

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel* ) Case No. 2015-1371  
Renee Walker, et al., )  
 )  
Relators, )  
 )  
-vs- ) **RELATORS' MERIT BRIEF**  
 ) **IN SUPPORT OF**  
 ) **VERIFIED COMPLAINT**  
Jon Husted, )  
Secretary of the State of Ohio, ) **REQUEST FOR**  
 ) **EXPEDITED RELIEF**  
Respondent. )  
 )

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September 1, 2015

## Table of Contents

Table of Authorities.....	3
STATEMENT OF FACTS.....	5
ARGUMENT.....	6
Proposition of Law No. I: The Secretary may determine only the procedural validity of a petition for a county Charter, and therefore the Secretary acts outside his authority when the Secretary invalidates a petition based on the Secretary's view of the constitutionality of the proposed Charter's substance.....	6
A.    The Secretary of State misinterprets the scope of his authority under O.R.C. § 307.95, as he may not make constitutional judgments to preemptively strike election propositions from the ballot.....	6
B.    Ohio Courts have repeatedly held that the Secretary of State's authority to determine “validity” is limited to the procedural validity of the petition form, not the proposed charter's substance.....	7
C.    The Secretary of State invalidated the Petitions for reasons beyond the Secretary of State's authority, because the Secretary may not invalidate a Petition based on the substance of the proposed Charter.....	8
1.    Alternate Form of Government.....	9
2.    State Oil and Gas Law Preemption.....	10
Proposition of Law No. II: This Court will issue a Writ of Mandamus to require the Secretary of State to validate a petition when the petition meets procedural requirements.....	11
Proposition of Law No. III: Expedited relief is warranted in election matters concerning what measures go onto the ballot.....	11
CONCLUSION.....	12
Appendix.....	14
Exhibit 1 – Ohio Constitution Article X, Section 3.....	14
Exhibit 2 – Secretary of State's Decision on O.R.C. § 307.95 Protests.....	16

**Table of Authorities**

**Cases**

*Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993).....10

*Durell v. Celebreeze*, 1980 WL 353759 (10th Dist. Ct. App. 1980) (unpublished).....8

*State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 45, 693 N.E.2d 794 (1998).....11

*State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*,  
875 N.E.2d 902 (Ohio S.Ct. 2007).....7

*State ex rel. Citizens for a Better Portsmouth v. Sydnor*,  
61 Ohio St.3d 49 572 N.E.2d 649 (Ohio 1991).....11

*State ex rel. Cope v. Cooper*, 121 Ohio St. 519, 169 N.E. 701 (1930).....12

*State ex rel. DeBrosse v. Cool H*, 716 N.E.2d 1114 (Ohio S.Ct. 1999).....7

*State ex rel. Esarco v. Youngstown City Council*,  
116 Ohio St.3d 131, 876 N.E.2d 953, 2007-Ohio-5699 (2007).....11

*State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 977 N.E.2d 590 (Ohio S.Ct. 2012).....7

*State ex rel. Morrison v. Beck Energy Corp.*,  
2015-Ohio-485 (Sup. Ct. No. 2013-0465, Feb. 17, 2015).....10

*State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,  
86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062.....7

*State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 941 N.E.2d 782 (Ohio 2011).....11

*Whitman v. Hamilton Cty. Bd. of Elections*,  
97 Ohio St.3d 216, 2002-Ohio-5923, 778 N.E.2d 32.....11

**Statutes**

O.R.C. § 307.94.....6

O.R.C. § 307.95.....6-7

**Constitutional Provisions**

Ohio Const., Art. II, § 1(e).....8

Ohio Const., Art. X, § 3.....9

**Other Sources**

Attorney General Opinion, OAG 85-047.....9

Charters and Alternative Forms of County Government, Chapter 10, Ohio Secretary of State,  
Ballot Questions and Issues Handbook.....9

Ohio County Commissioners Handbook, Charter 2, County Structural Options.....10

Relators Renee Walker, Randy Walker, John P. Ragan, Elizabeth Athaide-Victor, Katharine S. Jones, Lynn Kemp, Douglas S. Arbuckle, Austin Babrow, John Howell, Richard McGinn and Sally Jo Wiley (“Relators”), proceeding by and through counsel, provide their merit brief in support of the allegations of the Verified Complaint for the granting of a Writ of Mandamus.

