

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, EX REL. RENEE	:	
WALKER, <i>et al.</i> ,	:	
Relators,	:	
v.	:	Case No. 2015-1371
JON HUSTED, Ohio Secretary of State	:	
Respondent,	:	
and	:	Expedited Election Case Pursuant to
JOANNE DOVE PRISLEY, <i>et al.</i> ,	:	S.Ct.Prac.R. 12.08
Intervening Respondents.	:	

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**BRIEF OF AMICUS CURIAE COUNTY COMMISSIONERS ASSOCIATION OF OHIO  
IN SUPPORT OF RESPONDENT AND INTERVENING RESPONDENTS**

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## **I. INTERESTS OF *AMICUS CURIAE***

*Amicus curiae* the County Commissioners Association of Ohio (“CCAO”) respectfully submits this brief of *amicus curiae* in support of Respondents, pursuant to S.Ct.Prac.R. 16.06(A).

CCAO is a private, not-for-profit statewide association of county commissioners founded in 1880 to promote the best practices and policies in the administration of county government for the benefit of Ohio residents. CCAO’s membership consists of the county commissioners of eighty-six of Ohio’s counties as well as the Summit and Cuyahoga County Executives and County Council members. In accordance with the determination of the Secretary of State (the “Secretary”), CCAO shares the view of the Secretary and the other Respondents that the forms of county charter government proposed by the petitions (the “Petitions”) at issue in this case are not sustainable under the laws of the State. CCAO appreciates the opportunity to submit this brief and urges this Court to uphold the determination of the Secretary.

## **II. SUMMARY OF ARGUMENT**

CCAO is of the view that the charters proposed in connection with the Petitions (the “Charters”) propose untenable and unauthorized forms of county charter government in light of the relevant provisions of the Ohio Constitution and the Ohio Revised Code.

*First*, CCAO argues that certain provisions contained in the Charters exceed the authority with which Ohio counties may act under Ohio statutory and constitutional law. The Charters purport to establish and grant fundamental rights never before recognized by courts in this State or throughout the country. *See* Section 1.01, Athens, Fulton and Medina County Charters (“All rights delineated and secured by this Charter are inherent, *fundamental*, irrevocable, unalienable, and shall be self-executing and enforceable against private and public entities.”) (emphasis added). However, Ohio counties are not authorized, under the proposed forms of charter government nor any other conceivable circumstance, to extend the concept of fundamental rights

as established by the jurisprudence of the Supreme Court of the United States and the Supreme Court of Ohio. When a proposed charter attempts to do so, as was the determination of the Secretary regarding the Charters, it must be declared invalid.

Additionally, it is evident that the intent of the Charters is to regulate or prohibit the practice of hydraulic fracturing. CCAO is of the belief that the Ohio Constitution envisions the county charter form of government as a mechanism for structural reform in Ohio's counties, not, as in the case of Relators, a tool by which counties may attempt regulate areas of law already regulated by the General Assembly. Recent case law of this Court demonstrates that even a city with full home rule authority is not permitted to regulate this area of Ohio law. Therefore, it follows that counties, with only limited home rule authority under the Charters, would also be prohibited from regulating the same activities. Because no structural changes in the form of government is proposed by them, and because they attempt to regulate an area of law preempted by the State, the Charters should be invalidated.

*Second*, as a matter of public policy, the Charters are practically unworkable, as it would be difficult to determine what each of the new purported rights means in the eyes of Ohio courts. In addition to the granting of these new rights, each Charter contains a provision authorizing citizens of the applicable county to bring an action to enforce these rights against public entities, including certain member counties of CCAO. Under a properly authorized charter, this provision is not so troubling; certainly, citizens should be guaranteed the ability to enforce their rights. But when, as in the instant case, those rights are created out of whole cloth and never before recognized, it will likely take decades for Ohio courts to fully define the boundaries of and develop a framework within which such rights may be analyzed. CCAO believes that the protracted litigation to develop that framework will necessarily involve its member counties as

litigants, and therefore lead to a decrease in the amount of legal resources the counties may utilize elsewhere and the potential for unpredictable and extraordinary legal fees the counties may be forced to pay.

For these reasons, as they are more specifically detailed below, CCAO urges this Court to uphold the Secretary's determination and find the Petitions and the Charters invalid.

### **III. ARGUMENT**

#### **A. The Petitions And The Charters Are Invalid Because They Purport To Endow Counties With Powers Not Authorized By Ohio Law And They Do Not Propose Any Authorized Alternative Form Of County Government.**

Pursuant to Article X, Section 1 of the Ohio Constitution, the General Assembly enacted Chapters 301 and 302 of the Ohio Revised Code ("R.C."), which respectively implement general and alternative forms of county government. Additionally, Article X, Section 3 of the Ohio Constitution provides the procedure by which Relators seek to adopt the Charters. In accordance therewith, the people of any county may frame and adopt a charter form of government providing for the exercise by the county of power vested in municipalities by the constitution or other laws of the State, otherwise known as limited home rule authority. However, "[w]hen a charter form of government attempts to exercise powers exceeding those conferred by the Ohio Constitution and the Revised Code, it lacks authority to do so." *State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 705 (9th Dist. 2000). The Petitions lack the authority required to grant and provide for the enforcement of new fundamental rights not previously recognized by this Court or the Supreme Court of the United States, and they should be invalidated.

