

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. :
CITY OF YOUNGSTOWN, :
 :
Relator, : Case No. 2015-1422
 :
v. : **Original Action in Mandamus**
 :
MAHONING COUNTY BOARD OF :
ELECTIONS, et al., :
 :
Respondents. :

RELATOR'S MERIT BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii-iii

STATEMENT OF FACTS.....1

LAW AND ARGUMENT.....3

RELATOR’S FIRST PROPOSITION OF LAW

RELATOR HAS A CLEAR LEGAL RIGHT TO THE RELIEF REQUESTED, RESPONDENTS ARE UNDER A CLEAR LEGAL DUTY TO PROVIDE THE REQUESTED RELIEF, AND RELATOR HAS NO PLAIN AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.....3

A. Relator, City of Youngstown, a municipal corporation within the State of Ohio and a home-rule charter city, has a clear legal right to a writ of mandamus in the present action.....4

B. The Mahoning County Board of Elections has a clear legal duty to place the proposed charter amendment on the ballot for submission to the voters at the November 3, 2015 election.....5

C. Relator, City of Youngstown, has no plain and adequate remedy in the ordinary course of law.....7

RELATOR’S SECOND PROPOSITION OF LAW

THE RESPONDENTS, MAHONING COUNTY BOARD OF ELECTIONS AND THE SECRETARY OF STATE, HAVE NO AUTHORITY TO PASS UPON THE CONSTITUTIONALITY OF A PROPOSED CHARTER AMENDMENT, AND THUS, VIOLATED THE DOCTRINE OF SEPARATION OF POWERS.....8

RELATOR’S THIRD PROPOSITION OF LAW

THE DETERMINATION AS TO THE CONSTUTIONALITY OF THE PROPOSED CHARTER AMENDMENT AT ISSUE IS OFF LIMITS TO PRE-ELECTION PROTEST.....9

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

| | |
|---|-----|
| Ohio Const., Art. XVIII, Section 3..... | 4 |
| Ohio Const., Art. XVIII, Section 7..... | 4 |
| Ohio Const., Art. XVIII, Section 8..... | 6-7 |
| Ohio Const., Art. XVIII, Section 9..... | 5-6 |

STATUTES

| | |
|-------------------|---|
| R.C. 3501.11..... | 5 |
|-------------------|---|

CASES

| | |
|---|------|
| <i>State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.</i> , 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d54..... | 3 |
| <i>State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections</i> , 62 Ohio St.3d 17, 577 N.E.2d 645 (1991)..... | 5 |
| <i>State v. Bodyke</i> , 126 Ohio St.3d 266, 2010-Ohio-2424 933 N.E.2d 753..... | 8 |
| <i>State ex rel. Bryant v. Akron Metro. Park Dist. of Summit Cty.</i> , 120 Ohio St. 464, 166 N.E. 407 (1929)..... | 8 |
| <i>State ex rel. Burech v. Belmont County Bd. of Elections</i> , 19 Ohio St. 3d 154, 484 N.E.2d 153 (1985)..... | 8 |
| <i>State ex rel. Citizen Action v. Hamilton Cty. Bd. of Elections</i> , 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902..... | 9. |
| <i>State ex rel. City of Toledo v. Lucas County Bd. of Elections</i> , 95 Ohio St. 3d 73, 2002-Ohio-1629, 765 N.E.2d 356..... | 5 |
| <i>State ex rel. DeBrosse v. Cool</i> , 87 Ohio St.3d 1, 1999-Ohio-239, 716 N.E.2d 1114..... | 9-10 |
| <i>State ex rel. Ebersole v. City of Powell</i> , 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274..... | 10 |
| <i>State ex rel. Gonwer vs. Graves</i> , 90 Ohio St. 311, 107 N.E. 1018 (1914)..... | 7 |