### **STATEMENT OF FACTS**

The facts are fully set forth in Relators' Verified Complaint for Writ of Mandamus, which Relators incorporate herein, and summarize below:

Three committees of electors, one each in Athens, Fulton, and Medina counties, initiated, circulated, and filed substantially similar county Charter proposals for the November 3, 2015 general election ballots in their respective counties.

Ballot protests were filed against the petitions to the Secretary of State. On August 13, 2015 the Secretary issued a seven-page decision on all ballot protests. (Appendix Ex. 2.) The Secretary invalidated the petitions based on his assessment of the proposed Charters' substantive validity. Specifically, he concluded that “the petitions must be invalidated on the basis that the petitions fail to provide for an alternative form of government consistent with clear statutory and constitutional requirements, and that state law preempts any authority to regulate 'fracking' by political subdivisions of the state, including charter counties.” (App. Ex. 2 at 7.)

Relators filed a Complaint for Writ of Mandamus on August 19, asking this Court to order the Secretary to validate the petitions.

## ARGUMENT

**Proposition of Law No. I: The Secretary may determine only the procedural validity of a petition for a county Charter, and therefore the Secretary acts outside his authority when the Secretary invalidates a petition based on the Secretary's view of the constitutionality of the proposed Charter's substance.**

The validity or the invalidity of the *Petition itself, not the Charter*, is all that may properly be protested to the Secretary under O.R.C. § 307.95.<sup>1</sup> Consideration of the proposed charter's substance or its constitutionality is premature before the proposed charter is enacted by the electorate. The Secretary's August 13, 2015 denial is based on the substantive content of the Petitions and is therefor unlawful. The Petitions indisputably meet the requirements of law and have sufficient valid signatures, therefore they are valid and must appear on the ballots.

**A. The Secretary of State misinterprets the scope of his authority under O.R.C. § 307.95, as he may not make constitutional judgments to preemptively strike election propositions from the ballot.**

The Secretary claims the authority to make the “final” determination of the substantive validity of the content of any proposed County Charter, relying on his extensive interpretation of “validity” in the protest review statute, O.R.C. § 307.95(C).<sup>2</sup>

The Secretary's “validity” determination under this statute is not a sweeping power to decide whether the substance of an initiative is in conflict with state law. Such a rule would

- 1 In the second paragraph of O.R.C. § 307.94, the authority of elections officials is limited to reviewing whether a petition – and not the proposed Charter – meets the requirements of law and contains the sufficient number of signatures. See O.R.C. § 307.94 (the BOE “shall immediately proceed to determine whether the petition and the signatures on the petition meet the requirements of law and to count the number of valid signatures and to note opposite each invalid signature the reason for the invalidity”). The Secretary ignored the limited scope of what matters may properly be protested to him when he issued his determination letter.
- 2 This statute subsection provides, in full:

The secretary of state, within ten days after receipt of the protests, shall determine the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures. The secretary of state may determine whether to permit matters not raised by protest to be considered in determining such validity or invalidity or sufficiency or insufficiency, and may conduct hearings, either in Columbus or in the county where the county charter petition is filed. The determination by the secretary of state is final.

violate fundamental separation of powers concepts, as the Secretary, as part of the executive branch of government, would be interpreting the law and interfering with the lawmaking process (violating the roles of both the judicial and legislative branches). *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 466-67, 469, 1999-Ohio-123, 715 N.E.2d 1062 (emphasizing that only the judicial branch determines the constitutionality of acts of other branches of government, and that “the judicial function does not begin until after the legislative process is complete and the void law is about to be enforced against a citizen to his prejudice.” (quotations and citations omitted)). The Secretary's interpretation of his authority under O.R.C. § 307.95(C) usurps the judicial function, and gives the Secretary of State “final” determination of the constitutionality of proposed laws. The Court must interpret a statute to make it constitutional, if possible, and therefore this Court cannot uphold the Secretary's reading of his powers to determine “validity” in O.R.C. § 307.95(C).

