

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 REPLY BRIEF

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I. PURSUANT TO THE PRINCIPLES OF STARE DECISIS RELATOR IS ENTITLED TO A WRIT OF MANDAMUS.

Respondents wish for this court to follow the law of the State of Maine and deny Relator's request for a writ of mandamus. Relator simply asks the court to follow the long-standing decisions of this court and find that the Board of Elections and Secretary of State do not have the power to determine the constitutionality of a proposed charter amendment. In the case of *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570 (1922), the "primary and paramount question presented was, "Can the secretary of state, under the constitution of Ohio, nullify or deny to the people their right of referendum on a proposed law, statutory or constitutional, upon the sole ground that the proposed law, if it shall receive a majority vote of the people and thus be adopted as a law, will be in conflict with some provision of the federal constitution?" The court specifically answered this question in the negative, holding that the secretary of state had a mandatory duty to place the proposal on the ballot. The court stated, "If this (allowing the secretary of state to refuse to place the item on the ballot) would not be a denial of the sovereign right of the people in our democracy, I do not know what would." *Marcolin* at p. 593. In this case, neither the secretary of state nor the Mahoning County Board of Elections has the power to determine the constitutionality of the Community Bill of Rights Proposal.

Respondents cite the case of *State ex rel. Schultz v. Cuyahoga County Board of Elections*, 50 Ohio App. 2d 1 (1970), for the proposition that a board of elections has authority to independently examine the content of an issue and determine its validity. However, that case expressly states that the substantive limitation of the board's power is that the "board of elections has no power to determine that an issue should not be placed on the ballot because if passed it would be unconstitutional or illegal. *Schultz* at p. __. Thus, the *Schultz* case supports the Relator's position and not that of the Respondents.

Many of the case cited by Respondents are distinguishable because they do not deal with citizen's initiative petitions or proposed charter amendments. For example, the cases of *State ex rel. Burgstaller v. Franklin County Board of Elections*, 149 Ohio St. 193 (1948) and *Wiss v. Cuyahoga County Board of Elections*, 61 Ohio St. 2d 298 (1980) dealt with candidate petitions. In those cases, it was the form not the substance of the petitions that was at issue.

The Burgstaller case was specifically distinguished in the case of *State ex rel. Lane v. Montgomery County Board of Elections*, 149 Ohio St. 484 (1948), which held that where candidate petitions were in proper form, it was an abuse of discretion to fail to certify the candidate's petition.

The cases of *Ebersole v. Del. County Board of Elections*, 140 Ohio St. 3d (2014), and *State ex rel. City of Upper Arlington v. Franklin County Board of Elections*, 119 Ohio St. 3d 478 (2008), dealt with the distinctions between legislative versus administrative actions, an issue that is not present in this case. The case of *State ex rel. Flynn v. Board of Elections*, 164 Ohio St. 193 (1955), dealt with the qualifications to run for judge, and was later overruled. See *State ex rel. Schenck v. Shattuck* (1982), 1 Ohio St.3d 272, 1 OBR 382, 439 N.E.2d 891.

II. ANY QUASI JUDICIAL POWER OF THE BOARD OF ELECTIONS IS LIMITED TO DETERMINING THE SUFFICIENCY OF THE PETITIONS, NOT THE VALIDITY.

Respondents argue that the Board of Elections has quasi-judicial power to determine the validity of the substance of the proposed charter amendment. However, this court has held that the act of placing an issue on the ballot is ministerial in nature and not quasi-judicial. *State ex rel. Burech v. Belmont County Bd. Of Elections*, 19 Ohio St. 3d 154 (1985), citing *State ex rel. Williams v. Brown*, 52 Ohio St. 2d 13 (1977). Any discretion that the board of elections has is related to interpretation of election laws, not determination of general laws or the constitutionality of any proposed ballot initiative.

III. ASSUMING THE BOARD OF ELECTIONS HAD THE AUTHORITY TO DETERMINE THE VALIDITY OF THE PROPOSED CHARTER AMENDMENT, THE PROPER ISSUE TO BE DETERMINED WAS NOT WHETHER SOME ASPECTS OF THE PROPOSAL ARE UNCONSTITUTIONAL, RATHER THE PROPER INQUIRY IS ARE THERE ANY PARTS THAT ARE CONSTITUTIONAL.