| | |
|---|-----|
| <i>State ex rel. Henslee v. Newman</i> , 30 Ohio St.2d 324, 285 N.E.2d 54 (1972)..... | 3-4 |
| See <i>State ex rel. Kilby v. Summit Cty. Bd. of Elections</i> , 133 Ohio St.3d 184, 2012-Ohio-4310, 977 N.E.2d 590..... | 9 |
| <i>State ex rel. McGovern v. Bd. of Elections</i> , 24 Ohio Misc. 135, 136, 263 N.E.2d 586 (1970)..... | 8-9 |
| <i>State ex rel. Melvin v. Sweeney</i> , 154 Ohio St. 223, 226, 94 N.E.2d 785 (1950)..... | 7-8 |
| <i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> , 86 Ohio St.3d 451, 716 N.E.2d 1062 (1999)..... | 8 |
| <i>State ex rel. Timmons v. Bd. of Elections of Montgomery County</i> , 1979 Ohio App. LEXIS 9802, 1979 WL 208563..... | 7 |
| OTHER SOURCES | |
| City of Youngstown Charter, Section 120..... | 4-7 |
| 19 Ohio Jurisprudence 2d 14..... | 7 |
| 37 Ohio Jurisprudence 2d 349..... | 7 |

I. STATEMENT OF FACTS

In this case, the Petitioner, State of Ohio ex rel. City of Youngstown, seeks a writ of mandamus to compel the Respondents, the Mahoning County Board of Elections and its members, Respondents David Betras, Mark Munroe, Robert Wasko, and Tracey Winbush, together with Ohio Secretary of State Jon Husted, (“Respondents”) to certify a proposed amendment to the Charter of the City of Youngstown to appear on the November 3, 2015 ballot.

Relator, the City of Youngstown, is a municipal corporation within the State of Ohio. The City of Youngstown has a duly enacted city charter. The Youngstown Charter was approved by the voters on May 15, 1923, and has been amended from time to time thereafter. *See Complaint Exhibit B.* Pursuant to Youngstown City Charter Section 120, Amendments to the Charter “**shall** be submitted to the Electors of the City of Youngstown in the manner provided by the Constitution and law of the State of Ohio.” (emphasis added).

Respondents, David Betras, Mark Munroe, Robert Wasko, and Tracey Winbush are the duly appointed members of the Respondent, Mahoning County Board of Elections. Respondent, Jon Husted is the Ohio Secretary of State.

The parties agree that on August 3, 2015 the “Community Bill of Rights” proposal was presented to Youngstown City Council with 1,534 valid signatures; 422 more than the 1,112 valid signatures required by Youngstown City Charter and the Ohio Constitution and the laws of the State of Ohio. *See Complaint at paragraphs 28 and 29; Mahoning County Board of Elections Answer at paragraphs 28 and 29.*

On August 24, 2015, Youngstown City Council unanimously passed ordinance No. 15-283, fulfilling their ministerial duty to forward a citizen initiative petition to the Mahoning County Board of Elections for inclusion on the November 3, 2015 ballot. *See Complaint Exhibit*

A. Pursuant to the ordinance, the Mayor and Clerk of Council certified the proposed amendment to the Board of Elections of Mahoning County, Ohio, for submission to the voters of the City of Youngstown as provided by law. *See Complaint at paragraphs 25 and 26.*

The Respondent, Mahoning County Board of Elections, and its members, Respondents Betras, Munroe, Wasko and Winbush confirmed that the proponents of the charter amendment had obtained more valid signatures than the number required to place the charter amendment on the ballot.