**B. Ohio Courts have repeatedly held that the Secretary of State's authority to determine “validity” is limited to the procedural validity of the petition form, not the proposed charter's substance.**

Long-affirmed Ohio law clearly states the propriety of the substance of a proposed charter is off limits in determining its validity or invalidity for certification to the ballot. *See, e.g., State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 977 N.E.2d 590, 595 (Ohio S.Ct. 2012) (“any claims challenging the validity of the proposed charter amendment are premature when made before the amendment is approved by the electorate.”); *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 875 N.E.2d 902, 909 (Ohio S.Ct. 2007) (“insofar as the board’s claim could be construed as a challenge to the constitutionality or illegality of the substance of the initiative, that challenge is premature before the proposed legislation is enacted by the electorate.”); *State ex rel. DeBrosse v. Cool H.*, 716 N.E.2d 1114, 1118 (Ohio S.Ct. 1999) (“Any claims alleging the unconstitutionality or illegality of the substance of the proposed

ordinance, or actions to be taken pursuant to the ordinance when enacted, are premature before its approval by the electorate.”).

The Secretary ignores the rule set down in these numerous cases, and instead relies on one unpublished Court of Appeals case that examined the exceptional issue of whether the express property tax subject matter limitations on the initiative and referendum power in Ohio Constitution Article II, Section 1(e) can be addressed pre-election. SoS letter at 3 (relying on *Durell v. Celebreeze*, 1980 WL 353759 (10th Dist. Ct. App. 1980) (unpublished)). The strongly divided *Durell* court struck the initiative pre-election because Ohio Constitution Article II, Section 1(e)<sup>3</sup> expressly limited the initiative power as directly related to that initiative. *Durell*, 1980 WL 353759 at \*3. *Durell* does not overrule the general prohibition against substantive pre-election initiative review, rather, *Durell* explores a nuanced exception brought on by the express language of Article II, Section 1(e), which is not at issue here.

The rule is that there can be no substantive review of an initiative pre-election. This Court recognizes this rule for the important policy reasons of separation of powers, of judicial restraint, against issuing advisory opinions, and against infringing on the people's democratic political rights to initiative. The Secretary blatantly broke this rule.

**C. The Secretary of State invalidated the Petitions for reasons beyond the Secretary of State's authority, because the Secretary may not invalidate a Petition based on the substance of the proposed Charter.**

The Secretary of State's decision letter concluded:

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<sup>3</sup> This section of the Ohio Constitution reads, in full:

The powers defined herein as the “initiative” and “referendum” shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.

Ohio Const., Art. II, § 1(e).

Accordingly, the petitions must be invalidated on the basis that the petitions fail to provide for an alternate form of government consistent with clear statutory and constitutional requirements, and that state law preempts any authority to regulate “fracking” by political subdivisions of the state, including charter counties.

(App. Ex. 2 at 7.) Both of these bases are substantive challenges, which are off-limits for the Secretary's determination, and off-limits for review before the Charter becomes law.

### **1. Alternate Form of Government**

The Secretary first justifies his invalidation by claiming that the proposed Charters do not establish an “alternate form of government.” This is an attack on the substance of the proposed Charter and, as set forth above, an attack on substance is inappropriate at the pre-election stage.

Ohio Constitution Article X, Section 3 (included as Appendix Ex. 1) requires that county Charters (1) reserve the right of initiative and referendum, (2) provide the form of government of the county, (3) determine which county officers shall be elected and the manner of their election, (4) provide for the exercise of all powers vested in the county, and (5) provide for the performance of all duties imposed upon counties and county officers by law. These proposed Charters meet all of those requirements.

The proposed Charters need not, and do not, purport to establish an alternative form of government. In addition, Ohio electors may as a distinct and separate matter, establish a county charter. *See* Charters and Alternative Forms of County Government, Chapter 10, Ohio Secretary of State, Ballot Questions and Issues Handbook. The Ohio Attorney General has described the adoption of a county charter as a way by which “the people of any county may increase the authority of their county government.” Attorney General Opinion, OAG 85-047.<sup>4</sup>

As provided by Chapter 10 of the Ohio Secretary of State Handbook: “The Ohio Constitution authorizes the adoption of charters by counties and municipal corporations; many

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<sup>4</sup> Available at <http://www.ohioattorneygeneral.gov/getattachment/521ab19e-b3f4-48fd-aace-be83bee1ee2f/1985-047.aspx> (last visited Aug. 17, 2015).

