

IN THE SUPREME COURT OF OHIO

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

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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 reply brief in support of the allegations of the Verified Complaint for the granting of a Writ of Mandamus.

I. Reply to Secretary of State’s ‘Sufficiency and Validity’ Argument

A. O.R.C. § 731.28 Does Not Impute Substantive Discretion to O.R.C. § 307.95

Secretary Husted maintains (“Merit Brief of Respondent Jon Husted, Ohio Secretary of State,” hereinafter “Husted Brief” at 1-2) that he has discretion under O.R.C. § 307.95 to inquire into the “validity or invalidity” of initiative petitions, that it is the fundament of his power to make constitutional determinations about the petitions prior to an election. While asserting on the one hand (Husted Brief at 13) that the interpretation of O.R.C. § 307.95 is one of first impression, Secretary Husted urges that O.R.C. § 731.28 provides analogous statutory language and court interpretation to support the conclusion that responsibility to conduct a constitutional inquiry as an Executive Branch official has been assigned him by the Ohio General Assembly. Nothing could be further from a logical and reasoned conclusion.

Village Clerk Sodders of Englewood, Ohio refused to certify the sufficiency and validity of an initiative petition because of its purported noncompliance with O.R.C. §§ 3519.05 and 3519.06. These sections were “manifestly inapplicable” to the petition, and Sodders was held to have abused her “limited discretion under R.C. 731.28” by refusing to certify the sufficiency and validity of the initiative petition. . . .” *State ex rel. Sinay v. Sodders*, 685 N.E.2d 754, 80 Ohio St.3d 224, 232, 1997-Ohio-344 (1997).

Construing O.R.C. § 731.28 in *State ex rel. Lange v. King*, 2015-Ohio-3440, 2015-1281, (August 25, 2015), this Court affirmed the village clerk’s “limited, discretionary authority” to determine the sufficiency and validity of initiative petitions. *Id.* at ¶ 5. This Court expressed that “it is an abuse of discretion for a village clerk to inquire into substantive questions ‘not evident on the face of the petition,’” quoting from *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 30 (2005). In *Webb*, the Supreme Court also interpreted O.R.C. § 731.28 and ruled that the village clerk of the Village of Wellington had abused her “limited, discretionary authority to determine the sufficiency and validity of the petition” by “attempting to resolve substantive questions not evident on the face of the petition,” specifically, a proposed ordinance to approve a location for a surface street grade-separation project involving an overpass bridge and legislating a village contribution of up to five percent of the project cost. The Supreme Court remarked that the municipal legislative authority’s discretion is “limited to matters of form, not substance,” is “more restricted than that of a board of elections,” does not involve “judicial or quasi-judicial determinations” such as determining if the requirements of O.R.C. § 3501.38(F) have been satisfied, and does not permit “inquir[ing] into questions not apparent on the face of the petitions themselves or which require the aid of witnesses to determine.” *Id.*, ¶ 30.

Moreover, in *State ex rel. Williams v. Iannucci*, 39 Ohio St.3d 292, 294 (1988), this Court declared, “We construe R.C. 731.28 to confer on the auditor only the ministerial duty to certify to the board of elections the text of a proposal for which sufficient signatures have been obtained.” The “sufficiency and validity” mission expressed in O.R.C. § 731.28 has been only narrowly defined by the Ohio Supreme Court and does not support the Secretary of State’s

postulation that O.R.C. § 307.95 grants him “discretionary authority to determine the validity of the petitions.” (Husted Br. at 7.)

B. The Secretary Inveighs Against A Century of Contrary Precedent

Indeed, the Secretary’s claimed power to review the substantive content of a charter amendment initiated by petition prior to voter approval directly conflicts with over a century of Ohio Supreme Court precedent. The Secretary cannot explain how the unremarkable “validity or invalidity” language of O.R.C. § 307.95 should be read to import an unprecedented principle of interpretation which allows him, as an Executive Branch official, to pre-emptively divert an initiative from the ballot and from traditional court review, post-election.