The Respondents acknowledge in their answer that, on August 26, 2015, David Betras, Mark Monroe, Robert Wasko and Tracey Winbush held a Mahoning County Board of Elections meeting and voted 4-0 to “not certify” the proposed charter amendment. *See Complaint at paragraph 31; Mahoning County Board of Elections Answer at paragraph 31; Sectary of State Jon Husted Answer at paragraph 31.*

During the August 26th Board of Elections meeting, Board Member Attorney David Betras announced that he was not going to follow the legal advice of the Board’s statutory legal counsel. According to his statement, County Prosecutor, Paul Gains, had written a legal opinion stating that the Board had a legal duty to place the “Community Bill of Rights” proposal on the November 3, 2015 ballot if the petition had the valid number of signatures. *See Transcript of the August 26th, 2015 Board of Elections Meeting at page 18 and The Affidavit of Dennis Earl Roller at paragraph 3 indicating that a true and accurate video of the meeting can be viewed at: <http://youngstownhappenings.com/videos/embed/board-elections-2015-08-26/>.*

Instead of following the prosecutor’s advice, Betras offered his own legal opinion to fellow board members. *See Transcript of the August 26th, 2015 Board of Elections Meeting at pages 16-22.* His opinion was largely based upon State ex rel. Morrison v. Beck Energy Corp.,

2015-Ohio-485 and the opinion of the Ohio Secretary of State, Jon Husted, issued in regard to County Charter Proposals. *See Complaint Exhibit C.*

Respondents failed to perform the mandatory duties required by law and exceeded the power granted to the Board of Elections and its members under Ohio Revised Code Section 3501.11, when in direct contravention of the legal advice provided by the Board of Elections' legal counsel, they refused to certify the "Community Bill of Rights" proposal to be placed on the ballot.

On August 28, 2015, Relator filed a Verified Complaint in Mandamus requesting a Writ of Mandamus issue to require the Respondents to perform their mandatory legal duty.

There are less than ninety (90) days remaining until the November 3, 2015 election and Relator has no plain or adequate remedy at law to correct the unlawful, unreasonable and/or arbitrary acts and abuses of discretion committed by the Respondents by improperly refusing to fulfill their mandatory legal duty to certify the proposed "Community Bill of Rights" to appear on the ballot.

II. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1

RELATOR HAS A CLEAR LEGAL RIGHT TO THE RELIEF REQUESTED, RESPONDENTS ARE UNDER A CLEAR LEGAL DUTY TO PROVIDE THE REQUESTED RELIEF, AND RELATOR HAS NO PLAIN AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.

For a writ of mandamus to issue, Relators must demonstrate (1) that they have a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to provide the requested relief, and (3) they have no plain and adequate remedy in the ordinary course of law.

State ex rel Am. Legion Post 25 v. Ohio Civ. Rights Comm., 117 Ohio St.3d 441, 444, 2008-Ohio-1261, 884 N.E.2d 54. The burden is on the Relator to show by plain, clear and convincing

evidence that the writ should issue. *State ex rel. Henslee v. Newman*, 30 Ohio St.2d 324, 325, 285 N.E.2d 54 (1972).

A. Relator, City of Youngstown, a municipal corporation within the State of Ohio and a home-rule charter city, has a clear legal right to a writ of mandamus in the present action.

The Ohio Constitution, Article XVIII, Section 3 provides as follows: “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Article XVIII, Section 7 of the Ohio Constitution gives a municipality the power to “adopt or amend a charter for its government” and “exercise thereunder all powers of local self-government.”

The City of Youngstown has a duly enacted city charter. The Youngstown Charter was approved by the voters on May 15, 1923, and has been amended from time to time thereafter. Section 120 of the Youngstown City Charter provides for amendments to the city charter. It reads: “Amendments to this Charter shall be submitted to the Electors of the City of Youngstown in the manner provided by the Constitution and laws of the State of Ohio.” The submission of municipal charter amendments is governed by the Ohio Constitution, Article XVIII, Section 9. This provision reads as follows:

Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments may be mailed to the electors as hereinbefore provided for copies of a proposed charter, or pursuant to laws passed by the general assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any

amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

This Court in *State ex rel. City of Toledo v. Lucas County Bd. of Elections*, 95 Ohio St. 3d 73, 2002-Ohio-1629, 765 N.E.2d 356, held the City of Toledo has the requisite standing, and thus, a clear legal right to commence a mandamus action because of its “undeniable interest in having the election proceed pursuant to the pertinent charter provisions.” Moreover, this Court held in *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections*, 62 Ohio St.3d 17, 577 N.E.2d 645 (1991) that a home rule city was entitled to a writ of mandamus to compel the board of elections and Secretary of State to place an advisory election on the subject of subsequent charter amendments on the ballot.

