitutionally mandated requirement of complaint and hearing for purposes of removal of an elected official. A complaint in one action does not constitute a complaint in another.

As an example of this problem, to this day, Relator has never been presented with any complaint setting forth the purported "cause" for his removal. The County Commissioners filed a complaint to recover money, not to remove Relator. Said "complaint" did not set forth any basis for removal of Relator, nor suggest he acted in a manner to justify removal. The purpose of a complaint for removal is to put the defending party on notice as to the basis for which his removal is sought. The Complaint filed by the County Commissioners in the Recovery Action sets forth a basis for recovery of money and nothing else. Thus, Relator received no complaint and was not put on notice of the basis upon which the County Commissioners sought his removal from office, as required by Article II, Section 38. Therefore, with respect to Relator's potential removal, the Complaint in the Recovery Action fails to satisfy even the most liberal interpretation of the "notice pleading rule." The Complaint filed under R.C. 321.37 cannot be a "complaint" satisfying the requirements of Article II, Section 38.[13] The "complaint"

[13] Although Respondent has never asserted that the resolution/notice contained in Joint Stipulated Exhibit E was intended to serve as the "complaint" required by Article II, Section 38, the same is defective because it fails to assert any "cause" or specific act of impropriety for which Relator should appear at the meeting to defend.

contemplated by Article II, Section 38 would require some specific basis upon which Relator engaged in some act or omission that resulted in a substantial and continuing harm to the citizens. A complaint solely seeking recovery of money presents no such basis, and thus, is not a complaint in conformity with Article II, Section 38. Such is the reason the General Assembly enacted R.C. 3.07 – 3.09.

**5. R.C. 3.07–3.09 Provide the Only Constitutionally Proper Method By Which Relator Could Be Removed From Office.**

R.C. 3.07 sets forth that "any public officer coming within the official classification in Section 38 of Article II, Ohio Constitution", where grounds exist to remove said officer, "upon complaint and hearing in the manner provided for in 3.07 – 3.10 ... such person shall have judgment of forfeiture of said office ... entered thereon against him." R.C. 3.07. This section was created in direct response to the mandates of Article II, Section 38. *In re Bostwick* (1931), 43 Ohio App. 76.

An action under R.C. 3.07 is one specifically for the removal of the public officer. The complaint and hearing must comport with the mandates of R.C. 3.08, which require commencement by filing a written complaint **specifically setting forth** the charge, and signed by 15% of the qualified electors. See, R.C. 3.08. The complaint must be filed in the common pleas court, and the proceedings shall be tried by a judge, unless a jury trial is demanded. See R.C. 3.08. Just as R.C. 3.07 was created to meet the mandates of the constitutional enactment, R.C. 3.08 was created to provide a constitutionally sound method of adjudicating the removal contemplated in R.C. 3.07. If Article II, Section 38 is to have meaning, then any statute, such as R.C. 321.38, which fails to comport to its mandates must fail.

### 6. The Enactment of R.C. 321.38 Did Not "Trump" Article II, Section 38 Of The Ohio Constitution.

In lower court proceedings, the County Commissioners have asserted that the later enactment of R.C. 321.38 somehow trumped Article II, Section 38. R.C. 321.38 does not become valid because it was enacted later in time than Article II, Section 38. By enacting a law that did not comply with constitutional mandates, the General Assembly violated the doctrine of separation of powers and the newer statute is likewise, unconstitutional. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 475. In doing so, the General Assembly chose to usurp this Court's constitutional authority by failing to recognize the holding in *Brown*. *Id.* at 476. The General Assembly "cannot annul, reverse or modify a judgment of a court already rendered, nor require the courts to treat as valid laws which are unconstitutional." *Id.* at 506.

In sum, this matter was decided by this Court with its decision in *Brown*. The General Assembly was powerless to enact any law without complying with that decision. The State Constitution is supreme and all statutes enacted by the General Assembly are subject to that supreme document. "What the State Constitution grants, no statute may take away." *Id.* at 490, citing, *State ex rel. Hoel v. Brown* (1922), 105 Ohio St. 479.

### 7. Inclusion Of The Word "May" Within R.C. 321.38 Does Not Imply That The Hearing Mandated By Article II, Section 38 Will Occur.

The County Commissioners have also asserted that R.C. 321.38's use of the word "may" suggests that a constitutionally mandated hearing will take place. Stretched to its furthest extremes, it could be implied that the word "may" could allow the County Commissioners to engage in some form of deliberative process, but it in no way mandates or specifically permits that Relator be heard. In fact, the first two notices issued by the County Commissioners for the

scheduled special meetings stated only that meetings were set "to consider the status of the Treasurer's office in light of the pending action." (See JT Stip. Ex. B and C). These "notices" could not even arguably amount to the constitutionally required notice of hearing and here, if left unchallenged, that is exactly what the County Commissioners intended to rely upon. The "may" language contemplates nothing more than the County Commissioners have unfettered discretion to remove the treasurer. This word does not provide for the constitutionally mandated hearing.

