

BACKGROUND

This is a direct appeal of denial of a writ of a mandamus from a case initiated in the Meigs County Court of Appeals, Fourth Appellate District. Appellee Meigs County Board of Commissioners filed their pending “Motion to Dismiss” on February 16, 2016, in which they ask the Court to dismiss on the basis of mootness.

In support of the motion, Appellee says that the Court “ruled on a similar case where it upheld the Secretary of State's decision rejecting similar Charter Petitions.” The Board of Commissioners admits that “the legal arguments are different between this case and in *[State ex rel. Walker v. Husted]*,” but insists that “[s]ince that subject matter is the same, this Court shouldn't allow this petition to be placed onto the ballot when this Court previously upheld keeping it off of the ballot due to defects in it's *[sic]* validity.”

ARGUMENT IN OPPOSITION TO ‘MOTION TO DISMISS’

A. The Issue of This Case Is Not Identical to the Controversy in *State ex rel. Walker v. Husted*

This litigation is focused upon the Meigs County Commissioners’ abject failure to certify a duly-initiated county charter proposal to the ballot. The Appellee admits that “the legal arguments are different between this case and in *[State ex rel. Walker v. Husted]*” but then contends, notwithstanding, that:

. . . the main subject matter is still there — charter petitions. Since that subject matter is the same, this Court shouldn't allow this petition to be placed onto the ballot when this Court previously upheld keeping it off of the ballot due to defects in it's *[sic]* validity.

It appears that the Meigs County Commissioners hope to divert the Court’s attention away from the serious consequences of the Fourth District Court of Appeals’ ruling by calling for a summary determination of futility which is not the issue before the Court.

B. The Central Issue of This Case Is ‘Capable of Repetition, Yet Evading Review’ Because It Exalts Statutory Requirements Over Supreme Court Precedent

The November 2015 general election was the election wherein the Appellant Home Rule Committee members sought to have their proposed initiative voted upon, and it occurred before Appellants’ measure could be appealed to the Ohio Supreme Court.¹ However, the Fourth District Court of Appeals’ ruling imposes a contrarian reading of a county charter statute which will undoubtedly be invoked in the future to thwart invocations of local initiative and referendum rights under the Ohio Constitution and Revised Code. The central issue of this lawsuit is not moot because it is “capable of repetition, yet evading review” - the classic exception to mootness. “[E]ven when an election has been conducted, a case is not moot where the issue or controversy is “capable of repetition yet evading review.”” *Storer v. Brown*, 415 U.S. 724, 737, fn. 8, 94 S.Ct. 1274, 1282, fn. 8, 39 L.Ed.2d 714 (1974), quoting *Rosario v. Rockefeller*, 410 U.S. 752, 756, fn. 5, 93 S.Ct. 1245, 1249, fn. 5, 36 L.Ed.2d 1 (1973).

The Fourth District ruling under challenge here left citizens who had fulfilled all prerequisites to have a vote on their initiated county charter proposal, and who were completely faultless, wholly dependent upon the vagaries of the Meigs County Board of Elections’ communications with the Meigs County Commissioners to assure a vote. A mistake caused by the Board of Elections deprived the public of access to the constitutional initiative and referendum right. It is easily foreseeable that it will happen again, and that the appellate decision under challenge will be cited in support of thwarting other local initiatives around the state with

¹As the Fourth District Court noted, the Meigs County Home Rule Committee formally moved for that court to expedite its decision. *State ex rel. Meigs County Home Rule Committee v. County of Meigs Board of Commissioners*, 2015-Ohio-3701, 15CA9, ¶ 2 (Meigs App., Sept. 9, 2015).

its improperly strict interpretation of statutory requirements.

The Court of Appeals ruled that because the Meigs County Board of Elections did not correct a supposedly defective communication with the Board of Commissioners within the ten-day window for action contained in O.R.C. § 307.94 (*i.e.*, by the 120th day before the election), the Home Rule Committee of petitioners was stripped of any recourse. Hence, there will no longer be a remedy available to the public if the Board of Elections intentionally or unintentionally muffs a required report or other communication to the County Commissioners over an initiative petition and it takes too long to fix. It is quite conceivable that the Meigs County Commissioners may, with impunity, decline to take action on a Board of Elections referral of a measure to the ballot based upon a real, or feigned, objection which happens to be timed to run out the 10-day clock within which the initiative must be perfected to the ballot.

All it takes now to nullify the hundreds of volunteer hours of effort and sacrifice necessary to gather hundreds of signatures is for a board of elections or county commissioners to take more than the statutory 10-day period to complete certification to the ballot. According to the Fourth District Court of Appeals, this delay cannot be contested, irrespective of the reason for it and the legitimacy or illegitimacy of the delay. This new court-made rule will certainly be used in the future to stop initiative campaigns cold, and even to chill the public's appetite to attempt to legislate as is its right under the Ohio Constitution. Who, after all, would spend all of the time, money, and effort to obtain signatures, print out petition forms, and force hundreds of encounters with complete strangers to sign petitions, if elections officials could just wipe it all out by simply not acting on time?