The City of Youngstown, a home-rule, charter city, has the requisite standing and clear legal right to have the November 3, 2015 election proceed in accordance with its pertinent charter provisions. The infringement upon this right by the Mahoning County Board of Elections is in direct contravention of the laws of the City of Youngstown and the State of Ohio. The Board cannot, through its judgment, interfere with the rights of the City of Youngstown and its power of self-government.

B. The Mahoning County Board of Elections has a clear legal duty to place the proposed charter amendment on the ballot for submission to the voters at the November 3, 2015 election.

A board of elections in the State of Ohio has a limited number of duties pursuant to R.C. 3501.11. Ohio Revised Code Section 3501.11 (K) provides a board of elections shall “[r]eview, examine, and certify the sufficiency and validity of petitions.” Pursuant to Article XVIII, Section 9 of the Ohio Constitution, and Section 120 of the Youngstown City Charter, petitions signed by ten per centum of the electors of the municipality setting forth the proposed amendment are required for submission to the legislative authority and ultimately to the electors.

Article XVIII, Section 9 of the Ohio Constitution further provides “the submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission.”

Article XVIII, Section 8 of the Ohio Constitution provides as follows:

The legislative authority of any city or village may by a two-thirds vote of its members, and **upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors**, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question **shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage**; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed **shall be submitted to the electors of the municipality** at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein

(emphasis added).

In accordance with Section 120 of the Charter of the City of Youngstown and Sections 8 and 9 of Article XVIII of the Ohio Constitution, petitions signed by ten per centum of the electors of the City of Youngstown were submitted to the Council Clerk; Youngstown City Council passed an ordinance directing that the proposed charter amendment be submitted to the electors at the next regular municipal election, that was set to occur between sixty and one hundred and twenty days after its passage; and the Mayor and Council Clerk certified the proposal to the Mahoning County Board of Elections for submission to voters.

Upon receipt, the Mahoning County Board of Elections verified that the requisite number of valid signatures had been obtained and then refused to certify the proposed charter amendment. The law is clear—the Mahoning County Board of Elections is required to review, examine, and certify the sufficiency and validity of petitions. Upon confirmation that the requisite number of valid signatures had been provided, the Board was required to submit the proposed charter amendment to the electors. This is not a discretionary function. It is not by happenstance that the Ohio Constitution, Article XVIII, Section 8 and the Youngstown City Charter Section 120 use the word “shall” in the iteration of the Board’s duties. Those with the most basic understanding of legislative construction understand that the word “shall” is used purposefully, and to direct a party to undertake a specific task. Accordingly, the Board of Elections has a clear legal duty to place the proposed charter amendment on the ballot for submission to the electors at the November 3, 2015 election. In fact, the Board’s own attorney advised them of such.

C. Relator, City of Youngstown, has no plain and adequate remedy in the ordinary course of law.

Mandamus is appropriate in election matters where there is a clear disregard of the law or a serious abuse of discretion in excess of delegated authority. *State ex rel. Timmons v. Bd. of Elections of Montgomery County*, 1979 Ohio App. LEXIS 9802, 1979 WL 208563 relying on *19 Ohio Jurisprudence 2d 141*; *37 Ohio Jurisprudence 2d 349*; *State ex rel. Gonwer vs. Graves*, 90 Ohio St. 311, 107 N.E. 1018 (1914). Mandamus by its nature has some similarity to mandatory injunctive relief; however, in election cases, where speed and finality is required, the Supreme Court has regularly recognized that under the Constitution the high preemptory writs are proper to require compliance with the law. *Id.* In *State ex rel. Melvin v. Sweeney*, 154 Ohio St. 223, 226, 94 N.E.2d 785 (1950), the per curiam opinion says: "The fact that the determination by the

officer (Secretary of State), as to what constitutes his duty, calls for the construction of the statute imposing the duty, does not prevent such duty from being enforceable by mandamus."