Ohio municipalities, and two of its counties, operate under charters approved by the voters. Additionally, the Ohio Revised Code provides for other alternative plans of government that may be adopted by municipalities, townships and counties.” *See also* Ohio County Commissioners Handbook, Charter 2, County Structural Options.

Thus, adopting a county charter is one means of changing county government, while establishing a statutory alternative form of county government is another. The Petitions are for a proposed charter, not to establish an alternative form of county government. The Secretary's argument concerning an “alternative form of government” is inapposite.

## **2. State Oil and Gas Law Preemption**

The Secretary's denial based on his presumed preemption of certain proposed Charter provisions is a blatant substantive challenge, which this Court has repeatedly stated is not allowed before a law is enacted at an election. Notably, the Secretary relies on a common pleas court decision as the basis for invalidating petitions in three counties which are all outside the deciding court's jurisdiction. The Secretary's opinions<sup>5</sup> and interpretations as to the legality of the terms and conditions of the proposed Charters are proper subjects to be raised in the political debate preceding a lawful vote on the proposal, but they are not grounds for excluding it from the ballot. This Court must order the Secretary to validate these petitions.

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5 Even if the Secretary had the authority to assess the constitutionality of the substance of a proposed Charter, his reliance on *State ex rel. Morrison v. Beck Energy Corp.*, 2015-Ohio-485 (Sup. Ct. No. 2013-0465, Feb. 17, 2015), misses the differences between the provisions in these Charters and the local law at issue in *Morrison*. The proponents of the Charters at issue here can make a good faith argument that the Charter provisions are not unconstitutional under existing law, a good faith argument for an extension of the existing law (namely, that a local Charter is a constitutional document of independent force capable of providing rights and liberties protections that are immune from state law preemption, just as the Ohio Constitution can provide greater protections than the United States Constitution, *see, e.g., Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993)), or both. The Secretary's view of the proposed Charter's substantive validity is not a judicial determination, and his subjective political viewpoint underscores the reasons that courts do not allow pre-election challenges to the substance of proposed laws.

**Proposition of Law No. II: This Court will issue a Writ of Mandamus to require the Secretary of State to validate a petition when the petition meets procedural requirements.**

Mandamus relief is appropriate where (1) the respondents have a clear legal duty, (2) the petitioners have a clear legal right to the relief sought, and (3) there is no plain and adequate remedy in the ordinary course of the law.<sup>6</sup> *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 45, 693 N.E.2d 794 (1998). This Court grants writs of mandamus to compel placement of proposed charter provisions on the next general ballot. *E.g.*, *State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 53, 572 N.E.2d 649 (Ohio 1991) (ordering a proposed charter amendment onto the ballot for which it had been petitioned, despite delay caused by objections to the amendment's substantive content). “In extraordinary actions challenging the decisions of the Secretary of State and boards of elections, the standard is whether they engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions.” *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, 778 N.E.2d 32, ¶ 11. Here, the Secretary clearly disregarded applicable legal provisions by granting the protests based on his assessment of the proposed Charters' substance.

**Proposition of Law No. III: Expedited relief is warranted in election matters concerning what measures go onto the ballot.**

This case represents the prompt, timely, diligent and responsible actions taken by the Relators. The Relators' efforts and momentum towards adoption of these Petitions would be

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<sup>6</sup> Mandamus actions are frequently used in the election context, because there is no adequate remedy at law. *See, e.g.*, *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 26, 941 N.E.2d 782, 793 (Ohio 2011) (“because of our recognition of mandamus as the appropriate remedy and the need to resolve this election dispute in a timely fashion, relators lack an adequate remedy in the ordinary course of the law”); *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St.3d 131, 876 N.E.2d 953, 2007-Ohio-5699 (2007) (entertaining expedited election action for a writ of mandamus). The purpose of Relators' action for this Writ of Mandamus is to compel the Secretary to comply with his non-discretionary duty to certify the Petitions for placement on the November 3, 2015 general election ballot. The electors have the right to vote on the proposed Charters. Damages cannot provide adequate compensation for a violation of voters' fundamental right to participate in the democratic process.