Whether the County Commissioners could provide a complaint and could provide a hearing is not curative of the fact that R.C. 321.38 does not require or provide for one, and one was not provided in the circumstances that gave rise to this action. The issue is whether R.C. 321.38 complies with the mandates of Article II, Section 38. The plain fact is there is nothing that the County Commissioners could do with regard to "complaint and hearing" since no such safeguards are provided for in the statute. By not providing for or requiring a hearing, R.C. 321.38 allows for a public official to be removed, without complying with constitutional mandates and allows for the removal of an elected public officer, upon the whim of the County Commissioners. Therefore, this statute is irreconcilably in conflict with the Ohio Constitution.

R.C. 321.38 is a nullity and does not present a basis for any action under any circumstance. If the County Commissioners intended to remove Relator, they were required to look to R.C. 3.07-3.09, enacted by the General Assembly, pursuant to Article II, Section 38, as the appropriate method of removal of public officials.

**8. The Facial Constitutional Deficiency Of R.C. 321.38 Cannot Be "Fixed" By The County Commissioners.**

The County Commissioners contended in proceedings below that the deficiencies of R.C. 321.38 can be cured by offering Relator the procedural due process required by the Ohio Constitution. On this basis, after deficiencies in R.C. 321.38 were brought to their attention, the

County Commissioners issued a revised meeting notice setting a meeting and asserted the meeting amounted to a "hearing." The County Commissioners further argued that the Complaint in the Recovery Action amounts to the requisite "complaint" referenced in Article II, Section 38. These actions are of no consequence because it is a legal impossibility to "fix" an enabling statute. In *Primes v. Tyler* (1975), 43 Ohio St. 2d 195, this Court stated:

> ***If a statute is unconstitutional, it is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.***

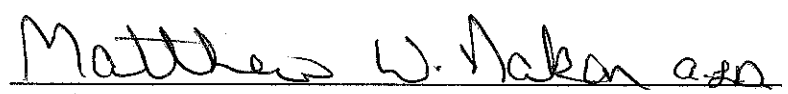
(Emphasis added.) *Id.* at 196-197, citing, *Norton v. Shelby County* (1886), 118 U.S. 425, 442. The fact is, R.C. 321.38 is unconstitutional, and as a result, does not represent anything. The County Commissioners could not "fix" an unconstitutional statute by curing due process deficiencies in the challenged statute through actions not provided for or requested by that statute. It is as if it does not exist, and therefore it cannot: (1) be used under any circumstances and did not represent a valid basis to remove Relator; (2) cannot be "fixed" by the County Commissioners; and (3) cannot otherwise be relied upon for any purpose whatsoever. An unconstitutional statute cannot suddenly become constitutional through conduct not contemplated by its language, and Respondent's suggestions to the contrary would require this Court to allow a non-legislative modification to the challenged statute. As it relates to this facial challenge, Relator maintains that any conduct taken outside of the plain textual requirements of R.C. 321.38 do not represent a "circumstance . . . under which the statute would be valid." See, *Harrold v. Collier* (2005), 107 Ohio St.3d 44, 2005-Ohio-5334.

## III. CONCLUSION

R.C. 321.38 is facially unconstitutional as it cannot be constitutionally applied in ***any*** set of circumstances. It violates Article II, Section 38 of the Ohio Constitution as it directly and incompatibly conflicts with the "complaint and hearing" requirements. R.C. 321.38 also conflicts with the public policy of this State regarding the removal of public officers. The Ohio Constitution is the supreme law of Ohio and not subject to or superseded by state statute. An unconstitutional law is for all legal purposes, as if it had never been enacted, and could not be used as a basis to remove Relator under any circumstances.

For these reasons and any reasons advanced during any hearing or argument on this matter, Relator asserts that Respondent is unlawfully holding the office of Stark County Treasurer. Respondent should be ousted from said office and Relator should be immediately reinstated to that office for the balance of his term.

Respectfully submitted,



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## PROOF OF SERVICE

This is to certify that a copy of the foregoing Merit Brief In Support Of Original Complaint In *Quo Warranto* has been sent by ordinary United States mail, postage prepaid, on this 28th day of December, 2010, to:

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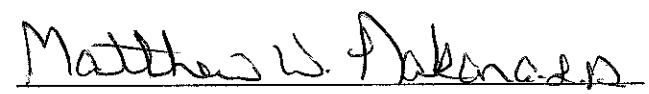

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# APPENDIX

# 321.38 Removal of treasurer - filling of vacancies.

Immediately on the institution of the suit mentioned in section 321.37 of the Revised Code, the board of county commissioners may remove such county treasurer and appoint some person to fill the vacancy created. The person so appointed shall give bond and take the oath of office prescribed for treasurers.