Respondents and particularly the amici curae, focus on aspects of the proposed Community Bill of Rights that they believe are unconstitutional. While relator contends that there is no power vested in the board of elections or secretary of state to determine validity, even if there were, it was nevertheless an abuse of discretion to not put the proposed charter amendment on the ballot. The reason for this is that the proposal itself expressly states:

Section 122-4. The provisions of this Section are severable. If any court decides that any sub-section, clause, sentence, part, or provision of this section is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sub-sections, clauses, parts or provisions of this Charter Section...

See Complaint Exhibit B.

This language makes it clear that the invalidity of one aspect of the charter amendment would not necessarily invalidate it all. Thus, even a correct finding that some aspect of the proposed charter amendment was unconstitutional would not justify the refusal to place the proposed amendment on the ballot, where other parts could be severed and lawfully enacted.

Pursuant to the Ohio Constitution, Article XVIII, Section 3, municipalities have the power to “adopt and enforce, police, sanitary, and other similar regulations as are not in conflict with general laws. The pursuit of clean air and clean and safe drinking water as described in the Community Bill of Rights is not in conflict with the general laws of the State of Ohio.

IV. RESPONDENTS MISCONSTRUE THE POSITION OF THE CITY OF YOUNGSTOWN.

Respondents suggest that the City of Youngstown is the proponent of the Community Bill of Rights proposal. In fact, it is a citizen’s initiative not sponsored or supported by the City administration or City Council. This complaint in mandamus is not based on nor designed to

support or enact the proposal, but simply to vindicate the constitutional right to petition the government provided by the United States and Ohio Constitutions and the Charter of the City of Youngstown.

V. CONSIDERATIONS OF JUDICIAL ECONOMY FAVOR GRANTING THE COMPLAINT IN MANDAMUS.

Respondents argue that judicial economy favors denial of the writ of mandamus. However, logic tells us that the granting of the writ is more in line with the concept of judicial economy because if only proposals that become law are subject to litigation, many proposals will never require court review. By allowing the Secretary of State and/or the Board of Elections to determine the constitutionality of proposals, any proposal that is denied access to the ballot will be likely to be litigated.

In this case, the Community Bill of Rights has been on the ballot on four prior occasions and been defeated all four times. In all likelihood, it will not pass this time and thus the constitutional questions raised by Respondents might never have to be decided. Respondents and the community have survived the four previous elections on which this proposal was on the ballot and will not be harmed if it is placed on the ballot again.

VI. DENIAL OF THE WRIT OF MANDAMUS WILL DENY THE PROPONENTS OF THE CHARTER AMENDMENT THE OPPORTUNITY TO ARGUE THAT THE PROPOSAL IS DISTINGUISHABLE FROM THE ZONING ORDINANCE FOUND UNCONSTITUTIONAL IN THE BECK ENERGY CASE OR ARGUE IN GOOD FAITH FOR MODIFICATION OF EXISTING LAW.

At the Board of Elections, proponents of the charter amendment contended that the case of Beck Energy case was distinguishable from the Community Bill of Rights Proposal and noted that the Beck Energy decision was a 3-3-1 plurality decision of the Ohio Supreme Court. See Transcript of Board of Elections Meeting, Statement of Susie Biersdorfer at p. 36. Should the

court deny the issuance of the writ of mandamus, the proponents of the charter amendment will never get the opportunity to argue why the Community Bill of Rights is distinguishable from other cases or an opportunity to argue that the law should be changed.

VII. THE ISSUANCE OF A WRIT AGAINST THE SECRETARY OF STATE IS NECESSARY IN ORDER TO GRANT COMPLETE RELIEF TO THE RELATOR.

Secretary of State Jon Husted is included as a Respondent because O.R.C. 3501.11(P) he was the one who issued an opinion to the Board of Elections that led to its action in denying the placement of the proposed charter amendment on the ballot. In another case, despite the decision of a court to place county charter amendments on the ballot, the secretary of state has denied the request and ordered that the proposals not go on the ballot. Therefore, the Secretary is a necessary party to this action in order to afford the Relator complete relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served this 13th day of

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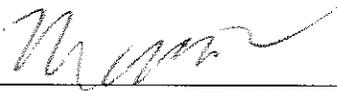
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