undermined by a delay in election cycles. The ballot must be prepared by 60 days prior to the election. Expedited review is essential to securing the people's right to participate in their community governance. *See State ex rel. Cope v. Cooper*, 121 Ohio St. 519, 525, 169 N.E. 701 (1930) ("in emergent cases, where defendant should be brought into court at an earlier date application may and should be made to the court, and a time fixed for appearance and to show cause why the writ should not be granted, within a shorter period than that fixed by the Code relating to services of summons.").

### CONCLUSION

The undisputed facts show that the Secretary violated the law by upholding the protests, invalidating the petitions, and ordering the petitions not to be placed on the November 3, 2015 general election ballot. Relators respectfully request that the Court issue a Writ of Mandamus to the Secretary of State directing him to deny the protests, and ordering the valid petitions to be placed on the November 3, 2015 general election ballots in Athens, Fulton, and Medina counties.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on September 1, 2015, I sent a copy of the foregoing document by email to:

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## Appendix

### Exhibit 1 – Ohio Constitution Article X, Section 3

#### County Charters; Approval by Voters

The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of power vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon. In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township

without the consent of the legislative authority of such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not included within any township any part of its area lying within a municipality.

(1933, am. 1957)

**Exhibit 2 – Secretary of State's Decision on O.R.C. § 307.95 Protests**

(Seven page letter begins on next page.)



## Jon Husted Ohio Secretary of State

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August 13, 2015

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Medina County Board of Commissioners  
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### **Re: Protests filed pursuant to R.C. 307.95**

To the Members of the Athens, Fulton, and Medina County Boards of Elections and Boards of Commissioners:

On August 3, 2015, my office received protests against proposed county charter petitions<sup>1</sup> from the Athens, Fulton, and Medina County Boards of Elections.

Pursuant to R.C. 307.95, I am required to “determine the validity or invalidity” of these charter petitions within ten days after receipt of the protests.<sup>2</sup> To aid in my determination, I issued Advisory 2015-06 requesting parties to the protest to submit additional written briefs and supporting documentation, and permitting interested parties to submit *amicus* briefs to my office by 5:00 p.m. on Friday, August 7, 2015.

### **FACTUAL BACKGROUND AND PROCEDURE**

The Ohio Constitution (Article X, Section 3) and R.C. 307.94 allow electors of a county to file a petition seeking to submit the question of the adoption of a county charter to the electors of the county.

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<sup>1</sup> For ease of reference, I will refer to these county charter petitions as the “Athens petition,” the “Fulton petition,” and the “Medina petition,” respectively.

<sup>2</sup> “The secretary of state, within ten days after receipt of the protests, shall determine the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures. The secretary of state may determine whether to permit matters not raised by protest to be considered in determining such validity or invalidity or sufficiency or insufficiency, and may conduct hearings, either in Columbus or in the county where the county charter petition is filed. The determination by the secretary of state is final.” R.C. 307.95(C).

A committee of petitioners in Athens, Fulton, and Medina counties each initiated, circulated, and filed substantially similar county charter petition proposals for the November 3, 2015 general election ballot.

The Fulton and Medina petitions were filed with their respective county Boards of Elections on June 24, 2015. The Boards certified their petition to their respective Board of Commissioners, which, in turn, certified the petition back to that Board of Elections for placement on the ballot.

In Athens County, the Board of Elections certified the petition as invalid to the Board of Commissioners on July 6, 2015, after which, on July 9, 2015, the petitioners requested the Board of Elections, pursuant to R.C. 307.94,<sup>3</sup> to “establish the validity or invalidity” of the Athens petition in an action before the Athens County Court of Common Pleas.

The Board of Elections complied with petitioners’ request and filed an action with the Court of Common Pleas on Monday, July 13, 2015. On July 15, 2015, Judge George P. McCarthy determined that “the petition is valid and contains sufficient valid signatures,” and certified his decision to the Board of Commissioners, which, in turn, certified the petition back to the Board of Elections on July 23, 2015.

