IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel* Virginia L. Coover, et al.,	)	Case No. 2016-1247
	)	
Relators,	)	**RELATORS' MERIT BRIEF IN SUPPORT OF VERIFIED COMPLAINT**
-vs-	)	
Jon Husted, Secretary of the State of Ohio, et al.,	)	
Respondents.	)	**Expedited Election Case Pursuant to S.Ct.Prac.R. 12.08**
	)	

James Kinsman, Esq.
(S.Ct. #0090038)
P.O. Box 24313
Cincinnati, OH 45224
(513) 549-3369
james@jkinsmanlaw.com

Terry J. Lodge, Esq.
(S.Ct. #0029271)
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
(419) 205-7084
lodgelaw@yahoo.com

Counsel for Relators

Keller J. Blackburn (0080777)
Athens County Prosecutor Attorney
Zachary L. Saunders (0088223)
Assistant Athens County Prosecuting Attorney
1 South Court Street
Athens, Ohio 45701
Tel: 740-592-208; Fax: 740-592-3291
keller.blackburn@athenscountyprosecutor.org
zach.saunders@athenscountyprosecutor.org

Counsel for Respondent, Helen Walker, Chair, Kate McGuckin, Ken Ryan, and Aundrea Carpenter-Colvin, Athens County Board of Elections

Collen S. Williams (0065079)
Meigs County Prosecuting Attorney
Jeremy Fisher (0090031)
Assistant Meigs County Prosecutor
Meigs County Prosecutor’s Office
117 W. 2nd Street
Pomeroy, Ohio 45769
Tel: 740-992-6371; Fax: 740-992-6567
cwilliams@meigscountyprosecutor.com
jfisher@meigscountyprosecutor.com

Counsel for Respondent Meigs County Board of Elections and its Members

Victor V. Vigluicci (0012579)
Portage County Prosecutor
Denise L. Smith (0017811)*
*Counsel of Record
Charmine Ballard (0074689)
Portage County Prosecutor's Office
241 S. Chestnut Street
Ravenna, Ohio 44266
Tel: 330-297-3850; Fax: 330-297-4594
vvigluicci@portageco.com
dsmith@portageco.com
cballard@portageco.com

Counsel for Respondent Portage County Board of Elections and its Members, Craig Stephens, Patricia, Nelson, Andrew Manning, Doria Daniels

Michael DeWine (0009181)
Ohio Attorney General
Nicole M. Koppitch (0082129)*
*Counsel of Record
Brodi J. Conover (0092082)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16thFloor
Columbus, Ohio 43215
Tel: 614-466-2872; Fax: 614-728-7592
nicole.koppitch@ohioattorneygeneral.gov
brodi.conover@ohioattorneygeneral.gov

Counsel for Respondent Jon Husted, Secretary of the State of Ohio

August 29, 2016

Table of Contents

Table of Authorities....................iii

I. SUMMARY....................1

II. STATEMENT OF FACTS....................1

III. ARGUMENT....................3

A. Proposition of Law I: The constitutional right of local community self-government prevents the Boards of Elections, the Secretary of State, and this Court from scrutinizing or adjudicating the substance of the proposed Charters until the people have voted upon them....................4

1. The right of local community self-government empowers the people to alter their government to achieve majority rule and to secure and enforce their rights....................5

2. Community self-government is the well-settled foundation of the American system of constitutional law, making the right of local community self-government fundamental and unalienable....................9

a. Community self-government was the foundation of the early American colonies....................10

b. Community self-government is the foundation of American constitutional law. 12

c. Denial of the right of community self-government was the cause of the American Revolution....................14

d. Community self-government is the foundation of the Declaration of Independence....................17

e. Community self-government is the foundation for state constitutions....................19

f. The right of community self-government was practiced in the Northwest Territory....................20

g. The Ohio Constitution guarantees the right of local community self-government....................21

h. The U.S. Constitution guarantees the right of local, community self-government....................21

3. Pre-election review of the substance of the proposed Charters is unconstitutional, as it infringes the right of local community self-government without satisfying strict scrutiny....................25

B. Proposition of Law II: Respondents’ Refusal to Certify the County Charter Petitions to the Ballot Violates the First Amendment of the United States Constitution and Article I, Section 11 of the Ohio Constitution...28

C. Proposition of Law No. III: A proposed Article X, Section 3 charter 'form of government' is legally sufficient for a vote when the voter can understand what offices are created or maintained by the provisions within the charter language........32

D. Proposition of Law No. IV: The SOS and BOE functions respecting the Petition are limited and ministerial and do not permit inquiries into substantive legality..............37

E. Proposition of Law No. V: There is no requirement that the county government be changed in order to enact a Charter; the SOS confuses a ‘charter form of government’ with the statutory option of an ‘alternative form of government’...............................38

F. Proposition of Law No. VI: No Laches Defense Is Available Here............................41

G. Proposition of Law No. VII: This Court will issue a Writ of Mandamus to require the Secretary of State to validate a petition when the petition meets procedural requirements..41

H. Proposition of Law No. VIII: Expedited relief is warranted in election matters concerning what measures go onto the ballot...42

IV. CONCLUSION..43

CERTIFICATE OF SERVICE...44

APPENDIX..45

Decision on Protest, August 15, 2016 (SoS letter, also referred to as Exhibit J to Complaint)

U.S. Const. First Amendment

Ohio Const. Art. I, § 2

Ohio Const. Art X, § 3

O.R.C. § 302.01

O.R.C. § 307.94

O.R.C. § 307.95

Table of Authorities

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n. 1 (1996)..28

Arizona Students' Ass'n v. Arizona Bd. of Regents, 824 F.3d 858, 867 (9th Cir. 2016).................29

Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999)..30

Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981)..6

City of Cleveland v. Trzebuckowski, 85 Ohio St.3d 524, 709 N.E.2d 1148, 1152 (1999).............29

Coleman Young Motors, Inc. v. Limbach, 51 Ohio App.3d 117, 121 (11th Dist. 1988)................40

Commonwealth v. McElwee, 193 A. 628, 630 (Pa. 1937)..7

Creed v. Sauline, 74 Ohio St.3d 402, 407-408 (1996)..40

Deitz v City of Central, 1 Colo. Rptr. 323 (Colo. Terr. 1871)..25

Ex parte Lewis, 73 S.W. 811, 817–18 (Tx. Cr. App. 1903)..6

Federal Gas & Fuel Co. v. City of Columbus, 118 N.E. 103, 105 (Ohio 1917)..................7, 20-21

Griswold v. Connecticut, 381 U.S. 479, 493 (1965)..9, 24

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)...6

Helena Consol. Water Co. v. Steele, 49 P. 382, 386 (Mont. 1897)...6

Henry Broderick, Inc. v. Riley, 157 P.2d 954, 966 (Wash. 1945)..25

In re Protest of Brooks, 2003-Ohio-6525, 155 Ohio App. 3d 384, 801 N.E.2d 514......................30

Marbury v. Madison, 5 U.S. 137 (1803)..24

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347, 351 (1995)..29

Meyer v. Grant, 486 U.S. 414 (1988)..29-31

Moore v. City of East Cleveland, 431 U.S. 494, 503 (1997)..9

People v. Hurlbut, 24 Mich. 44 (1871)..6

People v. Lynch, 51 Cal. 15, 27 (1875)...6

Rathbone v. Wirth, 45 N.E. 15, 17 (N.Y. 1896)...6

Roth v. United States, 354 U.S. 476, 484 (1957)..29

State ex rel Holt v. Denny, 21 N.E. 274, 277–78 (Ind. 1888)...6

State ex rel Jones v. Husted, No. 2016-1164..1

State ex rel. Asberry v. Payne, 82 Ohio St.3d 44, 45,...41

State ex rel. Becker v. Eastlake, 93 Ohio St.3d 502, 505 (2001)..41

State ex rel. Brinda v. Lorain Cty. Bd. of Elections,
115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205..41

State ex rel. Citizens for a Better Portsmouth...41

State ex rel. Kilby v. Summit Cty. Bd. of Elections, 977 N.E.2d 590, 595 (Ohio S.Ct. 2012)........38

State ex rel. Landis v. Morrow Cty. Bd. of Elections, 88
Ohio St.3d 187, 724 N.E.2d 775 (2000)..41

State ex rel. O'Connor v. Davis,
139 Ohio App.3d 701, 705,745 N.E.2d 494, 2000-Ohio-1923 (App. 9 Dist. 2000)................32-33

State ex rel. Painter v. Brunner, 128 Ohio St.3d 17, 26, 941..42

State ex rel. Pearson v. Hayes, 61 N.H. 264, 322 (1881)..6

State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections, 74 Ohio St.3d 143, 145, (1995).................41

State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135
Wn.2d 618, 625, 957 P.2d 691 (1998)...31

State ex rel. Walker v. Husted, 144 Ohio St.3d 361, 2015-Ohio-3749 (2015). .1, 3-4, 28, 31, 36-40

State v. Essling, 195 N.W. 539, 541 (Minn. 1923)..7

State v. Standford, 66 P. 1061, 1062 (Utah 1901)..6

Susan B. Anthony List v. Driehaus, 805 F. Supp. 2d 423, 427 (S.D. Ohio 2011)..........................29

Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 295 (6th Cir. 1993)....................29

Thomas v. Thomas, 2004-Ohio-2136, 03AP1106, 04-LW-1828 (10th Dist.)................................40