At least twenty-two of this Court's decisions, discussed below, uniformly hold that reviewing the content of the proposed charter amendment must wait until after the election and that the power of clerks of council, boards of election, and the Secretary of State himself are limited to considering the “propriety of its submission to the voters,” not the legality or effectiveness of the initiated proposal. *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 38 (2005).

See *State ex rel. Lange v. King*, 2015-Ohio-3440, 2015-1281, ¶ 11¹ (August 25, 2015) (objections that one-subject rule would be violated and would unconstitutionally impair village’s contract rights improper concerns to deter ballot); *State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, ¶¶ 6, 7 (claimed unconstitutionality was improper objection to

¹“[¶ 11] As noted above, King's discretion is limited: it is an abuse of discretion for a village clerk to inquire into substantive questions ‘not evident on the face of the petition.’ *Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, at ¶ 30. The fiscal impact of the measure is a question that falls outside the four corners of the document. We therefore hold that it was an abuse of discretion for the clerk to refuse to certify this petition on that basis. Moreover, even if King did have such discretion, there is no evidence in the record to substantiate her claim about the fiscal impact the measure would have.”

vote on initiative); *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14 (holding “the city's claim that public policy requires that the initiative be removed from the ballot because the electorate cannot force the mayor to speak in support of an issue that is contrary to the United States Constitution attacks the substance of the proposed ordinances, and this challenge is premature before adoption of the proposed ordinances by the people” (citation omitted)); *State ex rel. Kilby v. Summit Cty. Bd of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, ¶ 12 (objections that initiative overemphasized public cost savings and under-emphasized new term limits in ballot language rebuffed as intrusion into substance); *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶ 24 (objection based on separate-vote requirement was deemed a constitutional challenge and barred).

Also, see *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, ¶ 43 (ballot protest which attacked constitutionality and legality of an initiative requiring city to “comply with all appropriate procedures and law of Ohio” in acquiring parkland was repudiated); *State ex rel. Lewis v. Rolston*, 115 Ohio St.3d 293, 2007-Ohio-5139, ¶ 28 (“suspected illegality [of proposed ordinance] does not bar the fiscal officer from certifying the initiative”); *Mason City School Dist. v. Warren Cty. Bd of Elections*, 107 Ohio St.3d 373, 2005-Ohio-5363, ¶ 21 (protest challenging constitutionality of O.R.C. § 5705.26 cannot be considered, pre-election); *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 38 (2005) (claim that the ordinance might, if enacted, violate O.R.C. § 5501.31 “is an attack on the legality or effectiveness of the ordinance instead of a challenge to the propriety of its submission to the voters,” and was overruled).

Moreover, see *State ex rel. Commt. For the Charter Amendment v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶ 43 n. 3 (2002) (city council’s “frivolous claim that the petition contained insufficient signatures, its irrelevant claims of defending the charter, and the city law director's concerns that the amendment, if approved, would be unconstitutional” all ruled improper); *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999) (“Any claims alleging the unconstitutionality or illegality of the substance of the proposed ordinance, or action to be taken pursuant to the ordinance when enacted, are premature before its approval by the electorate.”); *State ex rel. Hazel v. Cuyahoga Cty. Bd of Elections*, 80 Ohio St.3d 165, 169 (1997) (protest claiming violation of one-subject limitation “addresses the substance or propriety of the ordinance rather than the validity and sufficiency of the initiative petition under the pertinent constitutional and statutory requirements”); *State ex rel. Thurn v. Cuyahoga Cty. Bd of Elections*, 72 Ohio St.3d 289, 293 (1995) (assertion that one invalid zoning petition would bar others from the ballot would be a review of the substance of the proposed ordinances prior to their approval by the electorate and “is premature”).