## **DISCUSSION**

According to R.C. 307.95, when certifying a county charter petition a board of elections must determine that the petition does, in fact, “meet the requirements of law.”

I am unconvinced by Petitioners’ contention that my legal examination herein is solely restricted to the “part petition” itself, as opposed to a review of the petition *and* the charter proposal which, for all practical purposes, is one document. The initiative petition and the proposed charter are inseparable at this stage of the process.<sup>4</sup>

Nor am I persuaded that the law restricts R.C. 307.95’s statutory mandate of legal compliance to merely the administrative or technical aspects of a particular petition, or to the provisions of R.C. 3501.38, as Petitioners claim.

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<sup>3</sup> R.C. 307.94 (in relevant part) provides that, “[i]f the petition is certified by the board of elections to be invalid or to have insufficient valid signatures, or both, the petitioners’ committee may protest such findings or solicit additional signatures as provided in section 307.95 of the Revised Code, or both, or request that the board of elections proceed to establish the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures in an action before the court of common pleas in the county.”

<sup>4</sup> See *Durell v. Celebrezze*, 1980 WL 353759 (10<sup>th</sup> Dist. Ct. App. 1980), in which the Court determined that the substance of the initiative legislation at issue was “inseparable” from the initiative petition itself.

Accordingly, I find nothing to materially limit the scope of my legal review of the petitions (including the language and substantive content of the county charter proposals) in question.

On the contrary, I am empowered by the unique language of R.C. 307.95 that both permits the chief elections officer to consider matters that may not have been raised via the protests, and provides unfettered authority to “determine the validity or invalidity of the petition.”

Finally, I am unmoved by Petitioners’ argument which flatly asserts that I am unable at this time to consider the *substance* of the proposed county charters as I reach my decision. Among other distinguishing factors, the cases cited by Petitioners<sup>5</sup> involved municipal legislative authorities reviewing municipal petitions, relied on different fact patterns and different statutes to reach their respective conclusions, and did not involve the constitutionally empowered chief elections officer of the state reviewing a county charter petition pursuant to statutory authority.

I maintain, instead, that the unrestricted language<sup>6</sup> of the sole statute governing this protest plainly and unambiguously authorizes me to examine every aspect of these petitions in more than just a “ministerial” fashion.

In *Durell v. Celebreeze*, 1980 WL 353759 (10<sup>th</sup> Dist. Ct. App. 1980), the plaintiffs successfully enjoined the Secretary of State from placing on the ballot at the general election an initiative petition on the basis that the proposed initiative sought to pass a law that would clearly violate a provision of the Ohio Constitution that prohibits using the initiative process to authorize a classification of property for the purpose of levying different rates of taxation.<sup>7</sup>

Our situation is analogous. Article X, Section 3 provides for initiative county charter petitions, but, as in *Durell*, the Constitution restricts what may be contained in the substance of the initiative petition itself.

In this case, Article X, Section 3 provides that the initiative process is “reserved to the people of each county on all matters which such county may now or hereafter be authorized to **control by legislative action**,” (Emphasis added.) As I will explain later in my decision, substantive provisions of these petitions contain questions on which a county is not authorized by law to control by legislative action.<sup>8</sup>

As the 10<sup>th</sup> District Court of Appeals in *Durell* wisely noted:

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<sup>5</sup> *State ex rel. Ebersole, et al. v. The City of Powell, et al.*, 141 Ohio St.3d 17 (2014), and a similar line of cases.

<sup>6</sup> R.C. 307.95 (in part): “The secretary of state...**shall** determine the validity or invalidity of the petition...” (Emphasis added.)

<sup>7</sup> O. Const. Article II, Section 1(e): “The powers defined herein as the ‘initiative’ and ‘referendum’ shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.”

<sup>8</sup> See also *State ex rel. Rhodes v. Board of Elections of Lake County*, 12 Ohio St.2d 4 (1967), in which relators failed to force the local board of elections to place an initiative petition on the ballot because it contained proposed legislation that a municipality is not authorized by law to control by legislative action.