Effective Date: 10-01-1953

# § 38. Removal of officials.

**Ohio Constitution**

**Article II. Legislative**

*Current through the November, 2009 Election*

**§ 38. Removal of officials**

Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

2

# 321.37 Suit on bond of county treasurer.

If the county treasurer fails to make a settlement or to pay over money as prescribed by law, the county auditor or board of county commissioners shall cause suit to be instituted against such treasurer and his surety or sureties for the amount due, with ten per cent penalty on such amount, which suit shall have precedence over all other civil business.

Effective Date: 07-01-1985

# 3.07 Misconduct in office - forfeiture.

Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office. Upon complaint and hearing in the manner provided for in sections 3.07 to 3.10, inclusive, of the Revised Code, such person shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for in such sections are in addition to impeachment and other methods of removal authorized by law, and such sections do not divest the governor or any other authority of the jurisdiction given in removal proceedings.

Effective Date: 10-01-1953

# 3.08 Removal of public officers.

Proceedings for the removal of public officers on any of the grounds enumerated in section 3.07 of the Revised Code shall be commenced by the filing of a written or printed complaint specifically setting forth the charge and signed by qualified electors of the state or political subdivision whose officer it is sought to remove, not less in number than fifteen per cent of the total vote cast for governor at the most recent election for the office of governor in the state or political subdivision whose officer it is sought to remove, or, if the officer sought to be removed is the sheriff or prosecuting attorney of a county or the mayor of a municipal corporation, the governor may sign and file such written or printed complaint without the signatures of qualified electors. Such complaint shall be filed with the court of common pleas of the county where the officer against whom the complaint is filed resides, except that when the officer against whom the complaint is filed is a judge of the court of common pleas, such complaint shall be filed in the court of appeals of the district where such judge resides, and all complaints against state officers shall be filed with the court of appeals of the district where the officer against whom the complaint is filed resides. The judge or clerk of the court shall cause a copy of such complaint to be served upon the officer, against whom the complaint has been filed, at least ten days before the hearing upon such complaint. Such hearing shall be had within thirty days from the date of the filing of the complaint by said electors, or by the governor. The court may suspend the officer pending the hearing.

The removal proceedings filed in the court of common pleas shall be tried by a judge unless a jury trial is demanded in writing by the officer against whom the complaint has been filed. If a jury is demanded, it shall be composed of twelve persons who satisfy the qualifications of a juror specified in section 2313.42 of the Revised Code. If nine or more persons of that jury find one or more of the charges in the complaint are true, such jury shall return a finding for the removal of the officer, which finding shall be filed with the clerk of the court and be made a matter of public record. If less than nine persons of that jury find that the charges on the complaint are true, the jury shall return a finding that the complaint be dismissed. The proceedings had by a judge upon such removal shall be matters of public record and a full detailed statement of the reasons for such removal shall be filed with the clerk of the court and shall be made a matter of public record.

Effective Date: 08-22-1995

# 3.09 Appeal in removal cases on questions of law by court of appeals.

The decision of the court of common pleas in all cases for the removal of officers may be reviewed on appeal on questions of law by the court of appeals. The transcript of the record and the notice of appeal shall be filed in the court of appeals in not more than thirty days after the decision is rendered and the journal entry made by the court of common pleas. Such notice of appeal may be filed only after leave has been granted by the court of appeals for good cause shown at a hearing of which the attorneys for both the officer and the prosecution have been notified. The court of appeals has jurisdiction to hear such case at any place in the judicial district in which such court may be sitting, and such court shall hear such case in not more than thirty court days after the filing of the notice of appeal. The decision of the court of appeals in refusing to allow a notice of appeal to be filed, or in the passing upon the merits of the case in the appellate proceedings, shall be final. If the court of appeals reviews the proceedings provided for in section 3.08 of the Revised Code in any county within its judicial district other than the county where the officer complained against resides, said court of appeals shall transmit its findings with the reasons therefor to the clerk of the court of common pleas of the county where the officer complained against resides, with instructions to said clerk to make the findings of said court a matter of record upon the journal of said court in the county where the officer complained against resides. In all cases involving the removal of an officer against whom a complaint has been filed in the court of appeals, the officer has the right of review or appeal to the supreme court on leave first obtained, and such court shall hear such case in not more than thirty court days after leave has been granted. In other respects such hearing shall follow the regular procedure in appealable cases which originate in the court of appeals.

If any officer is removed and the law provides no means for filling the vacancy, the board of elections in the county where the removed officer resides shall order a special election to fill such vacancy in the unit of government in which such officer was elected.

Effective Date: 10-01-1953