Town of Holyoke v. Smith, 226 P. 158, 158 (Colo. 1924)..7

Walker, see *State ex rel. Walker v. Husted*

Washington v. Glucksberg, 521 U.S. 702, 721 (1997)..10

Whitman v. Hamilton Cty. Bd. of Elections, 97
Ohio St.3 d 216, 2002-Ohio-5923, 778 N.E.2d 32..........42

Constitutional Provisions

Ohio Const. Art. I, § 1..........21

Ohio Const. Art. I, § 2..........21

Ohio Const. Art. I, § 11..........28-29

Ohio Const. Art. I, § 20..........21

Ohio Const. Art. X, § 1..........39

Ohio Const. Art. X, § 3..........39-40

Ohio Constitution of 1803..........21

Constitution of Delaware (September 21, 1776)..........19

Constitution of Georgia (February 5, 1777)..........19

Constitution of Maryland (November 11, 1776)..........19

Constitution of New Hampshire (January 5, 1776)..........19

Constitution of New Jersey (July 2, 1776)..........19

Constitution of New York (April 20, 1777)..........19

Constitution of North Carolina (December 18, 1776)..........19

Constitution of Pennsylvania (September 28, 1776)..........19

Constitution of South Carolina (March 26, 1776)..........19

Constitution of Vermont (July 8, 1777)..........19

Constitution of Virginia (June 29, 1776)..........19

Cuyahoga County Charter..........34-35

Declaration of Independence (U.S. 1776)..........10, 18, 21-22, 26-27

Fundamental Orders of 1639..........12

Mecklenburgh Resolutions (May 20, 1775)..........17

Summit County Charter..........35

The Articles of Confederation of the United Colonies of New England (May 19, 1643)............12
The Mayflower Compact..........11
U.S. Const. Art. IV, § 4..........25
U.S. Const. amend. I..........28, 31
Virginia Declaration of Rights..........18

Statutes

O.R.C. § 302.01..........40
O.R.C. § 302.02..........38
O.R.C. § 307.94..........30
O.R.C. § 307.95..........4, 30, 37
O.R.C. § 3501.11..........37
O.R.C. § 307.94..........1, 3
O.R.C. § 307.95..........1, 3
O.R.C. § 325.03..........35
O.R.C. § 325.04..........35
O.R.C. § 325.06..........36
O.R.C. § 325.08..........36
O.R.C. § 325.09..........36
O.R.C. § 325.10..........35
O.R.C. § 325.11..........35
O.R.C. § 325.14..........36
O.R.C. § 325.15..........36
O.R.C. § 3501.11..........3
O.R.C. Chapter 302..........39
O.R.C. Chapter 307..........39

1 U.S.C., i-iii..19

Legislative History

Fed. Gazette, 18 Mar. 1789..22

James Wilson, Pennsylvania Ratifying Convention, 4 Dec. 1787..24

Journal of the First Congress of the American Colonies 29-31 (1845).......................................14

Journals of the Continental Congress, 4:342, 357-58...18

Ratification of the Constitution by the State of Virginia (June 26, 1788)....................................23

U.S. House of Representatives, August 14, 1789..23

U.S. House of Representatives, June 8, 1789...23

Secondary Sources

2 Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia 162 (1803).….25

Beach, Samuel Adams: The Fateful Years 1764-1776 55 (1965)...13

Christie & Labaree, Empire or Independence, 1760-1776 188 (1976)...16

Colonial Origins of the American Constitution: A Documentary History 3 (Lutz ed., 1998).......11

Dickinson, Watauga Association in Tennessee Encyclopedia of History and Culture (2002).......15

Charters and Alternative Forms of County Government," Chapter 10, Ohio Secretary of State, Ballot Questions and Issues Handbook..39

Harvey Walker, Municipal Government in Ohio Before 1912, 9 Ohio St. L.J. 1, 1-2 (1948).......20

John J. Duffey, Non-Charter Municipalities: Local Self-Government, 21 Ohio St. L.J. 304, 330 (1960)...26

Joshua Toulmin Smith, Local Self-Government and Centralization 101 (1851)..........................27

Kruman, Between Authority and Liberty: State Constitution Making in Revolutionary America (1997)..14

Kurt Lash, The Lost History of the Ninth Amendment 360 (2009)..25

Maier, American Scripture: Making the Declaration of Independence 48-49 (1997)...................17

Maier, From Resistance to Revolution (1972)..14-15

Marc Kruman, Between Authority and Liberty: State Constitution Making in Revolutionary America 157-58 (1997)....................20

Matthew J. Herrington, Popular Sovereignty in Pennsylvania 1776–1791, 67 Temp. L. Rev. 575 (1994)....................22

McQuillin, A Treatise on the Law of Municipal Corporations, Vol. 1 (1911)....................11-12

McQuillin, Municipal Corporations, 3rd ed., 2010 Revised Volume, vol. 1, § 1:45 (Thomson Reuters, 2010)....................7

Miller, Origins of the American Revolution (1962)....................13-16

Miller, The Rise and Fall of Democracy in Early America, 1630-1789, at 70 (1991)....................19

Ohio County Commissioners Handbook....................39

Oliver Wendell Holmes, The Common Law (1909)....................5

Philip B. Kurland, The Founders' Constitution Volume One 62....................24

Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 Tex. L. Rev. 1 (2006)......24

Ray Raphael, The First American Revolution: Before Lexington and Concord (2002)..........16-17

Siebert, The Government of Ohio 16, 103 (1908)....................20

Terry Bouton, Taming Democracy: "The People," the Founders, and the Troubled Ending of the American Revolution (2007)....................20

The Founders' Constitution, Vol. 1, Ch. 13, Doc. 4 (Kurland & Lerner eds., 1987)....................13

Relators Virginia L. Coover, John Howell, Richard McGinn, Michael H. Rowe, Sally Jo Wiley, Gregory D. Howard, Dennis Jay Sargent, Kathy Lynn Sargent, Marsha Nagy Whitton, Kathleen M. Schumann, Gwen B. Fischer, Brad Brotje, JoEllen Armstrong, and Sandra Engle ("Relators") hereby set forth their merit brief in support of the allegations of the Verified Complaint for a Writ of Mandamus.

I. SUMMARY

The boards of elections of Athens, Meigs and Portage counties each voted 4-0 to "invalidate" the respective proposed County Charter Petitions. In so doing, they failed to perform their mandatory duty to certify and submit the proffered Petitions to the ballot as required by law. The Secretary of State's subsequent determination to overrule the protests filed by the various Relators in their respective counties perfected the Respondents' collective abdications of their mandatory duty to certify and submit the proffered Petitions to the ballots of the three counties. Respondents have exceeded the powers granted them by O.R.C. §§ 307.94 and 307.95, and also violated the holding in *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749 (2015), prohibiting election officials from reviewing a ballot measure's substantive terms.

This case is nearly identical to the companion case *State ex rel Jones v. Husted*, No. 2016-1164, which concerned a proposed County Charter Petition in Medina County. If this Court appropriately finds for relators in that case, then the Court should necessarily find for Relators here. However, recognizing that these cases may be more about political power than about legal reasoning, and thus there is a possibility the Court does not hold for the relators in *Jones*, here Relators provide additional arguments that goes beyond the briefing in *Jones*.

II. STATEMENT OF FACTS

The facts are fully set forth in Relators' Verified Complaint for Writ of Mandamus, which Relators incorporate herein, and summarize below.

A committee of registered voters in Athens, Meigs and Portage Counties initiated, circulated, and filed petitions (Exh. A, B, and C to the Verified Complaint, or “VC”) containing a County Charter proposal (“Petition”) for placement on the November 8, 2016 general election ballot. Approval of the proposal by voters would establish a charter form of government in respective County, which is not presently a charter county. The committee’s of each county submitted petitions with sufficient valid signatures to be placed on the November 8, 2016 ballot for consideration by the electors of the county. However, the board of elections in each county voted 4-0 against certifying the petition to the county commissioners to be submitted to the ballot. Athens county Board of Elections voted on Friday July 8th, Meigs voted on July 21st, and Portage voted on August 1st, 2016. These decisions were protested to the Ohio Secretary of State (“SOS”) on July 25th, July 28th, and August 2nd respectively.

On August 15, 2016 the SOS denied the protests and sustained the Respondent Board’s votes to block the Relator’s petitions from the ballot. A true and correct copy of the SOS decision was provided as Exhibit J to Relators' Verified Complaint, and is incorporated by reference as though fully herein rewritten. In his decision the SOS stated:

> Turning to the Athens, Meigs, and Portage petitions now at issue, Article X, Section 3 of the Ohio Constitution contains a different, but equally foundational, prerequisite for county charter provisions than was analyzed in the 2015 protest decision. This bedrock provision, the “All Powers” provision, mandates that every county charter “shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.”. . . .
>
> . . . A closer review of the specific provisions regarding the enumerated duties of the county officers, however, reveals that the language of Section 3.1 rings hollow. In other words, the proposed Petitions fail to provide for the performance of all duties imposed upon county officers by general law as the Ohio Constitution requires.
>
> For example, Section 4.3.3 of the proposed county charters merely states that "[t]he County Auditor shall have those powers and duties as responsible for the day-to-day accounting of transactions for the County government under his or her jurisdiction and control, in accordance with general law.” . . . .