Also, see *State ex rel. Williams v. Iannucci*, 39 Ohio St.3d 292, 294 (1988) (“There is no express or implied authority residing in a city auditor to pronounce judgment on the legality of a proposed ordinance. Even a court will not pronounce such a judgment.”); *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 146 (1988) (reversal of trial court’s improper declaration that results of the election and the proposed charter amendment were null and void, and its injunction against implementation of amendment prior to certification of election results); *State ex rel. Walter v. Edgar*, 13 Ohio St.3d 1, 2 (1984) (petitions proposing (1) repeal of emergency measure transferring urban development bonds to a successor corporation and (2)

requiring the city to immediately collect a large delinquent account owed to the city's electric company may not be precluded from ballot on grounds of illegality); *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5, 6, 7 OBR 317, 318 (1983) (“It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature.”); *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 17-18 (1977):

We can not intervene in the process of legislation and enjoin the proceedings of the legislative department of the state. That department is free to act upon its own judgment of its constitutional powers. We have not even advisory jurisdiction to render opinions upon mooted questions about constitutional limitations of the legislative function, and we will not presume to control the exercise of that function of government by the General Assembly, much less by the people, in whom all the power abides.

State ex rel. Kittel v. Bigelow, 138 Ohio St. 497, syll. (1941) (“The courts will not interfere with the submission to the electors of a proposed amendment to a city charter, upon a claim that the amendment, if adopted, will contravene the Constitution of Ohio. Such a claim is prematurely asserted.”); *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 138 N.E. 881, syll. (1922):

[N]o officer or tribunal may interfere either with the enactment of laws or the amendment of the constitution while the same is in process, upon the ground that such legislation, if enacted, or constitutional amendment, if adopted, will be in conflict with the constitution, state or federal. These questions are and must necessarily be reserved for consideration and determination after the legislative or constitution making body shall have fully performed its function and such new law or constitutional amendment shall have become effective.

Cincinnati v. Hillenbrand, 103 Ohio St. 286, syll. ¶ 2 (1921):

This court has no authority to pronounce a judgment or decree upon the question whether a proposed law or ordinance will be valid and constitutional if enacted by a legislative body or adopted by the electors. And where the mandatory provisions of the constitution or statute prescribing the necessary preliminary steps to authorize the submission to the electors of an initiative statute or ordinance have been complied with the submission will not be enjoined.

Weinland v. Fulton, 99 Ohio St. 10, syll. (1918):

In an action to enjoin the Secretary of State from submitting for the approval or rejection of the electors a constitutional amendment proposed by petition in pursuance of the provisions of Section 1 and Section 1a of Article II of the Constitution Of Ohio, a court can not consider or determine whether such proposed amendment is in conflict with the Constitution of the United States.

Finally, see *Pfeifer v. Graves*, 88 Ohio St. 473, syll. ¶ 5, 488 (1913) (“We cannot enjoin the sovereign state of Ohio where the people have not in their constitution, clearly beyond reasonable doubt, limited the exercise of their power to legislate directly by the initiative. Therefore the writ must be refused.”).

From the foregoing recitation, the Secretary’s assertion (Husted Br. at 11-12) that Relators are not entitled to a writ of mandamus to compel the exercise of discretion is inapropos and misleading. Relators do not seek for Secretary Husted to exercise any discretion. Rather, whatever discretion he possesses is circumscribed; he may determine the fitness of the initiative to be placed on the ballot,² but is barred from going into its legality or illegality. Secretary Husted himself described his role in this limited way in *State ex rel. Cincinnati for Pension Reform v. Hamilton Cty. Bd. of Elections*, 137 Ohio St.3d 45, 2013-Ohio-4489 (2013). That case centered around disputed ballot language, and in his merit brief, Secretary Husted denied that he possessed any discretion whatsoever:

In this case, it is undisputed that the Secretary of State did not review the proposed ballot language for content, only for form. **The Secretary therefore did not exercise any discretion with respect to the content of the provision.** As he has not exercised discretion, the Secretary cannot have abused it.

