

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* SENSIBLE NORWOOD
and AMY G. WOLFINBARGER

* Case No: 2016-1277

Relators,

*

* ORIGINAL ACTION IN MANDAMUS

v.

* EXPEDITED ELECTION CASE

HAMILTON COUNTY BOARD OF
ELECTIONS

PURSUANT TO S.CT.PRAC.R. 12.08

*

Respondent.

*

*

REPLY BRIEF OF RELATORS SENSIBLE NORWOOD AND AMY G.
WOLFINBARGER TO RESPONDENT'S MERIT BRIEF *and* TO AMICUS CURIAE
BRIEF OF CITY OF NORWOOD

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ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition of Law

Respondent abused its discretion when it refused to certify the Initiative Petition for the ballot on the purported basis that portions of the Initiative Petition conflict with Ohio law.

Respondent is clear that it rejected Relators' Initiative Petition for the ballot because, in Respondent's belief, portions of the Initiative Petition are in conflict with the Ohio Constitution and statutory law. The thrust of Respondent's argument is stated at page 9 of Respondent's Merit Brief wherein Respondent argues:

While municipal corporations are possessed of home rule powers to "enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws," Ohio Constitution, Article XVIII, Section 2, municipalities have no authority under their home-rule to enact or punish felonies as that power exclusively belongs to the General Assembly.

Although careful not to use these terms, Respondent rejected Relators' Initiative Petition because Respondent believes that the Initiative Petition is unlawful and unconstitutional. Indeed, Respondent has cited two separate Constitutional provisions that it believes that the Initiative Petition violates. In the simplest terms, Respondent rejected the Initiative Petition because it believes it is unconstitutional and unlawful.

Respondent lacks the lawful authority and legal jurisdiction to refuse to place the Initiative Petition on the ballot because of its belief that the Initiative Petition is unlawful or unconstitutional. The law is clear: "[a]ny claims alleging the unconstitutionality 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." *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 716 N.E.2d 1114 (1999). A Board of Elections does not sit to judge whether an Initiative Petition is constitutional or lawful. This is the sole province of the

courts--but only after the Initiative Petition has been enacted by the electorate. Any pre-election determination of an Initiative Petition's constitutionality or lawfulness is premature. The reason for this is clear: courts did not sit as appellate courts to determine whether or not a board of elections properly determined if the substance of an initiative petition is constitutional or lawful. It is for a court to make such a determination in the first instance. To adopt Respondent's position that it is charged with determining the constitutionality or lawfulness of an initiative petition would be to usurp the role of courts and to eliminate any potential remedy for relators.

Even when the Respondent is permitted to serve in its "gatekeeping" role, the Respondent is limited from sitting "as arbiters of the legality or constitutionality of a ballot measure's substantive terms." *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, ¶15. *Walker* reaffirmed this Court's commitment 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 otherwise illegal." *Id.* quoting *State ex rel. Schultz v. Cuyahoga Cty. Bd. of Elections*, 50 Ohio App.2d 1, 361 N.E.2d 477 (8th Dist.1976). This Court explained:

An unconstitutional proposal may still be a proper item for referendum or initiative. If passed, the measure becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction. Until then, the people's power of referendum remains paramount. This conclusion is consistent with our rule that we '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. Cramer v. Brown*, 7 Ohio St.3d 5, 6, 454 N.E.2d 1321 (1983).

Walker, 144 Ohio St.3d at ¶16; see also *State ex rel. Coover v. Husted*, Slip Opinion No. 2016-Ohio-5794, ¶11 (noting that *Walker* "does not stand for the proposition that the

secretary of state or a board of elections may conduct a substantive review of the content of a proposed charter; instead, Walker recognizes the authority of election officials to determine whether a charter initiative meets the threshold requirements for inclusion on the ballot.”).

Further, an initiative action:

becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction. Any other conclusion would authorize a board of elections to adjudicate a constitutional question and require this court to affirm its decision even if the court disagreed with the board's conclusion on the underlying constitutional question, so long as the board had not abused its discretion.

State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶11. Respondent ignores *Walker* and *Youngstown* and submits that it--not the courts--should determine whether Relators’ Initiative Petition is constitutional or lawful. Because the Respondent is not vested with the authority to make such a determination the Respondent exceeded its authority and abused its discretion. Respondent’s decision should be vacated and Relators’ Initiative Petition placed on the general election ballot.