> . . . This language falls woefully short of providing for the full range of duties that a County Auditor must perform-even under a charter form of government. A County Auditor in Ohio has far greater duties pursuant to the Ohio Revised Code than merely being "responsible for the day-to-day accounting of transactions for the County government" as enumerated in the proposed county charters. As just one example, aside from keeping the official record of all county government receipts and disbursements, the County Auditor in Ohio is "the assessor of all the real estate in the auditor's county for purposes of taxation. Other examples abound in R.C. Chapter 319.". . . .
>
> . . . In summary, almost all of the powers or duties of the county officers enumerated in the proposed county charters are severely diminished or limited when compared to the duties imposed upon them by general law. There is a significant vacuum of required powers, duties, and responsibilities of county offices and officeholders, and the mere phrase "in accordance with general law" that Petitioner's repeat at the end of each proposed grant of "county officer power" in the Petition is not enough to account for this constitutional infirmity. To allow otherwise would require one to "look to sources outside the proposed charters," a fatal flaw that the Supreme Court recognized in Walker. . . .
>
> . . . Having carefully reviewed the law, court decisions, and the materials submitted in connection with the protests, for the reasons stated above, I hereby deny the protests and invalidate each of the Athens, Meigs and Portage petitions. Accordingly, the county charter proposals appended to each of the petitions shall not be placed upon the November 8, 2016, general election ballot in your counties.

(Exhibit D pgs. 2, 4, 6, 8).

Relators filed a Complaint for Writ of Mandamus on August 19, 2016, wherein they ask this Court to order the Secretary of State and the Respondent County Board of Elections to validate the Petitions and to certify them to the November 8, 2016 election ballot.

III. ARGUMENT

In denying to certify the petitions, the Respondents exceeded the power granted to them under O.R.C. §§ 3501.11, 307.94 and 307.95 as well as this Court's decision in *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749 (2015). In addition, the Respondents have a duty to uphold the people's constitutional rights of local community self-government, and their political rights of speech and petition. Finally, this Court has a duty to uphold separation of powers between the branches of government, and not allow the Secretary of State or Boards of

Election to decide what the law is when they are merely authorized to review the sufficiency of the petition and signature validity.

A. <u>Proposition of Law I:</u> **The constitutional right of local community self-government prevents the Boards of Elections, the Secretary of State, and this Court from scrutinizing or adjudicating the substance of the proposed Charters until the people have voted upon them.**

State law requires Boards of Elections and, when faced with a protest, the Secretary of State to make determinations limited to matters of process only, namely, whether the petition circulated was valid, and whether the signatures supporting it are sufficient. The law for Boards of Elections can only authorize the Boards to "immediately proceed to determine whether the petition and the signatures on the petition meet the requirements of law, including section 3501.38 of the Revised Code [which provides specific procedural rules for valid signatures, like "signatures shall be affixed in ink"], and to county the number of valid signatures." O.R.C. § 307.95(A). Similarly, the law for the SOS requires him, when he receives a protest, to "determine the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures." O.R.C. § 307.95(C). These requirements are fully satisfied here. The Secretary and the three Boards found nothing wrong with the *petitions* at issue. And all found the petitions supported by signatures sufficient to place them on the ballot in November.

To reject the petitions, the Boards and the Secretary went beyond the petitions and signatures, to analyze the *substance* of the proposed *Charters*. They did so using this Court's decision last year in *State ex. rel. Walker v. Husted*, 2015-Ohio-3749. There the Court said that before an election, the Boards, the Secretary, and the Courts may not make an "assessment of the legality or constitutionality of the measure if enacted." *Id*., ¶ 22. But then the Court weakened this proscription nearly to the point of eliminating it, saying the Boards, Secretary, and Courts may invalidate petitions pre-election when "the charters do not satisfy the threshold requirements that define a charter initiative." *Id*. This necessarily is a determination of constitutionality and

legality, in short, a determination of substance concerning the measure if enacted.

Relators have a constitutional right of local community self-government, which prevents the state and county from scrutinizing and adjudicating the substance of the Charters until *after* the people have voted upon them. It does not matter what language one uses to characterize such review, whether it concerns the constitutionality of a proposed measure, or its legality, or its compliance with "threshold requirements," as this Court finessed it last year. *Any* pre-election review that goes beyond the petition and signatures, into the substance of the measure, violates the people's right of local community self-government. By authorizing such review, this Court's decision last year was unconstitutional, and must be overturned (or clarified) to that extent. And because the Court did not consider or decide this issue last year, it must do so now.[1]

1. <u>The right of local community self-government empowers the people to alter their government to achieve majority rule and to secure and enforce their rights.</u>

The right of local community self-government is a fundamental, political right of people,

---

1 This section contains a lengthy historical review atypical of most legal briefs. Such history is necessary, more so even than case precedent, for understanding the origins and scope of the fundamental and unalienable right of local community self-government. Justice Holmes taught us that "[t]he life of the law has not been logic: it has been experience." Oliver Wendell Holmes, THE COMMON LAW 1 (1909). But less frequently cited is the rest of Holmes' famous paragraph, which is about the methods of understanding our laws. It reads in part:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively *consult history* and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

Id. at 1-2 (emphasis added). Thus, we turn to the law—both express, and embedded in our history—to show that a right of local community self-government has been a fundamental tenant of American law, both in theory and practice, until it was stripped from the people by the legislatures and courts. If it was once "convenient" to forget this right, it is no longer so.

a right to govern their local communities.[2] It is a right held individually, and exercised collectively, by all eligible electors of a local government. As the right is fundamental, government may not infringe it without satisfying strict scrutiny. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981).

2 The right first found judicial recognition in a concurring opinion in *People v. Hurlbut*, 24 Mich. 44 (1871) (Cooley, J., concurring) ("[L]ocal government is a matter of absolute right; and the state cannot take it away."). Since then, eleven states, including Ohio, have high court decisions, never overruled and thus still valid, that recognize the right. *See People v. Lynch*, 51 Cal. 15, 27 (1875) (approving Judge Cooley's opinion that the right of local self-government is implied in our constitutions, and adding in this regard, "By the Tenth Amendment of the Constitution of the United States … The Government of the United States can exercise only such powers as are expressly granted to it, and such as are necessarily implied from those granted. It follows from this, that the people of the States respectively retain such powers as have neither been granted, expressly or by implication, to the Government of the United States, nor conferred on the State governments."); *State ex rel. Pearson v. Hayes*, 61 N.H. 264, 322 (1881) ("Local self-government (including much administration of law, and the extensive use of the law-making powers of taxation and police), introduced not only before the organization of both the state and province of New Hampshire, but also before the extension of Massachusetts jurisdiction to the Piscataqua, and continuing in uninterrupted operation more than two hundred years, has been constitutionally established by recognition and usage."); *State ex rel Holt v. Denny*, 21 N.E. 274, 277–78 (Ind. 1888) ("As we interpret the theory of our State government, this right of local self-government, vested in, exercised and enjoyed by, the people of the municipalities of the State at the time of the adoption of the Constitution, yet remains in them, unless expressly yielded up and granted to one of the branches of the State government by the Constitution"); *Rathbone v. Wirth*, 45 N.E. 15, 17 (N.Y. 1896) (the right of local self-government "inheres in a republican government and with reference to which our Constitution was framed…. [A]s Judge Cooley has remarked with reference to the Constitutions of the states, 'if not expressly reserved, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.'"); *Helena Consol. Water Co. v. Steele*, 49 P. 382, 386 (Mont. 1897) ("We think the two provisos of the law under discussion are in violation of the clauses of the constitution quoted and referred to above, as well as the spirit of our governmental system, which recognizes 'that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government.'"); *State v. Standford*, 66 P. 1061, 1062 (Utah 1901) ("An examination into its early history will show the existence of a system of territorial subdivisions of the state into counties when the present constitution was adopted. At this early date the system of local self-government existed under the general laws of the territory, and there is no provision in the constitution which can be construed as impairing that right…. [T]he Constitution implies a right of local self-government to each county); *Ex parte Lewis*, 73 S.W. 811, 817–18 (Tx. Cr. App. 1903) ("We do not understand that the constitution grants power which is not expressly reserved to the legislative body of

The right of local community self-government includes three component rights. The first component is the right to a system of government within the local community that is controlled by a majority of its citizens. The second is the right to a system of government within the local community that secures and protects the political and civil rights of every person in the community, and the rights of nature in the community. And the third is the right to abolish any

---

the government. This is reserved to the people. Only the law-making power belongs to the legislature, and this must be in accordance with the principles of local self-government reserved to the people of the state, because the constitution says that all political power is inherent in the people, not in the legislature, and the right of local self-government is reserved to the state…. The Legislature is the law-making power, and to it alone is reserved the authority to make laws; but it has not right under the guise of its law-making authority to overturn the principles of local self-government which have been handed down to us from our fathers."); *Federal Gas & Fuel Co. v. City of Columbus*, 118 N.E. 103, 105 (Ohio 1917) ("If all political power is inherent in the people, as written in our Constitution, for the government of the state, it would seem at least of equal importance that all political power should be inherent in the people for the government of our cities and villages."); *State v. Essling*, 195 N.W. 539, 541 (Minn. 1923) ("The doctrine that local self-government is fundamental in American political institutions; that it existed before the states adopted their Constitutions, and that it is more than a mere privilege conceded by the Legislature in its discretion is ably discussed in *People v. Hurlbut*."); *Town of Holyoke v. Smith*, 226 P. 158, 158 (Colo. 1924) ("The central idea of government in this country was and is that in local matters municipalities should be self-governing."); *Commonwealth v. McElwee*, 193 A. 628, 630 (Pa. 1937) (in which the Supreme Court of Pennsylvania cited Cooley's *Hurlbut* opinion on the right of local self-government with approval, and also said that written constitutions must be construed in light of fundamental principles behind them. And also: "In analyzing this act preparatory to determining whether or not it trenches upon the Constitution, one is impressed with the fact that it violates the principle of 'home rule,' i.e., local self-government, which, like the tripartite separation of governmental powers, is a vital part of both the foundations and general framework of our state and federal governments.")