2 The only discretion the Secretary has is in the questions of which signatures to challenge or in what method to review the signatures or the form of the petition. Here, during this review period the Secretary made no objections to the signatures or forms of these petitions, and therefore they should be certified to the ballots of their respective counties.

“Brief of Respondent Ohio Secretary of State Jon Husted”³ at 3 (Emphasis supplied).

Contrastingly, Secretary Husted’s exercise of discretion which excluded the three county charter proposals from the ballot was, by definition, an abuse and a departure from clear legal standards.

The Secretary may examine a proposed measure to ensure that it actually legislates, but once that determination has been made, deeper inquiry into substance may not occur. That was Secretary of State Husted’s position in *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530. In his brief there,⁴ Secretary Husted made a finding that, “An examination of the Brecksville Initiative indicates that it creates a new legislative provision requiring a number of affirmative acts that are not designed to merely carry out the administration of an existing portion of the Ordinances of the City of Brecksville.” But then, Secretary Husted cautioned:

To the extent Relator is challenging the constitutionality of the text of the statute itself, that argument is premature and does not support the issuance of an extraordinary writ. *State ex rel. Kilby v. Summit County Bd of Elections*, Case No. 2012-1515, 2012-Ohio-4310, ¶ 12, (holding “any claims challenging the validity of the proposed charter amendment are premature when made before the amendment is approved by the electorate”) (internal quotations omitted).

“Respondent Ohio Secretary of State Jon Husted’s Merit Brief” at 7 n. 4 (Emphasis added).

Now, however, despite Respondent’s obvious understanding of the legal principles at play, he insists that he has been empowered by the “unique” validity/invalidity phraseology of O.R.C. § 307.95 to depart from the tidal wave of contrary interpretations of the very statute to which he has turned for analogy. Against nearly two dozen Supreme Court cases which consistently hold

3 The merit brief of current Ohio Secretary of State Jon Husted filed in *State ex rel. Cincinnati for Pension Reform v. Hamilton Cty. Bd. of Elections* is available on the Ohio Supreme Court Clerk's website at www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=734303.pdf

4 The merit brief of current Ohio Secretary of State Jon Husted filed in *State ex rel. Brecksville v. Husted* is available on the Ohio Supreme Court Clerk's website at www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=714444.pdf

to the principle that questions of illegality of a ballot proposal may not be delved into in the accelerated pre-election litigation period by non-judicial figures such as the Secretary of State, Respondent Husted can cite to nothing.

II. Reply to Deference to Secretary of State Interpretation

Respondent Husted maintains (Husted Br. at 13) that the Court “must give deference to the Respondent’s reasonable interpretation of R.C. 307.95(C).” While it is true that greater weight is accorded the interpretation of the Secretary of State where an election statute is subject to two different but equally reasonable interpretations, that deference disappears where the focus is not strictly on interpreting an election statute but involves interpreting constitutional and charter provisions. *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 80, 2002-Ohio-1383 (2002). Moreover, the Secretary’s is not a reasonable interpretation of O.R.C. § 307.95, as discussed above. Consequently, the Court should apply ample clear precedent to rule against the Secretary’s inconsistent, logic-defying interpretation of the county charter statute.

III. Reply to Argument that Relators Did Not Assert Secretary’s Abuse of Discretion

Respondent Husted states, inaccurately, that Relators “do not argue that Respondent abused his discretion.” (Husted Br. at 16.) Throughout the Verified Complaint, Relators allege facts and suggest arguments that the Secretary abused his discretion.⁵ Additionally, their Merit

5 For example, see Verified Complaint ¶ 4 (“Relators . . . have no plain or adequate remedy at law to correct the unlawful, unreasonable and/or arbitrary acts and abuses of discretion committed by the Ohio Secretary of State in his improper refusal to reject the ballot protests for lack legal [*sic*] justification and to order the three referenda to proceed.”); ¶ 21 (“Respondent’s ‘invalidation’ of the three Petitions is unconstitutional, arbitrary, illegal and an abuse of his legal authority.”); ¶32 (“Consequently, the Respondent Secretary of State’s refusal to reject the ballot protests and his refusal to put the three Petitions to a public vote was improper, unlawful, an abuse of discretion and arbitrary, and must be reversed by this Court.”); ¶ 33 (“The Secretary of State’s acts and omissions comprise a continuing abuse of discretion that must be corrected by a specific mandate from the Court.”).