“Form should not prevail over substance. The law becomes a laughing stock when such subterfuge succeeds.”

County government in Ohio is established in Article X, Section 1 of the Ohio Constitution,<sup>9</sup> which instructs the General Assembly to provide “by general law for the organization and government of counties...” Consistent with this mandate, the General Assembly enacted various provisions of Chapter 301 of the Revised Code that provide the structure for basic county government in Ohio.

Article X, Section 1 also permits the General Assembly to pass laws providing the structural requirements for “alternative forms of county government.” These laws are enacted in Chapter 302 of the Revised Code.

One of these “alternative forms of government” is a “home rule” county, which is implemented when voters of a county approve a county charter proposal petition via the procedures outlined in R.C. 307.94.

The petitioners in Athens, Fulton, and Medina counties are seeking to implement this home rule type of county government in their county charter proposal petitions.

These petitions, for the most part, contain the same general language and provisions. For example, the Preamble of each petition declares the following:

“... [W]e deem it necessary to alter the current County government...”

“... [W]e form this Charter so that the people in all incorporated and unincorporated parts of the county may exercise all powers including, but not limited to, those vested by the Constitution and laws of Ohio in home rule municipalities.”

“We...adopt this home rule Charter...to elevate the consent of the governed above administrative dictates and preemptions...”

Section 3.01 of each proposal similarly provides:

“The County...shall...[have] all the powers, authorities, and responsibilities granted by this Charter and by general law, including but not limited to all or

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<sup>9</sup> O. Const. Article X, Section 1: The general assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law. 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, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities or townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

any powers vested in municipalities by the Ohio Constitution or by general law.”

Additionally, provisions of each petition clearly aim to regulate what is commonly known as “fracking” within their respective county borders by making it illegal to “[d]eposit, store, treat, inject, dispose of, or process wastewater, produced water, ‘frack’ water, brine or other substances, chemical, or by-products that have been used” in the unconventional extraction (or “high-volume horizontal hydraulic fracturing”) of gas and oil on or into the land, air or waters....”<sup>10</sup>

Likewise, each outright ban the “procurement or extraction of water from any source” for use in hydraulic fracking.<sup>11</sup>

The Fulton and Medina petitions proceed a step further, prohibiting “the exploration for or extraction of gas or oil” within these counties, with an exception for currently operating gas and oil wells,<sup>12</sup> and banning the “siting or operation of equipment to support extraction of oil or gas, including pipelines, compressors, or other infrastructure.”<sup>13</sup>

In a similar vein, each of the petitions contains a “Community Bill of Rights” granting certain rights to “ecosystems,” and a general “right to be free of chemical trespass.”

What these charter petitions do *not* contain, however, is also fundamental to examine.

Significantly, I find that none of the petitions realistically provide for a county executive, or, indeed, provide for *any* meaningful change to the structure of county government.

As mentioned above, the Ohio General Assembly enacted Chapter 302 of the Revised Code to implement the “alternative form of government,” which these petitions purport to create. According to statute, every alternative form of county government in Ohio must include either an elected or an appointed county executive.<sup>14</sup>

None of these petitions, however, provide for the election or appointment of a county executive as required by Ohio law.

In fact, the language of each petition confirms as much, explicitly providing for the continuation of the same offices that exist in their current county governments (each of which include three county commissioners, an auditor, a treasurer, a prosecuting attorney, etc.) while not providing for a county executive:

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<sup>10</sup> See Section 2.01.1, Athens petition; Section 2.01.3, Fulton and Medina petitions.

<sup>11</sup> See Section 2.01.2, Athens petition; Section 2.01.4, Fulton and Medina petitions.

<sup>12</sup> See Section 2.01.1, Fulton and Medina petitions.

<sup>13</sup> See Section 2.01.2, Fulton and Medina petitions.

<sup>14</sup> See R.C. 302.02: “An alternative form of county government shall include either an elective county executive...or an appointive county executive...,” and R.C. 302.14: “There shall be a county executive, who shall be the chief executive officer of the county.”