A current treatise, McQuillin's *Municipal Corporations*, acknowledges that many jurisdictions have, contrary to history and practice, rejected the concept of an inherent, inalienable right of local self-government: "Contrary to general opinion and to practice largely, it seems that the doctrine of the existence of an inherent right of local self-government or home rule does not at present exist, and according to some authorities never did. According to some, however, this view is contrary to the historical development of cities and towns both in England and in this country." McQuillin, Municipal Corporations, 3rd ed., 2010 Revised Volume, vol. 1, § 1:45 (Thomson Reuters, 2010). So McQuillin shows how, despite contrary jurisprudence, the right is firmly embedded in the history of American government, making it a component of liberty that individuals today may assert in good faith: "The history of the early American settlements establishments that the principle of local self-government found a firm lodging on our soil. Everything relating to the public life of the colonists indicates that a home or local government was their central political idea". *Id.*, §

system of local government that infringes these component rights, and to reconstitute local government in a form that secures and enforces them instead. These rights are embedded in the founding theory and documents of American government.

The right of local community self-government, including its component rights, is inherent and unalienable. It derives necessarily from the fundamental principle that *all* political power is inherent in the people, and is exercised by *them*, for *their* benefit, and subject to *their* control. First articulated federally in the American Declaration of Independence, this fundamental principle and its derivative political right of local community self-government are secured by the Declaration, the U.S. Constitution, and the Ohio Constitution. As the right is inherent and unalienable, all legitimate governments are bound to secure and protect it fully. And as the right is fundamental, no government may infringe it without satisfying strict scrutiny. This means any infringement is only lawful if it must be necessary to satisfy a compelling state interest.

In this case, citizens from the counties of Athens, Meigs, and Portage have circulated petitions for adoption of county charters. Each proposed Charter explains that the people find their current form of county government inadequate to provide local government by majority rule, and inadequate to provide local government that protects the political and civil rights of the people and natural ecosystems. Thus each Charter explains that by adopting it, the people will be exercising their inherent and unalienable right to change their system of government to rectify the shortcomings of their government's current form. Finally, each Charter codifies locally the right of local community self-government, and other civil rights the petitioners wish to secure.

1:38. "Since our country was conceived on the theory of local self-government, political power has, from the beginning, been exercised by citizens of the various local communities. Having been so dedicated by long practice, local self-government has come to be regarded as the most important feature in our system. The American people have always acted upon the deep-seated conviction that local matters can be better regulated by the people of the locality then by the state or central authority…. Local self-government is, thus, a guaranty of individual liberty." *Id*., § 1:40.

By preventing the people of Athens, Meigs, and Portage from voting upon whether to adopt the proposed Charters, the Boards and the Secretary have infringed all three components of the right of local community self-government, in particular, the right of local government by majority, the right to a local government that secures political and civil rights, and the right to alter local government that fails to accomplish these. For this infringement to be lawful under strict scrutiny, it must be necessary to satisfy a compelling state interest. As explained at the conclusion of this section, the state cannot satisfy that standard here, so the infringement must fall, and the Charters must go before the people this November.

2. *Community self-government is the well-settled foundation of the American system of constitutional law, making the right of local community self-government fundamental and unalienable.*

The Supreme Court has declared that "when considering whether a right is a fundamental right, the court [must] look to whether it is a right deeply rooted in this nation's history and tradition." *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Brennan, J., concurring) (courts look to "traditions and (collective) conscience of our people to determine whether a principle is so rooted" there "as to be ranked as fundamental.") (citations omitted); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1997) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history (and), solid recognition of the basic values that underlie our society'") (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

The right of local community self-government is deeply rooted in our nation's history and tradition. Communities within the early American colonies were founded on the people's authority to govern themselves. From the Mayflower Compact to the conflagration of the American Revolutionary War and the ratification of the United States Constitution, no principle has been more seminal than that of the people's sovereignty, and no right more fundamental than

the right of local community self-government. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (declaring that "[o]ur Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking" that direct the court's recognition and enforcement of constitutional guarantees (citation omitted)).

The colonists' struggle with British rule illustrates how community self-government took shape as the foundation of the American system of constitutional law. The colonists' efforts culminated in the Declaration of Independence of 1776, which codified the principles of local community self-government that had been forged by American settlements since the 1600s. In adopting the Declaration, the Second Continental Congress made clear that a government's power originates from the people, and that the people have the right to alter their system of government to protect their "Life, Liberty . . . Safety and Happiness":

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — *That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness*.

THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) (emphasis added).

The violation of this right, enumerated in the Declaration as the first grievance against the British Empire that justified severance from its rule, read: "[h]e has refused his Assent to Laws, the most wholesome and necessary for the public Good." *Id.* ¶ 3. This fist grievance is the denial of the colonists' inherent right of local community self-government – their right to make laws to protect themselves – and it justified abolishing and replacing the system of government.

a. Community self-government was the foundation of the early American colonies.

The concept of community self-government in America dates back to the Mayflower Compact, adopted in 1620, over 150 years before Thomas Jefferson codified the principles of

self-government in the national Declaration of Independence.[3] The Mayflower Compact was the first constitution of its kind to be written by the American colonists, and it set the stage for an understanding of government that represented a dramatic departure from European rule. In one paragraph, the colonists dismantled the old system of government—based on royal authority—and forged a new one based purely on the political sovereignty of the people themselves:

> We . . . covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof to enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony . . . .[4]

Far from being unusual, such early American concepts—that people possessed the authority to create, control, and change their own governing systems—were the norm. In the 1620s, colonists founded settlements in New Hampshire that became the Towns of Portsmouth and Dover. Both were "wholly self-ruled," and Dover's inhabitants self-organized themselves into a "body politic … with all such laws as shall be concluded by a major part of the Freemen of our Society." In 1639, the settlers of Exeter, NH, created their own government, declaring in the Exeter Compact that we "combine ourselves together to erect and set up among us such Government. . . according to the libertyes of our English colony of Massachusetts." COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 3 (Lutz ed., 1998).

People in towns, villages, and colonies also joined with people from other areas to create broader levels of government to further secure their right of community self-government. For example, in 1639, people from the Connecticut Towns of Windsor, Hartford, and Wethersfield joined to adopt the Fundamental Orders of Connecticut, the first written state

---

3 McQuillin, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS, Vol. 1, at 152 (1911) ("In this country from the beginning, political power has been exercised by citizens of the various local communities as local communities, and this constitutes the most important feature in our system of government.").

4 THE MAYFLOWER COMPACT, in Kermit L. Hall et al., AMERICAN LEGAL HISTORY: CASES AND MATERIALS 14 (3rd ed. 2005).

constitution in America, a compact that secured the right of self-government within those towns.[5] And in 1643, the people of various towns and colonies joined together to create the United Colonies of New England, approving Articles of Confederation for the United Colonies which declared that the people of each plantation, town, and colony shall have "exclusive jurisdiction and government within their limits," thereby securing their authority to self-govern locally.[6]

Judge McQuillin, author of a seminal treatise on the law of municipal corporations, explained that those communities constituted "miniature commonwealths [with] the solid foundation of that well-compacted structure of self-government." McQuillin, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS, Vol. 1, at 144 (1911). Thus, the early American colonies were replete with constitutions, compacts, and agreements reflecting that emergent self-organizing American form of government, one in which the people of those communities possessed the sovereign and unabridged right to create, control, and change their systems of governance. *Id.* at 384–85 ("[T]he people of the various organized communities exercise their rights of local self-government under the protection of these fundamental principles which were accepted, without doubt or question . . . .").

b. Community self-government is the foundation of American constitutional law.

While Great Britain tolerated the colonists' self-rule in the interests of efficiency, it believed that the British king and parliament had final authority over local governing matters. Clashes between these two theories of government—of the right of the American people to create, manage, and alter their systems of government as they saw fit, and the "right" of the

5 *See* FUNDAMENTAL ORDERS OF 1639, *available at* avalon.law.yale.edu/17th_century/order.asp (accessed Aug. 28, 2016).

6 *See* THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND (May 19, 1643), *available at* avalon.law.yale.edu/17th_century/art1613.asp (accessed Aug. 28, 2016). Others proceeding to create self-governing jurisdictions included the Popham Colony in present-day Maine, the Saybrook Colony of present-day Connecticut, and the colonies of New Haven, New Netherland, East Jersey, West Jersey, and the Province of Carolina, among many others.

British government to manage the colonies—were commonplace in the period leading up to the Revolutionary War.[7] Such clashes led to the development of the doctrine of community self-government as constitutional law, and, inevitably, to revolutionary conflict.

In 1760, colonial lawyer James Otis, Jr. first used the right of community self-government as a constitutional doctrine when he represented colonial merchants in a direct challenge to Great Britain's authority to adopt "writs of assistance." Miller, ORIGINS OF THE AMERICAN REVOLUTION 46 (1962). The writs allowed British authorities to enter any colonist's residence without advance notice or probable cause. Otis argued that the writs were invalid because they had been adopted only by the British parliament, and not by the people of the colonies. Otis' thesis—that the people themselves were the only rightful lawmaking authority—was the first articulation of community self-government as a legal and constitutional doctrine within the colonial context. Beach, SAMUEL ADAMS: THE FATEFUL YEARS 1764-1776 55 (1965). Otis' work, entitled *The Rights of the British Colonies Asserted and Proved*, placed the right of local self-government (including the right to alter any system of governance that undermines that right) at the heart of the patriots' struggle. In his pamphlet he explained:

> There is no one act which a government can have a right to make that does not tend to the advancement of the security, tranquility, and prosperity of the people…. The form of government is by nature and by right so far left to the individuals of each society that they may alter it from a simple democracy or government of all over all to any other form they please….