Brief, even without incantation of the magic term, “abuse of discretion,” contains evidence and argument supporting that conclusion. Finally, as made clear in Section I above, the Secretary abused his discretion by exercising discretion he clearly lacked under the applicable statute and the solid weight of jurisprudence against pre-election consideration of a proposed law's substantive merits.

IV. Reply to Contention that Petitions Concern Areas of Law that Local Governments are not Authorized to Control

Secretary Husted insists that mandamus cannot require submission of a ballot issue that does not contain any question which a municipality is authorized by law to control by legislative action. (Husted Br. at 18-19.) However, Respondent’s argument misstates the constitutional standard. Article II, § 1f of the Ohio Constitution, provides for municipal initiative and states:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

The operative phrase is whether the question is on “which such municipalities may now or hereafter be authorized by law to control by legislative action.” As this Court noted in *State ex rel. Morrison, Law Dir. v. Beck Energy Corporation*, 2015-Ohio-485, 2013-0465 , ¶ 3, “In 2004, the General Assembly amended that chapter to provide ‘uniform statewide regulation’ of oil and gas production within Ohio and to repeal ‘all provisions of law that granted or alluded to the authority of local governments to adopt concurrent requirements with the state.’” Legislative Service Commission Bill Analysis, Sub.H.B. No. 278 (2004); R.C. 1509.02, Sub.H.B. No. 278, 150 Ohio Laws, Part III, 4157. That legislation, known colloquially as the “Niehaus Bill,” negated decades of local zoning and other local governmental controls over oil and gas drilling.

Just as local governments once had regulatory authority to direct or ban oil and gas drilling, they may now or hereafter be authorized by law to control it again, by legislative action. The charter amendment proposed by the initiative petitions at issue, if passed by the electorate and if challenged unsuccessfully in the courts after adoption by the electorate, would comprise just such authority. Ohio Const. Art. II, § 1f. Accordingly, Respondent Husted's argument fails.

V. Reply As To Vain Acts and High Costs

Respondent Husted's argument that it is the duty of the courts to uphold an act of the General Assembly (Husted Br. at 20) is grossly misplaced. While the courts may have that duty if there is a ripe challenge before it, this argument exposes the threadbare position of the Secretary. His argument subconsciously shifts gears into the presumption that the county charters have been enacted into law and that O.R.C. Chapter 1509 is under present attack. That is precisely *not* the actual circumstance here, but it epitomizes the wisdom behind the ancient judicial policy unswervingly articulated by generations of justices of the Ohio Supreme Court. An opinion directed to the merits of the charter proposals now is merely speculative and advisory and an improper use of the Court's resources.

Respecting Secretary Husted's "horribles" argument that "unpredictable and potentially extraordinary litigation costs" will be borne by the counties which have charter proposals enacted within their borders (Husted Br. at 20), that, too is a speculative argument. It is equally the circumstance faced by county government officials in each of Ohio's 88 counties when compiling annual budgets. This Court has addressed, within the past 15 days, a nearly-identical argument about the horrors of fiscal effect, finding it to comprise an illegitimate reason to block an initiative:

The fiscal impact of the measure is a question that falls outside the four corners of

the document. We therefore hold that it was an abuse of discretion for the clerk to refuse to certify this petition on that basis. Moreover, even if King did have such discretion, there is no evidence in the record to substantiate her claim about the fiscal impact the measure would have.

State ex rel. Lange v. King, 2015-Ohio-3440, 2015-1281, ¶ 11 (August 25, 2015). The Court's conclusions in *Lange* are similarly apropos to the instant matter.