Second Proposition of Law

Relators’ Initiative Petition is a valid exercise of the initiative power and should be placed on the ballot.

Respondent misinterprets and misapplies its limited gatekeeping function in asserting that Relators’ Initiative Petition is administrative rather than legislative. In making this determination Respondent has exceeded its authority and abused its discretion.

First, it appears that Respondent’s “administrative” argument is nothing more than an objection to the constitutionality and lawfulness of the Initiative Petition dressed up in other terms. In essence, Respondent argues that the Initiative Petition unlawfully restricts the city police and law director in the performance of their duties. Regardless of the semantics used by

Respondent its objection is one of legality. As set forth above, *Walker* and *Youngstown* are clear that the Respondent does not have the lawful authority to sit as the arbiter of the legality or constitutionality of a ballot measure's substantive terms.

Recognizing that such an attack would clearly fail as a challenge to the *substance* of the Initiative Petition, Respondent has unsuccessfully recast its objection to the purported "administrative" portion of the Initiative Petition. To determine whether the Initiative Petition is a permissible enactment under Section 1f, Article II of the Ohio Constitution this Court must look to the enactment to be repealed or amended by the proposed ordinance to determine whether the enactment is legislative or administrative. *See, e.g., State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529. It is undisputed that the Initiative Petition seeks to repeal and replace sections of Norwood's criminal code. Norwood's criminal code is a legislative scheme. Enactment of the criminal code was purely legislative. Thus, the Initiative Petition repealing and amending portions of Norwood's criminal code is within the permissible scope of Section 1f, Article II of the Ohio Constitution. The Initiative Petition "does not simply execute any preexisting ordinance," but "is legislative in nature because it creates a new law" decriminalizing marihuana in the City of Norwood. *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶46.

This is not a case of an initiative petition seeking to affect an enactment that merely executes and administers laws already in existence instead of enacting new laws. *Oberlin Citizens*, 106 Ohio St. 3d at ¶¶24-27. Simply because a portion of the Initiative Petition directs how the newly enacted law--if passed--should be enforced does not make the Initiative Petition administrative. The Initiative Petition *enacts new law*. Under *Oberlin Citizens*, the

fact that the Initiative Petition enacts new law satisfies the Constitutional requirements of Art.II, §1f. Any further objection to the manner in which the newly enacted law is enforced, i.e. the reporting and referring provisions contained in Section 513.15(m), are objections to the lawfulness of the enactment itself and can only be addressed by a court after a vote by the electorate.

But even if some portion of the Initiative Petition is administrative this does not support the Respondent's refusal to certify it for the ballot. The Initiative Petition's severability clause anticipates that certain provisions may be challenged in the court of law. In that event, and should a court strike a portion of the Ordinance from the Initiative Petition, the remainder of the Ordinance can and should still be enforced. However, the Respondent has usurped the role of the courts by determining that portions of the Ordinance are unenforceable. *See Citizen Action*, 115 Ohio St. 3d at ¶¶52-53.

Accordingly, for the reasons set forth above, the Respondent has abused its discretion. Respondent's decision should be vacated and the Initiative Petition placed on the general election ballot.

Third Proposition of Law

Laches does not bar Relators' action that was timely filed within five business days of the Respondent's Decision and the Respondent cannot show any prejudice.

Respondent incorrectly argues that Relators' claim should be barred by the doctrine of laches. However, Relators filed this action with the required diligence. Moreover, any delay caused by Relator was reasonable and did not cause Respondent any prejudice.

This Court requires that election cases be filed promptly. *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-

5379, 875 N.E.2d 902, ¶30. Laches may bar an action where the Realtor has failed to act with the required promptness. *Id.* “The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.” *State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205, ¶ 9 quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995).

This Court has said that “we generally require a showing of prejudice before we apply laches to bar a consideration of the merits of an election case.” *Brinda*, 115 Ohio St.3d at ¶ 11. “Normally, this prejudice in expedited election cases occurs because relators’ delay prejudices respondents by making the case an expedited election case under [S.Ct.Prac.R. 12.08] which restricts respondents’ time to prepare and defend against relators’ claims, or impairs boards of elections’ ability to prepare, print, and distribute appropriate ballots because of the expiration of the time for providing absentee ballots.” *Id.* quoting *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶ 18.