See THE FOUNDERS' CONSTITUTION, Vol. 1, Ch. 13, Doc. 4 (Kurland & Lerner eds., 1987).

---

7 Foreshadowing the American Revolutionary War, there were no fewer than a dozen armed peoples' revolts against British rule between 1676 and the 1760's. As with the Revolutionary War, almost all were triggered by British efforts to strip the colonists of self-governing authority. They included Bacon's Rebellion of 1676 (driven by the royal governor's refusal to implement measures adopted by the Virginia legislature), Culpeper's Rebellion of 1677 (evicting the proprietary government of Carolina due to the collection of a British-imposed tobacco duty), the Boston Revolt of 1689 (imprisoning the royal governor and re-establishing an earlier form of representative government), and the Mast Tree Riot of 1734 (against the royal government's prohibition on colonial use of mature pine trees used by the English navy for masts). Miller, ORIGINS OF THE AMERICAN REVOLUTION 38 (1962).

c. Denial of the right of community self-government was the cause of the American Revolution.

The British parliament's denial of the right of local community self-government was the cause of the American Revolution. In Boston, which would become the epicenter of the Revolution, a concerted movement to replace British rule with a system of governance premised on community self-government began in 1764. That year, the British parliament passed the Currency Acts to remove colonial legislative control over issuing currency. In response, the people of the Town of Boston, through their Town Meeting, voted to establish the first, temporary Committee of Correspondence. The Committee was tasked with informing the public about the Currency Acts, along with building public support for repeal. Maier, FROM RESISTANCE TO REVOLUTION 216 (1972). Other towns formed similar committees. *See* Miller, ORIGINS OF THE AMERICAN REVOLUTION 124-26 (1962).

"Stamp Act Riots" against British authority ensued. In 1765, the Stamp Act Congress issued a "Declaration of Rights and Grievances," which focused on the Currency and Stamp Acts' violation of the colonial right to local self-government. The Stamp Act Congress argued that the Currency Act's removal of monetary policy from the colonists, and the Stamp Act's removal of tax policy, violated the people's right of local self-government. *See* JOURNAL OF THE FIRST CONGRESS OF THE AMERICAN COLONIES 29-31 (1845).

The British Parliament retaliated by adopting the "American Colonies Act," which rejected the colonists' authority to self-govern locally. It proclaimed that Parliament "had hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever." Maier, FROM RESISTANCE TO REVOLUTION 145 (1972). In response, the colonists attacked the Act as "inconsistent with the natural, constitutional and charter rights and privileges of the inhabitants of this colony." Kruman, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN

REVOLUTIONARY AMERICA 12 (1997).

Over the next decade, Parliament continued to assert taxation authority over the colonists, and the American people continued to assert their right of community self-governance. In 1772, the people of Boston voted to establish the first permanent Committee of Correspondence in the colonies, tasking it with proclaiming "the rights of the colonists [and] to communicate and publish the same to the several towns in this province and to the world as the sense of this town." Miller, ORIGINS OF THE AMERICAN REVOLUTION 329-30 (1962). People in hundreds of towns and villages formed committees to coordinate responses to Parliamentary actions. *Id.*

Also in 1772, frontier settlers living along the Watauga and Nolichucky Rivers, in the eastern part of what would become the state of Tennessee, joined together to become the Watauga Association—the first independent constitutional government in America. After negotiating a ten-year lease with the Cherokee, the settlers unanimously adopted the Articles of the Watauga Association, establishing a local government system, a five-member court, a courthouse, and a jail. President Theodore Roosevelt declared that “the Watauga settlers outlined in advance the nation’s work. They bid defiance to outside foes and they successfully solved the difficult problem of self-government.” Dickinson, *Watauga Association* in TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE (2002).

In May 1773, Parliament adopted the Tea Act, allowing the East India Company to sell surplus tea directly to people in the colonies. Purchase of the English tea, and payment of parliamentary taxes along with it, was viewed as an effort to weaken colonial opposition to parliamentary taxation, and thus to weaken colonial claims to the right of local self-government. Maier, FROM RESISTANCE TO REVOLUTION 275-78 (1972). But the colonists rebelled, with the Boston Tea Party, as well as similar Tea Parties hosted by the people of other towns and villages.

To punish the colonists for their opposition to the Tea Act, Parliament adopted a series of laws known as the "Intolerable Acts" or "Coercive Acts." These sought to nullify completely certain types of colonial self-government.[8] For instance, parliament's Massachusetts Government Act sent a clear signal that Great Britain would not tolerate local self-government in the colonies. Miller, ORIGINS OF THE AMERICAN REVOLUTION 369-70 (1962). The goal of the Act was to displace the various legislative mechanisms of local self-government by expanding the royal governor's powers. British officials believed that their inability to control the people of Massachusetts was directly attributable to the highly independent nature of its local governments and the operation of the Town Meeting at the community level. The Act required that each "agenda item at every town meeting in Massachusetts . . . be submitted in writing to the governor and meet with his approval . . . . No meeting could be called without the prior consent of the governor." Ray Raphael, THE FIRST AMERICAN REVOLUTION: BEFORE LEXINGTON AND CONCORD 50 (2002). As Lord North explained to Parliament, the purpose of the Act was "to take the executive power from the hands of the democratic part of government." Christie & Labaree, EMPIRE OR INDEPENDENCE, 1760-1776 188 (1976). The royal governor eventually used the Act to dissolve the Massachusetts Assembly completely.

The people of Massachusetts rebelled by closing down the British judicial system, so that it could not be used to enforce the Act. People in the Towns of Worcester, Springfield, Southampton, Salem, Marblehead, Taunton, and Stoughton not only forcibly closed the courts,

---

8 The Acts included the Quebec Act (stripping the people of Quebec of most governing authority, it was seen as a parliamentary model for future treatment of the colonists), the Administration of Justice Act (requiring trials of certain British officers to occur in British courts, removing the jurisdiction of colonial courts over them), the Massachusetts Government Act (banning Town Meetings without the consent of the royal Governor, and canceling part of the Colony's original Charter by eliminating the authority of the colonial assembly to elect the Executive Council), and the Quartering Act (requiring the colonies to provide housing for British soldiers over the refusal of the assemblies of several states to do so).

but forced hundreds of British officials to resign their positions. The people of those Towns then drew up their own plans for keeping order, while urging the people of their own Town Meetings to "pay no regard to the late act of parliament, respecting the calling of town meetings, but, to proceed in their usual manner." Ray Raphael, THE FIRST AMERICAN REVOLUTION: BEFORE LEXINGTON AND CONCORD 107 (2002).

d. Community self-government is the foundation of the Declaration of Independence.

Beginning in 1773, in response to those royal assertions of power and nullification of local self-governance, the people of 90 towns, villages, and counties across the colonies began to issue their own local declarations of independence. Declaring that only their own democratically-elected governments could "constitutionally make any laws or regulations," those communities proclaimed independence from British rule, years before Congress issued a national Declaration of Independence. Maier, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 48-49 (1997). The Charlotte Town Resolves, as one example of many, declared in May 1775, that "all laws derived from the authority of the King or Parliament are annulled and vacated."[9]

It was amidst the issuance of these local declarations that the colonists formed the First Continental Congress, which met in September 1774, with representatives attending from twelve of the thirteen colonies. During that Congress, the delegates declared: "[a]ssemblies have been frequently dissolved, contrary to the rights of the people [and] that the inhabitants of the English Colonies in North America, by the immutable laws of nature . . . are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever a right to dispose of either without their consent." This articulation of the right of community self-government continued to lay the foundation for the final break between the American colonies and Great Britain.

9 THE MECKLENBURGH RESOLUTIONS (May 20, 1775), *available at* avalon.law.yale.edu/18th_century/nc06.asp (accessed Aug. 28, 2016).

In May 1776, the Second Continental Congress adopted a resolution that power be transferred from governments resting on the Crown's sovereignty to those based upon popular authority and self-government. The preamble demanded "that the exercise of every kind of authority under the . . . Crown should be totally suppressed." JOURNALS OF THE CONTINENTAL CONGRESS, 4:342, 357-58. Several months later, the people of Virginia adopted the first "Declaration of Rights," setting forth the constitutional doctrine of local self-government:

> Section 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.
>
> Section 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or *community*; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration. And that, when any government shall be found inadequate or contrary to these purposes, a majority of the *community* has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.[10]

This fundamental principle of local self-government was secured by the Congress in June 1776, when it issued the national Declaration of Independence. Penned by Thomas Jefferson and edited by a congressional committee, the Declaration listed the infringement of local self-government as the primary basis for severance from Great Britain. It codified the principles of local self-government that had been forged by the American colonists from the 1600s onward. Drawing on the declarations of towns, villages, colonies, compacts, early constitutions, and the writings of James Otis and others, the Declaration reaffirmed four major principles of law:

- First, certain rights – those of life, liberty, safety, and the pursuit of happiness – are natural rights, held by virtue of being human[11];

---

10 VIRGINIA DECLARATION OF RIGHTS, *available at* avalon.law.yale.edu/18th_century/virginia.asp (accessed Aug. 28, 2016) (emphasis added).

11 THE DECLARATION OF INDEPENDENCE ¶ 2 ("That all men [*sic*] . . . are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.").