VI. Reply to Supposed Lack of Identification of Governmental Structure

Respondent Husted maintains (Husted Br. at 21) that “none of the petitions state the form of government being proposed.” Given the selective reading applied by Respondent to the charters, that benighted conclusion is understandable.

Each of the three charter petitions contains this clause at § 4.01:

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.

(emphasis added). In discussing the contents of § 4.01, Secretary Husted completely fails to notice or mention the above, boldfaced, critical 21 introductory words en route to the distorted result that “each petition includes the same language in the Ohio Constitution, Article IV, Section 4.01.” Only by reading what he wishes were there, instead of what is actually contained within the charters, can the Secretary pretend that no form of government is proposed by the charters.

Then, inconsistently, Respondent Husted admits that Relators have, indeed, proposed a form of county government (albeit not a form that the Secretary evidently would prefer). In the very next paragraph of his brief, the Secretary admits, incorrectly, that “the petitions expressly state that they maintain the *status quo*.” (Husted Br. at 21.) At least he ultimately notices that a

governmental structure is proposed within the charters. But the Secretary ignores that the upshot of the charter proposals is to empower county commissioners in the three counties, as expressly authorized by Art. X, § 3 of the Ohio Constitution, to legislate local laws instead of proceeding merely as administrative subunits of the State of Ohio. The latter is the circumstance in 86 of Ohio's 88 counties. Moreover, engrafting legislative power on the existing county governmental form automatically endows the citizens of those counties with the power of local initiative and referendum. Ohio Const. Art. X, § 3. In sum, the charter proposals do not hold for the status quo circumstance in any of the three counties in which citizens have actively sought to restore lost control over their communities' futures. They want their commissioners henceforth to have legislative powers, and the people, themselves, desire to have initiative and referendum control so that they, too, may legislate.

VII. Reply to Claimed Inadequacy of Relators' Verification Affidavits

Relators have examined the criticisms raised by Respondent Husted concerning the alleged insufficiency of the affidavits they gave in support of their Verified Complaint in Mandamus. While Relators believe that their sworn assertions were adequately made, they intend to submit amended affidavits within a few days to ameliorate this objection.

VIII. Reply to Merit Brief of Intervenor Prisley

Relators assert all of their foregoing arguments in this Reply Brief in reply and opposition to the "Merit Brief of Intervening Respondent Joanne Dove Prisley" ("Prisley Br."). Arguments such as the "confusing" nature of including bill of rights provisions in the charter wording (Prisley Br. at 19-20) illustrate pellucidly that Intervenor Prisley misunderstands the principle enunciated by the Supreme Court that at this stage, public balloting must be allowed to take place as to the charters, and that court challenges - and not a pre-emptive Secretary of State

veto - must occur later, if at all.

IX. Reply to Merit Brief of Intervenor Overholt

Relators assert all of their foregoing arguments in this Reply Brief in reply and opposition to the “Merit Brief of Intervening Respondent Mark Overholt” (“Overholt Br.”).

Additionally, Relators oppose this Intervenor’s argument that there is a problem of miscaptioning of the Verified Complaint. There are ten Relators. Their names and addresses are denominated in the caption of the Complaint, connected by the article “and.” Relators are nonplussed at Intervenor Overholt’s admission that only Relator Renee Walker is properly represented as a Relator in the caption, since her name is preceded by the obligatory “State of Ohio ex rel.” wording. While Intervenor Overholt maintains that the connection of Relators’ names with “and” is fatal to their being accorded status as Relators, he produces no court interpretation consistent with that argument. Relators submit that where, as here, they have obviously followed the statutory and rule requirements for the captioning of this lawsuit, the Court must apply Civ.R. 8(F): “All pleadings shall be so construed as to do substantial justice.” “Substantial justice” here would be for the Court to disregard and deny this objection.