Actions are moot “when they are or have become fictitious, colorable, hypothetical, academic or dead.” *In re Brown*, 10th Dist. No. 03AP-1205, 2005-Ohio-2425, ¶11, quoting

Grove City v. Clark, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, ¶11. The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy. *Id.* ““A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.”” *Id.*, quoting *Culver v. Warren*, 84 Ohio App. 373, 393 (7th Dist.1948).

Issues that are capable of repetition, yet evading review, however, are not moot. The doctrine applies “in exceptional circumstances in which . . . (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the complaining party will be subject to the same action again.” *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231 (2000). *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947. “[T]here must be more than a theoretical possibility that the action will arise again.” *Robinson v. Indus. Comm.*, 10th Dist. No. 04AP-1010, 2005-Ohio-2290, ¶ 8, quoting *James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 792 (10th Dist.1991).

A court is vested with jurisdiction to address moot issues when those issues concern an important public right or a matter of great public or general interest. *In re Suspension of Huffer from Circleville High School*, 47 Ohio St.3d 12, 14, 546 N.E.2d 1308 (1989). Moreover, Ohio courts have expressly recognized that election cases must be carefully assessed in determining mootness:

In *Foster v. Bd. of Elections* (1977), 53 Ohio App.2d 213, the Cuyahoga County Court of Appeals held an election case is not moot ‘even though no effective relief can be provided to a candidate or voter because the election has passed’ where the issues will

persist and are likely to evade adequate review in the future because of the inherent time limitations in election controversies. The effect of construing the challenged statute and setting forth any constitutional limitations thereupon will be to simplify future controversies under that statute. By simplifying future controversies, there is an increased likelihood that effective relief can be provided to a candidate or voter in those future controversies.

In re a Protest Filed With the Franklin County Board of Elections by Citizens for Merit Selection of Judges, Inc., on Behalf of Issue III, Merit Selection of Judges, 88-LW-1960, 87AP-933

(Franklin App. June 7, 1988). See, also, *In re Protest Filed by Citizens for Merit Selection of Judges, Inc.*, 551 N.E.2d 150, 152, 49 Ohio St.3d 102 (1990) (where issue is a matter of constitutional and statutory interpretation which affects how Ohio's eighty-eight boards of elections will determine the sufficiency of a particular category of signatures on initiative petitions, it is a matter evading review but capable of repetition which was properly considered by the appellate court). Also, see *Blackmore v. Nasal*, 599 N.E.2d 298, 74 Ohio App.3d 382, 383 (Ohio App. 2 Dist. 1991) (issue of statutory interpretation which will affect how the boards of elections will determine the sufficiency of referendum petitions under O.R.C. § 3501.38 is not moot because capable of repetition yet evading review).

The challenged action - appealing the Fourth District Court of Appeals' contrarian interpretation of the statute - could not have been fully litigated before the November 2015 general election. The appellate precedent that the Fourth District has pronounced can reasonably be expected to be cited to block future citizen groups seeking to legislate a county charter or other local initiative and referendum actions anywhere in Ohio.

C. Conclusion

The underlying facts and legal issue are not moot. The facts of this case are readily replicable; it is conceivable that a resentful board of elections or board of county commissioners

will use the appellate decision to bar referendum votes on disagreeable controversies merely by gaming the 10-day limitation on certifying such things to the ballot.

Because this controversy is not moot, Appellant urges the Court to rule within this litigation that citizens who invoke the vital initiative and referendum tool may not have their ballot aims derailed by arbitrary mistake or malevolent misdeeds of governmental officials bent on depriving the public of a constitutional right.

WHEREFORE, Appellant Meigs County Home Rule Committee prays the Court deny the “Motion to Dismiss.”

Respectfully submitted,

/s/ Terry J. Lodge
Terry J. Lodge, Esq. (S.Ct. #0029271)
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
419.205.7084
lodgelaw@yahoo.com

Co-counsel for Meigs County Home Rule
Committee Members, Appellant

CERTIFICATION

I hereby certify that on February 26, 2016, I emailed a copy of the foregoing “Response of Appellant Meigs County Home Rule Committee in Opposition to Appellee Meigs County Board of Commissioners’ ‘Motion to Dismiss’” via electronic mail to Colleen S. Williams, Esq., Meigs County Prosecutor, at cwilliams@meigscountyprosecutor, and to Jeremy Fisher, Esq., Assistant Meigs County Prosecutor, at jfisher@meigscountyprosecutor.com. Further, I deposited the Response into the Ohio Supreme Court’s electronic filing system, and in accordance with its procedures and protocols, notice of the filing was to be served electronically upon counsel for Appellee.

/s/ Terry J. Lodge
Terry J. Lodge
Co-counsel for Appellant