- Second, governments are created to secure those natural rights[12];
- Third, each government owes its existence to, and derives its power exclusively from, the community that creates it[13]; and
- Fourth, when government becomes destructive of the people's natural rights, the people have a right (and duty) to alter or abolish that government and establish new forms.[14]

The Declaration of Independence has been congressionally recognized as an organic, enforceable law of the United States, and so is part of the United States Code. *See* 1 U.S.C. at i-iii. In the words of historian Joshua Miller, the great principles "evoked in the Declaration are autonomy of collectivities, natural rights, and the legitimacy of revolution." *See* Miller, THE RISE AND FALL OF DEMOCRACY IN EARLY AMERICA, 1630-1789, at 70 (1991).

e. Community self-government is the foundation for state constitutions.

The Constitutions adopted by the people of the colonies—transforming the colonies from chartered corporations into sovereign states—reaffirmed and codified, as the basis for those governments, the four principles of local self-government asserted by the Declaration.[15] In addition, the right of community self-government was embodied in the process by which the

12 *Id*. ("that, to secure these rights, governments are instituted among men [*sic*]").
13 *Id*. ("deriving their just powers from the consent of the governed").
14 *Id.* ("whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness . . . it is their right, it is their duty, to throw off such government").
15 The people of two states, New York and Connecticut, adopted the text of the Declaration directly into their state constitutions; the people of eight states adopted a Declaration of Rights that restated the four principles of the Declaration; and the people of four states, New Jersey, Georgia, South Carolina, and New Hampshire, included the principles of the Declaration in the text of the preamble to their state constitutions. *See* CONSTITUTION OF NEW YORK (April 20, 1777); CONSTITUTION OF NEW JERSEY (July 2, 1776); CONSTITUTION OF GEORGIA (February 5, 1777); CONSTITUTION OF SOUTH CAROLINA (March 26, 1776); CONSTITUTION OF NEW HAMPSHIRE (January 5, 1776); CONSTITUTION OF DELAWARE (September 21, 1776); CONSTITUTION OF MARYLAND (November 11, 1776); CONSTITUTION OF NORTH CAROLINA (December 18, 1776); CONSTITUTION OF PENNSYLVANIA (September 28, 1776); CONSTITUTION OF VIRGINIA (June 29, 1776); CONSTITUTION OF VERMONT (July 8, 1777), *available at* avalon.law.yale.edu/subject_menus/18th.asp (accessed Aug. 28, 2016).

people of each state drafted and adopted their constitutions. All but one of the thirteen original colonies entrusted the responsibility of drafting new constitutions to the people[16] themselves through conventions, rather than through legislatures. *See* Marc Kruman, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 157-58 (1997).

f. <u>The right of community self-government was practiced in the Northwest Territory.</u>

Settlers in the Northwestern Territory (now Ohio) authorized their own laws, and established their own local governments, without the authority of Congress or the Territorial Governor.[17] The Ohio Supreme Court found that this early Ohio history supports an inherent right of local community self-government. *Federal Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 534-35, 118 N.E. 103 (1917).[18]

---

16 "To see the Revolution as a democratic victory for the people, one has to cut most of the people out of the story. . . . when Americans talk about the Revolution as a victory for 'the people,' they generally use the phrase in the same sense as the founding generation: to refer to white men." Terry Bouton, TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION 4 (2007) (citations omitted). To be clear, Relators use "the people" throughout this Brief in the inclusive ideal to which it is used today (and in the future), and not in the narrower sense from the past.

17 Although Congress had vested the Territorial Governor with "authority to establish units of local government . . . in both Marietta and Cincinnati the inhabitants met in 1789 and enacted local police regulations without the benefit of a charter. Gallipolis did the same in 1790 although in this case the action was regularized by Governor St. Clair who appointed the officers chosen to enforce them." Harvey Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1, 1-2 (1948) (citing Siebert, THE GOVERNMENT OF OHIO 16, 103 (1908)).

18 The Ohio Supreme Court, lead by Justice Wanamaker, explained:

> The historical fact is that we had a hundred and more municipalities in Ohio already in existence at the time of the adoption of our first constitution, in 1802 . . . . All were then exercising local self-government. The constitutional fathers did not even mention municipalities or cities in the first constitution, and in the second constitution [of 1851] granted to the general assembly certain power to *restrict*, from all of which it would seem a mere legal and constitutional axiom that they never granted, nor intended to grant, to the general assembly of Ohio the general guardianship of all municipalities.
>
> If all political power is inherent in the people, as written in our constitution, for the government of the state, it would seem at least of equal importance that all political power should be inherent in the people for the government of our cities and villages,

g. The Ohio Constitution guarantees the right of local community self-government.

The Ohio Constitution of 1803 mirrored the four principles of the Declaration of Independence in the opening of its Bill of Rights, Article VIII:

> That the general, great and essential principles of liberty and free government may be recognized and forever unalterably established, we declare:
>
> Section 1. That all men born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence; to effect these ends, they have at all times a complete power to alter, reform or abolish their government, whenever they may deem it necessary.

This provision alone should be enough to secure and enforce the right. Yet the people of Ohio went on expressly to reserve their rights and powers in Section 28 of the same Article: "To guard against the transgressions of the high powers, which we have delegated, we declare, that all powers, not hereby delegated, remain with the people."

The 1851 Constitution changed the phrase "every free republican government" is founded on the "sole authority" of the people, to "all political power is inherent in the people." Ohio Const. Art. I, § 2. While minor changes were made to the 1803 provisions quoted above, the people retained all the substantive sections. *See* Ohio Const. Art. I, §§ 1, 2, 20.

h. The U.S. Constitution guarantees the right of local, community self-government.

The U.S. Constitution also secures the right of local community self-government, in a number of places. The Preamble says:

> and so it seemed to men like Thurman, Ranney, Cooley and Campbell, than whom there have been few greater in American jurisprudence. I prefer to follow their course of reasoning, based upon historical fact and political principles, rather than the mere dictums and dogmas of decisions holding that municipal government is government by the general assembly.

Federal Gas & Fuel Co. v. City of Columbus, 96 Ohio St. 530, 534-35, 118 N.E. 103 (1917).

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Three of the four principles of self-government from the Declaration appear here. The words "justice, tranquility, defence, welfare, and blessings of liberty" express the Declaration's principle that people have certain natural rights by virtue of being human. The words "in Order to" and "do ordain and establish" express the Declaration's principle that people form governments to secure their civil and political rights. The words "We the People of the United States" express the Declaration's principle that governmental authority stems from the people of the community exercising the powers of government, and is to be exercised for their benefit only. Only the Declaration's fourth fundamental principle, on the people's authority to alter or abolish governments, is left to necessary inference.[19]

The founders debated whether explicitly to insert all four principles of the Declaration directly into the Constitution's preamble, or whether the people's right of self-government was so fundamental that it need not be expressly stated in the text of the Constitution itself.[20] Advocating

19 As one writer said, "The people, who are sovereigns of the state, possess a power to alter when and in what way they please. To say [otherwise] is to make the thing created, greater than the power that created it." Fed. Gazette, 18 Mar. 1789 (reprinted in Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776–1791*, 67 TEMP. L. REV. 575 (1994)).

20 This debate was forced by the people of the states through their ratifying conventions. The conventions of many states chose to use the ratification process as another vehicle for securing their right to community self-government. They did so by offering amendments that incorporated the principles of the Declaration directly into the text of the Constitution. The people who voted to reject the Constitution outright (and the populations they represented), and the people who refused to ratify without the offering of those local self-government amendments (and the populations they represented) constituted a majority of the people living within the United States at the time of ratification. *See* Ratification of the Constitution by the Various States, *available at* avalon.law.yale.edu/subject_menus/18th.asp (accessed Aug. 28, 2016).

For example, mirroring the Declaration of Rights already adopted by a majority of people within a majority of states in their own constitutions, the people of Virginia ratified the Constitution subject to the following amendments:

> 1st. That there are certain natural rights of which men when they form a social

for express inclusion, James Madison argued "[i]f it be a truth, and so self-evident that it cannot be denied—if it be recognized, as is the fact in many of the State Constitutions . . . this solemn truth should be inserted in the Constitution."[21] The House rejected the addition, not because the Constitution was not to express the principles of the Declaration, but because the House deemed the language already incorporated within the preamble. Roger Sherman explained that as:

> this right is indefeasible, and the people have recognized it in practice, the truth is better asserted than it can be by any words whatever. The words "We the people," in the original Constitution, are as copious and expressive as possible; any addition will only drag out the sentence without illuminating it. . . [22]

> compact cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.
>
> 2d. That all power is naturally vested in, and consequently derived from, the people; that magistrates therefore are their trustees, and agents, and at all times amenable to them.
>
> 3d. That the Government ought to be instituted for the common benefit, protection and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression, is absurd, slavish, and destructive to the good and happiness of mankind.

RATIFICATION OF THE CONSTITUTION BY THE STATE OF VIRGINIA (June 26, 1788), *available at* avalon.law.yale.edu/18th_century/ratva.asp (accessed Aug. 28, 2016).

21 Madison proposed amending the Constitution's preamble to include the following language:

> That all power is originally vested in, and consequently derived from the people.
>
> That government is instituted, and ought to be exercised for the benefit of the people, which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.
>
> That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.

U.S. House of Representatives, June 8, 1789, *available at* teachingamericanhistory.org/bor/madison_17890608/ (accessed Aug. 28, 2016).

22 U.S. House of Representatives, August 14, 1789, *available at* teachingamericanhistory.org/bor/select-committee-report/ (accessed Aug. 28, 2016).

