

**IN THE SUPREME COURT OF OHIO**

State of Ohio, <i>ex rel.</i> Meigs County Home	)	Case No. 2015-1719
Rule Committee, by its members, Paul K.	)	
Strauss, Gregory D. Howard, Dennis Jay	)	
Sargent, Kathy Lynn Sargent, and Marsha	)	Court of Appeals No. 15CA9
Nagy Whitton,	)	
Appellant,	)	
-vs-	)	
County of Meigs, Board of Commissioners,	)	.
Appellee.	)	
	)	
	)	
	)	
	*	

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**REPLY BRIEF OF APPELLANT MEIGS  
COUNTY HOME RULE COMMITTEE MEMBERS**

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### Statutes

O.R.C. § 307.94	2, 3, 4
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Now come the Meigs County Home Rule Committee and individually-named Appellants (hereinafter “Appellants”), by and through counsel, and set forth their reply below to the “Brief of Appellee Meigs County Board of Commissioners, *et al*” (hereinafter “Appellees”).

**OBJECTION TO ATTEMPTED INTRODUCTION OF NEW  
EVIDENCE AND MOTION TO STRIKE**

Appellants object and move to strike references in Appellee’s Brief which inject into this appeal new evidence not previously made of record. Specifically, at Appellee’s Br. p. 4, Appellees refer to an “attached affidavit of Tim Ihle,” a Meigs County Commissioner. That affidavit is not attached to the Appellee’s Brief. Even if it were, the facts it purports to bootstrap into the record (“while the Board of Commissioners did have their regular meeting on July 2, 2015, the letter from the Director of the Board of Elections was not received until after the meeting was adjourned and the members disbursed [*sic*],” plus the ensuing mention of days when the Commissioners’ office was not open) are not factual averments of record from the litigation of this lawsuit in the Fourth District Court of Appeals.

Also, Appellee attached as “Exhibit B” to its Brief an Athens County, Ohio proposed county charter petition. This was not part of the record at the Court of Appeals, and Appellee has not explained the relevance of Exhibit B to this case. There is no identification of it in Appellee’s brief.

Appellants aver that these items of evidence are being improperly added to the record, and move that they be stricken.

It is well-settled law that appellate courts will not consider as error issues that are raised for only the first time on appeal. *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982). A litigant's failure to raise an issue in the trial court waives the litigant's

right to raise that issue on appeal. *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 220, 574 N.E.2d 457, 463 (1991). To allow appellants to waive an argument at trial and then revive it on appeal would frustrate the orderly administration of justice. As the Ohio Supreme Court stated in *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 171, 522 N.E.2d 524, 527 (1988):

“...The legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to discourage defendants from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones.”

Moreover, “A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.” *State v. Hill*, 740 N.E.2d 282, 90 Ohio St.3d 571, 573, 2001-Ohio-20 (2001), citing *State v. Ishmail*, 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, syll. ¶ 1 (1978). Accord, *State v. Coleman*, 85 Ohio St.3d 129, 133, 707 N.E.2d 476, 483 (1999).

## ARGUMENT

**Reply in Support of Proposition of Law No. 1: *A county board of elections fulfills its legal responsibility concerning a county charter proposal when it verifies the number of signatures and provides a report to the board of county commissioners along with a request that the commissioners certify the measure to the ballot.***

The Court of Appeals ruled that a board of elections that does not correct a mistake within the statutory window to act set by O.R.C. § 307.94 leaves petitioners completely without a remedy *even if the petitioners have thoroughly complied with all legal expectations*. The appellate court's ruling enables the complete negation of hundreds of hours of volunteer effort and sacrifice to gather hundreds of signatures to put to a board of elections by intentional or unintentional sloppiness. Citizens trying to invoke their power to have a direct, democratic vote on an issue they raise thus risk the nullification of all their efforts if their reluctant or incompetent government fails of stringent statutory compliance. The effect of the Fourth

District ruling is to make democracy a dramatically dicey option, subject to pocket veto if electios officials bungle perfunctory responsibilities.

On June 24, 2015, Appellant Home Rule Committee members timely filed the signed Petition with the Meigs County Board of Elections (“MCBOE”). The Committee had until June 26 to file the petitions with MCBOE, according to O.R.C. § 307.94.<sup>1</sup> Then, the MCBOE was given until July 6, 2015 to certify the Petition and accompanying signatures to the Meigs County Board of Commissioners. *Id.* On July 2, 2015, the MCBOE sent its first certification letter to the Board of Commissioners on July 2, 2015. The Commissioners waited until July 9, 2015 - three days *after* the 120<sup>th</sup> day before the election (July 6, 2015), which had been the purported deadline for the Board of Elections to report to the Commissioners<sup>2</sup> - to send their rejection letter to the MCBOE. The MCBOE quickly acted to vote and send a letter (Verified Compl. Exh. E) on July 13, which stated that its members had certified the validity of the petition and had validated the requisite number of signatures. The Board of Elections explained that it had:

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<sup>1</sup>O.R.C. § 307.94 states, in part: “Such electors may, in the alternative *not later than the one hundred thirtieth day before the date of a general election, file such a petition with the board of elections of the county.* In such case the board of elections shall immediately proceed to determine whether the petition and the signatures on the petition meet the requirements of law and to count the number of valid signatures and to note opposite each invalid signature the reason for the invalidity. *The board of elections shall complete its examination of the petition and the signatures and shall submit a report to the board of county commissioners not later than the one hundred twentieth day before the date of the general election certifying whether the petition is valid or invalid and, if invalid, the reasons for invalidity, whether there are sufficient valid signatures, and the number of valid and invalid signatures.* The petition and a copy of the report to the board of county commissioners shall be available for public inspection at the board of elections. *If the petition is certified by the board of elections to be valid and to have sufficient valid signatures, the board of county commissioners shall forthwith and not later than four p.m. on the one hundred eleventh day before the general election, by resolution, certify the petition to the board of elections for submission to the electors of the county at the next general election.”*

<sup>2</sup>See fn. 1, *infra*.

...voted as to form on the face of the petition and to the valid and sufficient number of signatures.... These petitions have been examined and the required number of signatures was found to be sufficient as evidenced by the attached report. The Meigs County Board of Elections voted as to form on the face of the petition and to the valid and sufficient number of signatures (567 required and 637 valid). Both motions carried.

Verified Compl. Exh. E. That report from the Board of Elections was then repudiated by the Commissioners at their July 14 meeting, when there was no second to a motion to certify.

Thus the public submitted a valid petition with the required number of signatures, and the MCBOE certified the petition to be valid under O.R.C. § 307.94. The deadline for the board of commissioners to certify was before 4:00 p.m., 111 days before the election<sup>3</sup> (*i.e.*, July 15, 2015). The County Commissioners were within their statutory timeline to act on July 14, 2015 (112 days before the election), but instead on that day, they declined even to bring the matter up for a vote. They declined because MCBOE had not strictly adhered to its 10-day window to act. The county commissioners deemed the MCBOE's act of having blown their statutory time limit to act as a excuse for them to immediately suspend attempts to comply with their own statutory deadline. MCBOE had certified the petition at a point that it remained possible for the Commissioners to certify the petition to the ballot by the 4:00 p.m., 111<sup>th</sup> day deadline. The Commissioners' refusal was contrived, arbitrary and unconscionable.

***Reply in Support of Proposition of Law No. II: A Board of Election's Untimely Action Cannot Deprive Innocent Petitioners Of A Ballot Opportunity to Vote On A County Charter Proposal***

Appellees insist that strict compliance is mandated by the wording of O.R.C. § 307.94. That is what the Appellants *did*; they strictly complied with the statute. Then the Board of Elections first certified the adequacy of the petition to the County Commissioners 122 days

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<sup>3</sup>See fn. 1, *infra*.

before the election. The County Commissioners rejected the MCBOE letter 117 days before the election. The MCBOE responded with its second certification letter, delivered July 13. The Board of Elections, *not* the group sponsoring the petition, failed to strictly comply with the statute. This is a critical factual distinction between the “strict compliance” precedent relied on by Appellees, and this appeal. In *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097 (2008) and *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 2002-Ohio-997 (2002), the petitioning parties, not their governmental officials, were the ones who had not strictly complied with the statutes. In sharp contrast, the Meigs County Home Rule Committee fulfilled all of the requirements of statute. The Committee has undeniably clean hands. Failure to follow the law was solely the failure of elections officials. And the equities disfavor the governmental obstruction perpetrated by the Meigs County Commissioners.

“Absolute compliance with every technicality should not be required in order to constitute substantial compliance, unless such complete and absolute conformance to each technical requirement of the printed form serves a public interest and a public purpose.” *Stern v. Cuyahoga Cty. Bd. of Elections*, 14 Ohio St.2d 175, 180, 43 O.O.2d 286, 237 N.E.2d 313 (1968) The people should not be forced to suffer the penalty of being denied a vote on their initiative because their government failed to strictly conform to the statute, especially since there was zero harm caused the public interest by the missed deadline.

Meigs County Commissioners can cite no harm to the public interest which would have been occasioned by their ordering placement of the petition on the ballot on July 14 following receipt of the second certification from the Board of Elections. Quite the contrary: the statutory aim of upholding the people’s right to vote on the petition would have been fulfilled if they had proceeded to approve the measure for the ballot. “Substantial compliance,” after all, is applied

“in those rare and unique circumstances where allowing substantial compliance does no harm to the purposes underlying the election requirement and the public interest is served.” *State ex rel. South-Western City School District Bd. Of Edn. v. Franklin County Bd. Of Elections*, 2004-Ohio-4893, 04AP869, 04-LW-4120 (10<sup>th</sup> Dist. 2004). “Absolute compliance with every technicality should not be required . . . unless such complete and absolute conformance to each technical requirement . . . serves a public interest and a public purpose.” *State ex rel. Fite v. Saddler*, 62 Ohio St.3d 170, 172 (1991).