The concept of fundamental rights carries significant weight in the history of this country. While some are enumerated in the Constitution of the United States (the "U.S. Constitution") and the Ohio Constitution, federal and state courts have for decades developed a framework under the Fifth and Fourteenth Amendments to the U.S. Constitution under which they have recognized

certain implied fundamental rights. The Supreme Court of the United States has noted the following with regard to the recognition of new fundamental rights:

“When the Court has found that the Fourteenth Amendment placed a substantive limitation on a State’s power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed ‘*implicit in the concept of ordered liberty.*’”

*Moore v. East Cleveland*, 431 U.S. 494, 537 (1977), quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Thus, courts are reluctant to recognize additional fundamental rights, especially when not grounded “in the concept of ordered liberty.” Indeed, each Charter claims that every right “delineated and secured” by such Charter is “fundamental.” See Section 1.01, Athens, Fulton and Medina County Charters. It is difficult to imagine how certain of the rights purported to be granted via the Charters could meet this high bar, in particular those rights granted to entities other than people. For example, the Charters attempt to establish fundamental rights for ecosystems and nature. See Sections 1.08, 1.09, 1.10, 1.13, 1.14 and 3.01, Athens, Fulton and Medina County Charters. Never has a court recognized any rights granted to plants, much less ones claimed as fundamental. The Charters certainly lack the requisite authority to do so. Additionally, under the Charters, it is purported that citizens of the applicable counties are protected from allegedly wrongful actions of private citizens. See ¶ 4 of the Preambles, Sections 1.01, 1.11, 1.12 and 2.01, Athens, Fulton and Medina County Charters. There is no authorization or precedent under Ohio law which would allow those counties to extend the rights of its citizens in this way.

In particular, the Charters claim that, by virtue of being created and empowered to act under Ohio law, corporations within the applicable counties are “creatures of the State and state actors.” See Section 1.12, Athens, Fulton and Medina County Charters. As this Court is aware, the concept of “state action” is another with many decades of history and great significance in

the context of the assertion of federal and state constitutional claims. As such claims are generally only sustainable against “state actors,” courts have been careful in establishing the meaning of that term. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (state action requires the performance a “public function” traditionally and exclusively performed by the state is state action); *Shelley v. Kramer*, 334 U.S. 1 (1948) (the enforcement of a judicial action by a private entity constitutes state action); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (state action includes coercion, influence or encouragement of private entity by government, but not mere acquiescence); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (“joint enterprise” or “symbiotic relationship” between private entity and state constitutes state action); and *Brentwood Academy v. Tenn. Secondary Sch. Athl. Assoc.*, 535 U.S. 971 (2002) (government agencies “pervasively entwined” with the leadership of private entities causes actions of such entities to constitute state action). This section of the Charters would turn an entire line of holdings by the Supreme Court of the United States (the “U.S. Supreme Court”) on its head; not to mention the increased liability it would place on corporations with regard to their activities within the applicable counties.

In the view of CCAO, the Ohio Constitution envisions the adoption of a county charter form of government for the purpose of accomplishing structural change of the government. No such structural changes are evident in the Charters; in fact, certain provisions of the Charters merely attempt to elevate the Charters and laws passed pursuant thereto above Ohio statutory and constitutional law. *See* Preambles, Sections 1.02, 1.05, 1.11, 1.12, 1.15, 2.01, 3.01 and 5.02, Athens, Fulton and Medina County Charters. As these provisions would be in conflict with the general laws of Ohio, they would be void and unenforceable. In the same line of reasoning, the Charters purport to preempt Ohio statutory law concerning the regulation of hydraulic fracturing

activities in the State. *See* Sections 2.01.1 and 2.01.2, Athens County Charter; Sections 2.01.3 and 2.01.4, Fulton and Medina County Charters (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” used in hydraulic fracturing and banning the “procurement of extraction of water from any source” for use in hydraulic fracturing). The Fulton and Medina County Charters further prohibit exploration activities and the construction of related infrastructure. *See* Sections 2.01.1 and 2.01.2, Fulton and Medina County Charters. However, this Court has previously held that even municipalities, with full home rule authority under Article XVIII, Section 3 of the Ohio Constitution, lack the ability to regulate these activities. *See State ex rel. Morrison v. Beck Energy Corp.*, slip op. 2015-Ohio-485 (Feb. 17, 2015) (holding that city zoning ordinances regulating hydraulic fracking activities conflicted with R.C. Chapter 1509 and were thus an impermissible use of the city’s police power pursuant to its constitutional home rule authority). If a city utilizing its full home rule authority is not permitted to regulate this industry, it is difficult to determine under what authority Ohio counties would be permitted to do so. Given this Court’s indisputable holding in *Morrison* and the comprehensive nature of R.C. Chapter 1509<sup>1</sup>, it must be equally true that Ohio counties may not “discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state has permitted under R.C. Chapter 1509.” *Id* at ¶ 34.