Fourteen years later, the U.S. Supreme Court, in *Marbury v. Madison*, 5 U.S. 137 (1803), validated Sherman's reasoning. Interpreting the Constitution's preamble as recognizing the people's inherent and fundamental right of self-government, the Court concluded: "That the people have an original right to establish, for their future government, such principles as, in their own opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected." *Id.* at 176.[23]

The right of local community self-government, as a fundamental right, is also protected by the Ninth Amendment of the Bill of Rights. It says, "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people." As the concurrence in *Griswold* explained: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, [in addition to] those fundamental rights specifically mentioned in the first eight constitutional amendments." 381 U.S. at 488.

Historical evidence uncovered in the last twenty-five years reinforces that the public intent of this amendment was to elevate the natural rights of people—those that existed before the Constitution—to the same status, whether or not the rights were explicitly enumerated in the Bill of Rights. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 28-29 (2006). These pre-existing natural rights include individual rights as well as collective rights. *Id.* at 20-21, 46.

---

23 Speaking at the Pennsylvania convention that ratified the federal Constitution, James Wilson said: "[Mr. Findley's] position is, that the supreme power resides in the States, as governments; and mine is, that it resides in the people, as the fountain of government; that the people have not—that the people mean not—and that the people ought not, to part with it to any government whatsoever. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper." James Wilson, Pennsylvania Ratifying Convention, 4 Dec. 1787, *available in* Philip B. Kurland, THE FOUNDERS' CONSTITUTION VOLUME ONE 62.

Among the retained rights of the people is the fundamental right to alter or abolish their form of government whenever they see fit. *See* 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 162 (1803); *Deitz v City of Central*, 1 Colo. Rptr. 323 (Colo. Terr. 1871); *Henry Broderick, Inc. v. Riley*,157 P.2d 954, 966 (Wash. 1945) (Millard, J., concurring) (the Ninth Amendment is a "sentinel against overcentralization of government, monuments to the wisdom of the constitutional framers who realized that for the stable preservation of our form of government, it is essential that local governmental functions be locally performed."). Legal scholar Kurt Lash explains:

> The right to local self-government is a right retained by all people and can be exercised in whatever political direction the people please. What we have forgotten, what we have lost, is that the right to local self-government is more than an idea. It is a right enshrined in the Constitution itself.

Kurt Lash, THE LOST HISTORY OF THE NINTH AMENDMENT 360 (2009).[24]

Accordingly, the people of Athens, Meigs, and Portage counties possess an inherent, federal, and state-guaranteed right of local community self-government, secured by the Declaration of Independence, the Ohio Constitution, and the United States Constitution.

3. *Pre-election review of the substance of the proposed Charters is unconstitutional, as it infringes the right of local community self-government without satisfying strict scrutiny.*

Despite the colonial history of local self-government in America, the foundation of our state and federal constitutions upon the principles of local community self-government, and the now mythic quality attached to the idea of "democracy," American jurisprudence generally disdains local communities making decisions with the force of law. Indeed, community lawmaking as the legitimate exercise of self-government by people *where they live* has generated

24 The U.S. Constitution also secures the right of local community self-government at Article IV, §4: "The United States shall guarantee to every State in this Union a Republican Form of Government."

mostly critical, occasionally derisive treatment from legislators, jurists, and commentators since the time of the founding.[25] Consistent with this attitude, American jurisprudence has developed legal doctrines to infringe the right of local community self-government. Pre-election review of the substance of local ballot measures is one such doctrine.

How does pre-election review infringe the right of local community self-government in this case? It does so in three ways. First, we established above that the first component of this right is the right of majority control over local affairs. The American Declaration of Independence says "Governments are instituted among Men, deriving their just powers from the consent of the governed." On the question whether to adopt the proposed Charters, pre-election review replaces an electoral decision by majority vote with a bureaucratic decision by the Boards and Secretary and the judicial opinion of this Court. It is no response to say those bodies are only keeping an unlawful Charter off of the ballot. Bureaucrats and judges too easily forget, or fail to understand in the first place, that the decision whether a proposed Charter is constitutional, legal, or otherwise satisfies "threshold requirements" is first and foremost an electoral decision. The people here are the lawmakers, and government their agent. The people, as lawmakers, are entitled to review the proposed Charters and then, by casting a ballot, say yes, we find this Charter lawful and desirable considering our history, our law, our society. Or no, we do not want it, we find it unlawful. But it is the people's decision to make. Pre-election review strips this decision from the people, thus denying their fundamental political right of local community self-government.

The second component of the right of local self-government is the right to a local government that secures the political and civil rights of people and nature. The American

---

25 John J. Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 330 (1960) ("[T]he parentalistic common-law concept of statutory control [over local governments] is deeply imbedded in the legal mind.").

Declaration says, "That to secure these rights, Governments are instituted among Men." All three proposed Charters at issue here would secure such rights. This includes securing rights not expressly secured by the federal and state constitutions, such as the right to clean air, water, and soil. Blocking these Charters from the ballot infringes the peoples' right to secure these rights.

The third component of the right of local self-government is the right to alter and reform government to secure majority rule and the people's political and civil rights. Here the Boards and the Secretary quibble with the manner in which these Charters establish county offices and provide for the duties of county officials. These are not questions for the Boards and the Secretary. The American Declaration says, "That whenever any Form of Government becomes destructive of these ends, it is the Right of the *People* to alter or to abolish it, and to institute new Government, laying its foundation on such principles *and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness*." State law concerning the form of county charter governments, and judicial decisions such last year's *State ex. rel. Walker v. Husted*, infringe this right when they authorize the Board and Secretary to dictate the details of county offices and duties.[26]

We have established that pre-election review of the substance of the proposed Charters infringes the fundamental, constitutional right of local community self-government of the people of Athens, Meigs, and Portage counties. To withstand constitutional scrutiny, this infringement

26 At a time when centralization in England was encroaching on local government, Joshua Smith wrote this about the very authority to form local governments, specifically with charters for boroughs: "They are founded, altogether, on the fundamental ideas of Local Self-Government which run through the whole spirit and practice of the Constitution. If, in any place, the inhabitants agree together to have that special form of united existence which is called a borough, it is their own affair; and, at the Common Law, it is their inherent right so to agree. Having thus agreed, they simply go to the Crown, as the head ministerial officer, and claim, as of common right, that it shall endorse their agreement, so as to make it a matter of permanent record. It is purely in its ministerial capacity that the Crown has anything to do with such charters. The agreement of the inhabitants is their sole legal ground and support…. The Crown has, legally, no discretion in the matter…." Joshua Toulmin Smith, LOCAL SELF-GOVERNMENT AND CENTRALIZATION 101 (1851).

must be *necessary* to serve a compelling state interest. It is indisputably not necessary: review of the substance of the Charters can happen after the elections, *if* the people adopt them.

The State likely will argue that avoiding the public expense of a ballot measure that *might* be overturned is compelling. It is not. Indeed, if the ballot measures fail, the public instead saves the considerable expense of judicial review. But more to the point, the suggestion that avoiding the expense of an election is compelling enough to take a political decision out of the hands of the people is dangerous and antithetical to democracy. The people's right to constitute government as the people see fit is the very foundation of free societies. Giving bureaucrats the power to decide whether the *people* want to incur the public expense of putting a charter government to the test, first electorally and only then judicially, is the opposite of democracy. It is tyranny of the same type that spurred the political transformation of the American Revolution.

On these grounds, the Relators ask the Court to overturn *State ex. rel. Walker v. Husted* to the extent that it authorizes pre-election review of the substance of the Charters at issue. And because such review was the only basis for the Boards' and the Secretary's rejection of the instant Petitions, which otherwise indisputably complied with all applicable law concerning form and signatures, the Relators ask the Court to grant the writ of mandamus they seek.

B. <u>Proposition of Law II:</u> Respondents' Refusal to Certify the County Charter Petitions to the Ballot Violates the First Amendment of the United States Constitution and Article I, Section 11 of the Ohio Constitution

The Free Speech Clause of the First Amendment states that "Congress shall make no law ... abridging the freedom of speech...." U.S. Const. amend. I.[27] Ohio Const. Article I, Section 11 similarly provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or

27 The First Amendment is applicable to the political subdivisions of the states under the Due Process Clause of the Fourteenth Amendment. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n. 1 (1996).

abridge the liberty of speech, or of the press."[28] The ballot initiative process constitutes political speech to which the First Amendment applies. Indeed, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The First Amendment protects Relators' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing. *Id.* at 424.

In *Meyer*, the United States Supreme Court recognized that the state cannot place restrictions on the exercise of the initiative procedure that unduly burden First Amendment rights. The state infringes on the people's core political rights when it "limits the size of the audience they can reach" or "limit[s] their ability to make the matter the focus of [jurisdiction-wide] discussion." *Id.* at 423; *see Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) ("A person's First Amendment free speech right is at its highest when that person engages in 'core political speech,' which includes issue-based advocacy related to ballot initiatives.") (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 351 (1995)). In other words, "a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). States may only impose "necessary and proper ballot controls that do not unjustifiably inhibit the circulation of

28 Ohio courts are generally guided by case law interpreting the First Amendment of the United States Constitution in interpreting Article I, Section 11 of the Ohio Constitution, with some exceptions. *See City of Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 709 N.E.2d 1148, 1152 (1999) ("First Amendment is the proper basis for interpretation of Section 11, Article 1, [of the] Ohio Constitution"); *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 427 (S.D. Ohio 2011) ("The Ohio Constitution goes beyond the federal Constitution in that certain false statements of opinion are protected. This protection exists as a separate and independent guarantee ancillary to freedom of expression and requires a reviewing court to determine whether the language in question is fact or opinion.").

ballot-initiative petitions." *In re Protest of Brooks*, 2003-Ohio-6525, ¶ 18, 155 Ohio App. 3d 384, 388, 801 N.E.2d 514, 517 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999)).