In the case here Relators promptly filed their Verified Complaint for a Writ of Mandamus. The Respondent issued its final decision on Relators’ Initiative Petition on August 22, 2016--after delaying the vote from its August 16, 2016 meeting. Thereafter, Relators retained new counsel and filed this action within five business days of the Respondent’s decision. An action is initiated when filed. S.Ct.Prac.R. 12.02(A)(1). A delay in filing of only five business days is not unreasonable. *See State ex rel. Ebersole v. Delaware Cnty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶26. Accordingly, Relators acted with the required promptness in asserting their rights.

Respondents are correct that service of the Complaint was accomplished via certified mail through the clerk's office rather than the manner prescribed in S.Ct.Prac.R. 12.08(C). To the extent that the manner of service caused a delay laches should not apply.

First, to the extent that the manner in which Respondents perfected service caused any delay, such a delay should be excused. S.Ct.Prac.R. 12.02 provides:

The Clerk of the Supreme Court shall issue a summons and serve the summons and a copy of the complaint by certified mail sent to the address of the respondent as indicated on the cover page of the complaint. The summons shall inform the respondent of the time permitted to respond to the complaint pursuant to S.Ct.Prac.R. 12.04, 12.08, or 12.09.

Relators relied upon S.Ct.Prac.R. 12.02(A)(2) for purposes of initiating original actions in this Court. Supreme Court Practice Rule 12.02(A)(2) makes specific reference to S.Ct.Prac.R. 12.08. Thus, Realtors mistakenly, but reasonably, understood that for the initiating document service is accomplished via certified mail through the Clerk of the Supreme Court. *See also* A Guide to Filing in the Ohio Supreme Court, Sec. III, B.4, pg. 24. Therefore, to the extent that any delay was caused by Realtors' service via certified mail such delay was excusable due to Relators' reasonable reliance upon S.Ct.Prac.R.12.02(A)(2) and Guide to Filing in the Ohio Supreme Court.

More importantly, however, Respondent has not made the requisite showing of "prejudice" to support its laches defense. This Court has consistently held that laches will not bar an action absent a showing of prejudice by Respondent. *Brinda*, 115 Ohio St.3d at ¶11; *State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-333, 881 N.E.2d 1214. Respondent has not claimed any prejudice in its ability to prepare and defend against Relators' claim. Respondent's only asserted prejudice is that Respondent is "required to send out absentee ballots no later than September 24, 2016 as required by R.C. §3511.04."

Respondent's Merit Brief at 16. Respondent is not prejudiced as this matter is fully briefed well in advance of the September 24, 2016 deadline.

It is well-established that no prejudice occurs where a case is filed and fully briefed before the absentee-ballot deadline has passed. *See, e.g., Stoll*, 117 Ohio St. 3d at ¶26 (no prejudice where the delay did not cause the absentee-ballot deadline of R.C. 3509.01 to pass before this case was filed and fully briefed); *Brinda*, 115 Ohio St.3d at ¶13 (“Nor did Brinda's purported delay cause the absentee-ballot deadline to pass before this case was filed and fully briefed.”); *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 14 (holding that laches did not bar consideration of the merits of expedited election case when briefing had been completed in the case before the passage of the absentee-ballot deadline); *Citizen Action*, 115 Ohio St.3d at ¶31 (mandamus action not barred by laches because “case was fully briefed *before* the expiration of the absentee-ballot deadline, and even had the case been filed a few days earlier, this case would not necessarily have been decided before the passage of that deadline”)(emphasis in original). Here, with the filing of Relators' Reply Brief, briefing in this matter is fully concluded before the expiration of the absentee-ballot deadline. Accordingly, under this Court's well-established framework, Respondent has not been prejudiced by any delay.¹

Respondents have not cited any case wherein an action has been timely initiated but laches barred the action due to the manner in which service was perfected. Rather, the cases cited by Respondent are inapposite as relators delay caused *actual prejudice* to the respective respondents. *State ex rel. Manos v. Delaware Cty. Bd. of Elections*, 83 Ohio St.3d 562, 701 N.E.2d 371 (1998) (relators waited 28 days after a referendum petition was filed with the board of elections before filing their written protest, although they knew the basis of most of

¹ This ballot issue is unique in Norwood; therefore only Norwood ballots are affected.