As the Supreme Court indicated, even though there may be an honest difference of opinion, on the law, mandamus is the proper remedy to compel such officer to act in accordance with the required construction, or show cause why he does not. A misdirection to the members of the board of elections may be corrected through the remedy of mandamus. *Id.*

PROPOSITION OF LAW NO. 2

THE RESPONDENTS, MAHONING COUNTY BOARD OF ELECTIONS AND THE SECRETARY OF STATE, HAVE NO AUTHORITY TO PASS UPON THE CONSTITUTIONALITY OF A PROPOSED CHARTER AMENDMENT, AND THUS, VIOLATED THE DOCTRINE OF SEPARATION OF POWERS.

The defining principle of a free constitutional government is the separation of powers. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 933 N.E.2d 753. The essential policy underlying the separation of powers is that the power belonging to one of the departments ought not be interfered with by one of the other departments. *Id.* citing *State ex rel. Bryant v. Akron Metro. Park Dist. of Summit Cty.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929). The administration of justice by the judicial branch cannot be impeded by the other branches in their exercise of government. *Id.* citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 462, 716 N.E.2d 1062 (1999).

This Court has held that placing an issue on the ballot is purely ministerial. *State ex rel. Burech v. Belmont County Bd. of Elections*, 19 Ohio St. 3d 154, 484 N.E.2d 153 (1985). The suspected unconstitutionality of a proposed charter amendment is not a reason for the Board of Elections not to allow a ballot proposal to be voted upon. *State ex rel. McGovern v. Bd. of Elections*, 24 Ohio Misc. 135, 136, 263 N.E.2d 586 (1970) (...nowhere does the court find in R.C. 3501.11, defining the powers and duties of the board of elections, any power or right to

make judicial determinations of the legality or nonlegality of issues to be presented to the people. If in fact the proposed charter amendment was duly passed by council and procedural requirements were met before its submission to the board of elections, the board was duty bound to put it on the ballot for the vote of the people.)

The Mahoning County Board of Election's position that it has the legal right to determine the constitutionality of the proposed charter amendment is unsupported by applicable law. By engaging in a legal analysis and determining that the proposed charter amendment at issue was unconstitutional, the Mahoning County Board of Elections inappropriately and unlawfully usurped the power of the judicial branch. In doing so, the Board of Elections ignored the advice of its own counsel, who specifically advised that the Board members had a duty to place the proposed charter amendment on the ballot.

PROPOSITION OF LAW NO. 3

THE DETERMINATION AS TO THE CONSTITUTIONALITY OF THE PROPOSED CHARTER AMENDMENT AT ISSUE IS OFF LIMITS TO PRE-ELECTION PROTEST.

It is well settled that the substance of a charter proposal is off-limits to pre-election protest. See *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, 977 N.E.2d 590 at ¶ 12 (“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 v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902 at ¶ 43 (“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*, 87 Ohio St.3d 1, 6, 1999-Ohio-239, 716 N.E.2d 1114 (“Any claims alleging the constitutionality 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.”).

In the recently decided case *State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, this Court reaffirmed the principle that “The proper time for an aggrieved party to challenge the constitutionality of (a proposed) charter amendment is after the voters approve the measure, assuming they do so.” Therefore, it would be improper at this time for this Court, the Secretary of State or the Mahoning County Board of Elections to make a determination as to the constitutionality of the proposed charter amendment. If the proposed charter amendment is passed by the electors on November 3, 2015, a challenge could then be brought by any alleged aggrieved party.

III. CONCLUSION

For the foregoing reasons, Relator respectfully requests that this Court grant its request for a writ of mandamus.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Relator's Merit Brief* was served by electronic mail or by facsimile transmission on September 10, 2015, upon the following:

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