Intervenor Overholt also insists in his “Proposition of Law No. 4” that Relators must refute challenges which were neither ruled upon or addressed by Secretary of State Husted in his August 13, 2015 ruling which removed the charter proposals from the ballot. Since Secretary Husted did not rely on the unspecified arguments to which Intervenor Overholt apparently refers, but cited his own, independent bases for striking the charters, there is no logical nor legal basis for this point. Relators suggest that the Court should apply the precept that where a trial court makes no ruling on a pending motion, it must be deemed to have been denied. *Teneric LLC v. Zilko*, 2009-Ohio-1363, 91410, ¶ 40 (2009). From a notice pleading standpoint, it was

incumbent on Intervenor Overholt to make this point as part of an affirmative lawsuit, not as a mere briefing argument.

X. Reply to Gas Associations Amicus Brief

Relators assert all of their foregoing arguments in this Reply Brief in reply and opposition to the “Brief of *Amici Curiae* Ohio Oil and Gas Association and Ohio Gas Association” (“Gas Associations Br.”).

Relators also respond in particular to one argument raised by the Gas Associations. At p. 10 of their Brief, they state as follows:

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

This *Ebersole* holding - and the line of argument which the Gas Associations seek to construct from it - were overruled and superseded by the Ohio Supreme Court days after this decision was published. The *Ebersole* decision cited by the Gas Associations was issued on September 19, 2014. But the relators in the case moved for reconsideration, and the Court took up the matter, and reversed itself.

In *State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283 (September 29, 2014), this Court concluded “that it was premature to assess the constitutionality of the proposed ordinance and that the city council abused its discretion by refusing to submit the amendment to the voters.” *Id.* ¶ 2. The Court continued:

The proper time for an aggrieved party to challenge the constitutionality of the charter amendment is after the voters approve the measure, assuming they do so. The council acted unlawfully when it failed to pass Ordinance No. 2014-41 to place the amendment before the voters.

Id. at ¶ 13. In light of this important reversal by the Supreme Court, wherein it returned to the century of precedent holding that attacks on legality of an initiative proposal must be reserved until after a vote has taken place, it is unimaginable that the Gas Associations' proposition should be taken seriously. It is no longer true - if it were ever true - that "Where the substance or content exceeds the people's initiative power, this Court has 'made clear that in such cases, the board of elections is 'required to withhold the initiative and referendum from the ballot.'" Relators urge the Court to disregard this line of argument completely.

XI. Reply to Farm Bureau, County Commissioners Association and Chamber of Commerce Amici

Relators assert all of their foregoing arguments in this Reply Brief in reply and opposition to the "Brief of *Amici Curiae* Ohio Farm Bureau Federation, Athens-Meigs Farm Bureau, Fulton County Farm Bureau, and Medina County Farm Bureau;" the "Merit Brief of Amicus Curiae the County Commissioners Association of Ohio;" and "Brief of the Ohio Chamber of Commerce, Affiliated Construction Trades of Ohio, and the American Petroleum Institute, *Amicus Curiae*."

CONCLUSION

The Respondents and *Amici* attempt to hypercomplicate and confuse a rather straightforward issue. While the charter proposals are undeniably controversial, there are portions of them which might easily withstand court attack (such as according legislative powers to county commissioners and the extension of local initiative and referendum rights to voters), even if the courts were to reject some parts of the other rights enumerated in the petitions. But until the

voters have spoken in the form of enacting the charter proposals into law, there is only speculation by Respondents and *Amici* as to what may or may not withstand constitutional muster.

Our system is designed to afford thoughtful post-election deliberation of thorny and complex legal issues, by courts which are qualified to undertake those deliberations. If the Court were to affirm Secretary of State Husted's veto power over the charter proposals, it would pre-empt, once and for all, access to the courts to counter the unlawful or abusive exercise of such discretionary authority. Ohio's Constitution recognizes and details the separation of legislative, executive and judicial branches to provide necessary checks against constitutional violations. The separation of powers doctrine will be seriously damaged if the Court confers supreme judicial authority upon the Ohio Secretary of State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 8, 2015, I sent a copy of the foregoing document by email to:

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