Rules governing municipal referendum balloting must be liberally construed to effectuate exercise of the power:

The policy involved here is the preeminent constitutional right of referendum ‘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.’ Section 1f, Article II of the Ohio Constitution. We must liberally construe provisions for municipal referendum so as to permit the exercise of the power and to promote rather than prevent or obstruct the object sought to be attained.

*Stutzman v. Madison Cty. Bd. of Elections*, 93 Ohio St.3d 511, 514 (2001).

Public and judicial policy cannot allow for the right to referendum to be suspended by the arbitrary or intentional error of governmental officials to strictly comply with the law. If governmental mis-, mal- or nonfeasance is allowed to negate the right to vote on an initiative, there will be a chill induced upon invocation of the right. No one will spend the time, money, and effort to obtain signatures, print out petition forms, and engage in hundreds of encounters with complete strangers to sign petitions, if elections officials could just wipe it all out by “accidentally” acting outside the time limits prescribed by statute.

The decision of *State ex rel. Stern v. Quattrone*, 68 Ohio St.2d 9 (1981) illustrates the point that technical compliance merely for its own sake is improper if the result is to curtail an

initiative vote. In *Quattrone*, an elector in Steubenville filed an initiative petition with the city auditor, proposing an ordinance to be put on the general election ballot. The certification as originally filed was defective and required a correction inside 75 days before the election. The board of elections found the initiative petition “good and valid” but ruled the issue off the November ballot because the petition had not been certified more than 75 days of the election. The relator sued for mandamus to compel placement of the proposal on the ballot. The Court ruled that the purpose behind the 75-day time period was to insure that concerned voters had an adequate amount of time to assess the issue or question, and ordered the measure onto the ballot. Because the initial attempted, but defective, certification was made 82 days before the election, the court held that the voters were given adequate time to assess the proposed ordinance. The Ohio Supreme Court refused to deny the right of initiative “*on the basis of some mere technical irregularities which will not interfere with that right and disenfranchise the voters of the choice.*” (Emphasis supplied). *Id.* at 10.

**Reply in Support of Proposition of Law No. III: *This Court will issue a Writ of Mandamus to require the Secretary of State to validate a petition when the petition meets procedural requirements.***

Appellees point out that the Secretary of State is not a party to this case. They are correct. Appellants committed a typographical error respecting this Proposition of Law by asserting it concerning the Secretary of State.. The essential point remains that the Court has the power to order initiated petitions to the ballot even if they are delayed past the current election. *See, e.g., State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 53, 572 N.E.2d 649 (1991) (proposed charter amendment placed on subsequent ballot after delay caused by objections to substantive content); *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 386 (1995) (referendum proposed for November 1994 delayed by suit, finally

set for primary election in March 1996) when litigation terminated).

The Court of Appeals endorsed an unlawful “pocket veto” which will be invoked in the future by elections officials who want to submarine an initiative to establish or amend a county charter form of government. Appellees’ worries that no one will be able to protest the initiative is a diversionary point. The Court must refuse the Board of Commissioners’ misleading attempt to skip past the immediate issues of this litigation “[I]t is the well-settled rule that a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make.” *Lester v. Leuck* (1943), 142 Ohio St. 91, 92, 26 O.O. 280, 50 N.E.2d 145. *See, also, State ex rel. Johnson v. Ohio Adult Parole Auth.*, 95 Ohio St.3d 463, ¶ 6 (2002).

The disturbing precedent set here is that mere inaction by government officials can completely derail the public’s exercise of a key constitutional right. Petitioners can fix any errors in the petition in a future initiative attempt. But their ability to do that will be meaningful only if elections officials cannot exclude the initiative from the ballot by the chicanery that happened here. This Court must reverse the lower court’s decision and close the loophole.

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**CERTIFICATION**

I hereby certify that on April 15, 2016, I served a copy of the foregoing “Reply Brief of Appellant Meigs County Home Rule Committee, *et al.*” via electronic mail upon Colleen S. Williams, Esq., Meigs County Prosecutor, and Jeremy Fisher, Esq., Assistant Meigs County Prosecutor, 117 West 2nd St. Pomeroy, OH 45769, at [cwilliams@meigscountyprosecutor.com](mailto:cwilliams@meigscountyprosecutor.com) and [jfisher@meigscountyprosecutor.com](mailto:jfisher@meigscountyprosecutor.com).

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