their objections even before the petition was filed, and by the time they filed their prohibition action, the date to print and make absentee ballots ready for use by electors had already passed); *State ex rel. Newell v. Tuscarawas Cty. Bd. of Elections*, 93 Ohio St.3d 592, 757 N.E.2d 1135 (2001) (relator waited 20 days after a petition was filed to protest the petition and another 14 days after the protest was denied to file an action for extraordinary relief, which was after the absentee-ballot deadline); *State ex rel. Fuller v. Medina Cty. Bd. of Elections*, 97 Ohio St.3d 221, 2002-Ohio-5922, 778 N.E.2d 37 (relators waited two months from the date the petition was submitted to the board of township trustees to file protest and an additional 17 days after denial of protest to seek a writ of prohibition, after the deadline to have absentee ballots printed and ready for use); *State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections*, 80 Ohio St.3d 302, 308–309, 686 N.E.2d 238 (1997) (six day delay was in addition to approximately three-month delay in filing protests which extended briefing schedule beyond deadline for absentee ballots); *State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88 Ohio St.3d 187, 189, 724 N.E.2d 775 (2000) (relators failure to submit merit brief resulted in dismissal of initial action and subsequent action was barred by laches where completion of the briefing schedule would have occurred after the deadline for printing absentee ballots); *Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff*, 101 Ohio St.3d 256, 2004-Ohio-812, 804 N.E.2d 419 (relator waited 19 days to file claim, 13 days after deadline to print absentee ballots had expired).

Nor has Respondent argued that Relators' delay in service under S.Ct.Prac.R.12.02 was intentionally done to obtain a strategic advantage (nor could such an argument be made). *Brinda*, 115 Ohio St.3d at ¶14. For these reasons, “the fundamental tenet of judicial review in

Ohio ... that courts should decide cases on their merits” should prevail. *State ex rel. Becker v. Eastlake*, 93 Ohio St.3d 502, 505, 756 N.E.2d 1228 (2001).

Fourth Proposition of Law

The Board of Elections’ gatekeeping function does not include excluding confusing language in an Initiative Petition from the ballot.

The Amicus City of Norwood (“Norwood”) argues that the Initiative Petition includes nonsensical language and thus the Respondent should be permitted to use its discretion to refuse placing it on the ballot. Norwood offers no legal support for this proposition. Such a result is an extreme over-reach of the Respondent’s gatekeeping function and has been rejected by this Court. *See State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 385, 662 N.E.2d 339 (1996) (holding that a municipality authority lacks authority to reject a petition based upon its substance even where it is alleged that the petition misled electors and was confusing). Norwood advocates for a rejection of the petition based upon the Petition’s merits which is an invalid basis for the Respondent to act. Accordingly, Norwood’s argument should be rejected.

Fifth Proposition of Law

Norwood cannot raise objections to the Initiative Petition that were not considered by the Respondent.

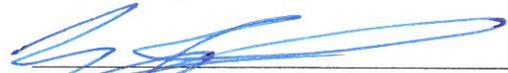
Norwood argues that the Respondent is authorized to exclude the Initiative Petition on the basis that it conflicts with State and Federal law respecting asset forfeiture. The Respondent did not rely upon this reasoning as a basis for rejecting the Initiative Petition. Therefore, this Court should not consider it now. “Courts have generally held that ‘[a]mici curiae are not parties to an action and may not, therefore, interject issues and claims not raised by parties.’” *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of*

Elections, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶26 quoting *Lakewood v. State Emp. Relations Bd.*, 66 Ohio App.3d 387, 394, 584 N.E.2d 70 (8th Dist.1990).

CONCLUSION

For all the reasons set forth herein, and as set forth in Relators' Merit Brief filed on September 12, 2016 incorporated by reference as if fully restated herein, Relators pray that this Court grant a writ of mandamus, ordering the Respondent Hamilton County Board of Elections to place the Sensible Norwood Initiative on the November 8, 2016 ballot for consideration by the voters of the City of Norwood, Hamilton County, Ohio and for an Order granting Relators' their attorney's fees.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing “*Reply Brief of Relators Sensible Norwood and Amy G. Wolfinbarger to Respondent’s Merit Brief and to Amicus Brief of City of Norwood*” was served by e-mail at this 16th day of September, 2016, upon the following counsel:

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