Because no structural change in the form of government is proposed by the Charters, and because the clear intent of the Charters appears to be the unauthorized regulation of areas of law

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<sup>1</sup> “The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.” R.C. 1509.02.

preempted by the General Assembly, the U.S. Constitution and the Ohio Constitution, the Charters are invalid and the Secretary's determination should be upheld.

**B. As A Matter Of Public Policy, The Enforcement Of Rights Created By The Charters Would Necessarily Involve Unnecessary Protracted Litigation And Potentially Extraordinary Expenses For The Counties.**

As this Court knows, the development of jurisprudential frameworks within which courts interpret and analyze fundamental rights, both enumerated and implicit, is in most cases a decades-long exercise of interpreting such rights. It was noted earlier that fundamental rights are those recognized as implicit in the concept of ordered liberty. In that same case, the U.S. Supreme Court referred to those rights as “deeply rooted in this Nation’s history and tradition.” *East Cleveland*, 431 U.S. at 503. While the Charters purport to create new fundamental rights through the adoption and implementation of a county charter, that is not the established path by which such rights have ever been created or recognized. Fundamental rights are historically created or recognized only through constitutional amendments or the development of case law. Further, when such rights are created or recognized, they must be applied equally and inure to the benefit of all citizens. Instead, in utilizing portions of Ohio statutory and constitutional law historically intended to accomplish structural county government reforms, the Charters attempt to create exclusive fundamental rights for the citizens of those counties in which they are proposed. Such a patchwork system of varying rights is untenable, and constitutes uncharted territory with respect to a court’s enforcement of those rights. CCAO argues that this new path of creating fundamental rights is rife with potential for litigation, for which Ohio counties will bear the financial and administrative burden.

In the enforcement of these new rights, the Charters enable its county’s citizens to file actions against public and private entities. CCAO is of the view that the applicable counties, which are members of CCAO, will inevitably be involved as litigants in these actions. The near

certainty of protracted litigation regarding the interpretation of the Charters leads CCAO to believe that, at worst, these counties will incur unpredictable and potentially extraordinary litigation expenses for the foreseeable future, and, at best, such counties can expect diminished legal resources available in other areas necessary for their effective administration. *See, e.g.*, Section 1.01, Fulton and Medina County Charters (“In such an action, the resident shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney’s fees. These costs and fees shall not be awarded against the resident.”).

To be clear, CCAO believes its member counties would ultimately be protected from adverse rulings in all such litigation, whether by operation of R.C. Chapter 2744 or a plaintiff citizen not meeting the requirements to enforce a mandamus action. However, the proposition of these counties providing a blank check to their citizens to pursue litigation against them is concerning, especially in the context of interpreting and enforcing the new and undefined rights granted by the Charters. Despite CCAO’s disposition on the ultimate outcome of any such litigation, the resources spent to defend these lawsuits initially and request summary judgment on these matters is likely to be substantial and burdensome to the counties; thus, CCAO urges this Court to uphold the Secretary’s determination.

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#### IV. CONCLUSION

CCAO respects the opportunity afforded to Ohio's citizenry to reform their county governance structure under Article X, Section 3 of the Ohio Constitution and R.C. Chapter 302. However, the Charters do not facially comport with the traditional application of the county charter process, nor do they appear to reflect the intent of these reform mechanisms. Rather, they appear to be a blatant attempt by certain citizens of those counties to exceed the statutory and constitutional boundaries of county government under Ohio law in order to regulate areas beyond their control. The ambiguity created by these petitions, at best, puts county commissioners in the untenable position of lacking any clear guidance as to how to perform the duties imposed upon them. At worst, the Counties will be the flashpoint for protracted litigation that will cost the taxpayers of the Counties untold sums of money without inuring any benefit to its citizens. Therefore, CCAO respectfully urges this Court to declare the Petitions and the Charters invalid and insufficient, consistent with the Secretary's determination.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that, in accordance with S.Ct.Prac.R. 3.11(B) and, a copy of the foregoing Merit Brief of *Amicus Curiae* the County Commissioners Association of Ohio was served via email, pursuant to S.Ct.Prac.R. 3.11(C)(3), on this 4th day of September, 2015, upon the following counsel:

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