**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 this 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.

**Section 4.01 County Officers, Duties, Powers and Manner of Election**  
(Emphasis added.)

The unavoidable truth is that the Athens, Fulton, and Medina petitions simply fail to adhere to the Revised Code's clear requirements for a legally constituted "alternative form of government."

In addition, recent court decisions forcefully address "home rule" as it relates to local governments (as political subdivisions of the state) and their attempted regulation of the oil and gas industry.

These cases acknowledge the primacy of the Ohio Constitution (which in Article II, Section 36 grants the General Assembly the power to pass laws providing for the "regulation of methods of mining, weighing, measuring and marketing coal, *oil, gas and all other minerals,*") and a "comprehensive regulatory scheme" found in R.C. 1509.02 that explicitly reserves for the state, to the exclusion of political subdivisions of the state, the right to regulate "all aspects" of the location, drilling, and operation of oil and gas wells.<sup>15</sup>

These provisions prohibit local governments from exercising powers in a way that "discriminates against, unfairly impedes, or obstructs oil and gas activities and operations" already regulated by the state.<sup>16</sup>

In OAG 85-047, the Attorney General describes the adoption of a county charter as a way by which "the people of any county may increase the authority of their county government."

Article X, Section 3 of the Ohio Constitution states in part that county charters "may provide for the concurrent or exclusive exercise by the county...of all or of any designated powers vested by the Constitution or laws of Ohio in municipalities."

Section 3.01 of each county charter petition attempts to provide these municipal powers to their respective counties.<sup>17</sup> In this way, the petitioners seek to "increase the authority of their county government" by authorizing the county to exercise the same local self-government and

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<sup>15</sup> In particular, *State ex rel. Morrison v. Beck Energy Corporation*, 2015 WL 687475 (2015), and *Bass Energy v. City of Broadview Heights, Cuyahoga*, C.P. No. CV-14-828074 (Mar. 11, 2015).

<sup>16</sup> *State ex rel. Morrison v. Beck Energy Corporation*, *supra*.

<sup>17</sup> See Section 3.01, Athens, Fulton, Medina petitions. ("In addition, the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter, including, but not limited to, the concurrent exercise of all or any powers vested in municipalities by the Ohio Constitution or by general law.")

police powers as a municipality in Ohio. The grant by a county charter of this municipal power may not, however, come into conflict with any constitutional provision.<sup>18</sup>

The courts in Ohio have spoken: a municipality may not “discriminate against, unfairly impede, or obstruct” the operation of oil and gas wells in Ohio.<sup>19</sup>

Common sense, and the law, both dictate that a county charter may not grant to a county *more* authority than a municipality in Ohio can have pursuant to the Ohio Constitution. Yet that is exactly what the restrictive “fracking-related” provisions<sup>20</sup> of these charter petitions propose to do.

Accordingly, the petitions must be invalidated on the basis that the petitions fail to provide for an alternate form of government consistent with clear statutory and constitutional requirements, and that state law preempts any authority to regulate “fracking” by political subdivisions of the state, including charter counties.

## **DECISION**

Having carefully reviewed the law, court decisions, and the materials submitted in connection with the protests, I find that the Athens, Fulton, and Medina petitions violate the aforementioned provisions of statutory and Ohio constitutional law.

For the foregoing reasons, the protests in Athens, Fulton, and Medina counties are upheld, the petitions are invalidated, and the county charter proposals appended to each of the petitions shall not be placed upon the November 3, 2015 general election ballot.

Sincerely,

A handwritten signature in black ink that reads "Jon Husted". The signature is written in a cursive, flowing style.

Jon Husted  
Secretary of State

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<sup>18</sup> See Ohio Attorney General Opinion 85-047 (1985).

<sup>19</sup> See, *Bass Energy v. City of Broadview Heights*, *supra* (in which the court ruled that the City does not have the power to enforce provisions of its Charter that are nearly identical to those in the Athens, Fulton, and Medina petitions ) and *State ex rel. Morrison v. Beck Energy Corporation*, *supra*.

<sup>20</sup> See Sections 2.01.1 and 2.01.2, Athens petition; Sections 2.01.1 through 2.01.4, Fulton and Medina petitions.