Limitations on political expression are subject to strict scrutiny. *Meyer*, 486 U.S. at 420 ("We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny."); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 207-08 (1999). Initiative procedures that contain content-based restrictions are generally unconstitutional.

The manner in which Respondents applied Ohio statutes pertaining to the pre-election determination of a petition's validity violated Relators' First Amendment rights to political speech free from content based restrictions. Respondents' review went beyond the ministerial act of counting the number of valid signatures and determining whether the petitions met the requirements of law. *See* O.R.C. § 307.94 ("the board of elections shall immediately proceed to determine whether the petition and signatures on the petition meet the requirements of law and to count the number of valid signatures"); O.R.C. § 307.95 ("the board 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"). Instead, Respondents considered the contents of the petitions in finding them to be invalid. Respondent Secretary of State determined that the charter petitions did not adequately delineate the powers and duties of county officers. In doing so, Respondent Secretary of State looked to the contents of the petitions and impermissibly and unconstitutionally refused to certify them for placement on the ballot by judging their perceived legality.

Interpreting Ohio statutory provisions pertaining to pre-election review of charter petitions to mean that Respondents could review and weigh the contents of the Charters would

violate Relators' First Amendment rights. The constitution does not allow this type of content based review and the Court should not interpret the relevant statutes in a manner inconsistent with the constitution. *See State ex rel.Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 2015-Ohio-3749, ¶ 15 (2015) (the "authority to determine whether a ballot measure falls within the scope of the constitutional power of referendum (or initiative) does not permit election officials to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms."); *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.") (quoting *Meyer*, 486 U.S. 419) (quotation omitted). Consistent with Relators' constitutional rights, Respondents' review under Ohio statutes is limited to form – not content – and validity of signatures.

Finally, Respondents cannot survive strict scrutiny because they cannot show a compelling interest that would justify content based review. There is no compelling interest that could justify this infringement on the people's First Amendment rights. Rather, endorsing Respondents' approach of allowing content based pre-election review by the board of elections and Secretary of State encourages an unfair and arbitrary charter petition process dependent upon the subjective views of government officials. By refusing to certify the charter petitions to the ballot, Respondents unconstitutionally limited Relators' speech.

C. Proposition of Law No. III: A proposed Article X, Section 3 charter 'form of government' is legally sufficient for a vote when the voter can understand what offices are created or maintained by the provisions within the charter language.

The Secretary of State contended in *State ex rel. Walker v. Husted* in 2015 that a 77-word paragraph incorporating state law by reference did not describe a "form of government." Now he maintains that the dense detail in the three Charter Proposals (including four single-spaced pages of county office description) *still* is inadequate to describe the "form of government" because the alleged "all powers clause" has not been fulfilled. This is spurious.

The SOS rejected the 2016 Petitions, ruling:

> Turning to the Athens, Meigs, and Portage petitions now at issue, Article X, Section 3 of the Ohio Constitution contains a different, but equally foundational, prerequisite for county charter provisions than was analyzed in the 2015 protest decision. This bedrock provision, the "All Powers" provision, mandates that every county charter "shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.". . . .
>
> . . . In other words, the proposed Petitions fail to provide for the performance of all duties imposed upon county officers by general law as the Ohio Constitution requires. . . .
>
> . . . In summary, almost all of the powers or duties of the county officers enumerated in the proposed county charters are severely diminished or limited when compared to the duties imposed upon them by general law. There is a significant vacuum of required powers, duties, and responsibilities of county offices and officeholders, and the mere phrase "in accordance with general law" that Petitioner's repeat at the end of each proposed grant of "county officer power" in the Petition is not enough to account for this constitutional infirmity. To allow otherwise would require one to "look to sources outside the proposed charters," a fatal flaw that the Supreme Court recognized in *Walker*.

Husted Ruling, 8/15/2016, Exh. J to Verified Complaint. So the SOS now contends that the entire universe of elected officeholder duties must be delineated within the county charter in order for there to be a "form of government" discernible to the voters. This position defies logic, Ohio law, and insults the intelligence of the voting public.

The use of wording in the Summit County Charter to incorporate by reference duties which are not expressly contained within the Charter was discussed by the Summit County Court

of Appeals in *State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 705,745 N.E.2d 494, 2000-Ohio-1923 (App. 9 Dist. 2000). There, the Summit County Charter provided that the duties of the Prosecutor "shall continue to be determined in the manner provided by general law * * *." The Court of Appeals decided that the county charter must draw its substance from such references to general, state, law:

> Pursuant to this section [§ 3] of the Ohio Constitution, then, the powers and duties of county officers are established by the general laws of the state of Ohio. The Ohio Supreme Court has held that Section 3, Article X of the Ohio Constitution, which allows the people of a county to establish a charter form of government, does not limit the power of the General Assembly "by general laws to provide for the * * * 'government of counties'" under Section 1, Article X. *Blacker v. Wiethe* (1968), 16 Ohio St.2d 65, 45 O.O.2d 367, 242 N.E.2d 655, paragraph three of the syllabus. Thus, while the powers and duties of county government are established by the general laws of the state of Ohio, the charter document provides for the "form" as well as the "exercise" and "performance" of those powers and duties. Section 4.01, Article IV of the Summit County Charter ("the Charter"), as it existed at the time this litigation was initiated, provided that the duties of the Prosecutor "shall continue to be determined in the manner provided by general law * * *." Therefore, in order to determine the powers and duties of the Prosecutor, we look to the general laws of Ohio.

State ex rel. O'Connor v. Davis, 139 Ohio App.3d 701, 705.

The Cuyahoga County Charter similarly draws upon Ohio general law via the incorporation-by-reference mechanism to define many of its county offices:

> SECTION 4.01 PROSECUTING ATTORNEY: ELECTION, DUTIES AND QUALIFICATIONS.
>
> The Prosecuting Attorney shall be elected, and the duties of that office, and the compensation therefor, including provision for the employment of outside counsel, ***shall continue to be determined in the manner provided by general law.***
>
> SECTION 5.04 CLERK OF COURTS: POWERS AND DUTIES.
>
> . . . The Clerk of Courts shall also have such powers and duties as shall be established by this Charter or by ordinance that are ***not inconsistent with those provided by general law for the office of clerk of the court of common pleas.***
>
> SECTION 5.07 COUNTY TREASURER: POWERS, DUTIES AND QUALIFICATIONS.

All powers and duties now or hereafter vested in or imposed upon county treasurers by general law shall be carried out by the appointed County Treasurer. ***The County Treasurer shall also have such powers and duties as shall be established by ordinance that are not inconsistent with those provided by general law.*** . . .

SECTION 5.08 SHERIFF: POWERS, DUTIES AND QUALIFICATIONS.

All powers and duties now or hereafter vested in or imposed upon county sheriffs by general law shall be carried out by the appointed Sheriff. The Sheriff shall possess and continue to maintain the qualifications provided by general law for the office of county sheriff. . . .

Cuyahoga County Charter (emphasis added).[29]

The Athens, Meigs and Portage County Charter proposals (Exhs. A, B and C to the Verified Complaint) each contain four (4) single-spaced pages of provisions to describe the form county government. Each contains this identical Section 3.01 (with proper county name inserted):

Section 3.1 Name, Boundaries and Powers The County of **______** as its boundaries now are, or hereafter may be, shall be a body politic representative of and directly responsible to the residents of this county to be known by the name of "County of **___________**" with all ***the powers, authorities, and responsibilities granted by this Charter and by general law, including but not limited to all or any powers vested in municipalities, subject to Section 1.6 of this charter, by the Ohio Constitution or by general law.***

The County of **___________** ***is responsible within its boundaries for the exercise of all powers vested in, and the performance of all duties imposed upon, counties and County officers by general law***, provided that general law does not infringe the rights of the people of **_____________** County, including without limitation rights enumerated in this County Charter, or other inalienable rights. In addition, the ***County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter, including, but not limited to, the concurrent exercise of all or any powers vested in municipalities by the Ohio Constitution or by general law.*** The County may recognize or create greater protections for people and nature than provided by state law.

All such powers shall be exercised and enforced by ordinance or resolution of the County Commissioners, through exercise of the initiative and referendum powers by the people, or by Charter amendment approved by a majority vote of the people.

---

29 *Available at* council.cuyahogacounty.us/pdf_council/en-US/Legislation/Charter/COUNTY%20CHARTER%20WITH%20EXECUTED%20CERTIFICATE%20PAGE%20AS%20OF%2011-3-2015.pdf (accessed Aug. 29, 2016).

> When not prescribed by the Charter or by amendment to this Charter, by local law enacted by the County Commissioners, or by local law enacted by the people, ***such powers shall be exercised in the manner prescribed by the Constitution of Ohio or by general law.***

Exhs. A, B and C at p. 3 of each (emphasis added).

Similarly to the above-cited incorporations of "general law" into the Summit County and Cuyahoga County Charters, Article IV of each of the three proposed County Charters extensively details responsibilities, salaries, duties and powers of the elected county officers, repeatedly using incorporation-by-reference language. Pages 3 to 7 of the Athens and Meigs Petitions (Exhs. A and B), and pages 4 to 7 of the Portage Petition (Exh. C) contain the minutiae of public offices in the proposed charter governments, using sundry incorporations by reference of "general law" or in many instances, specific O.R.C. sections. Relators have properly used this common and accepted method of completing the form of government in their charter proposals.

There are many incorporations by reference in the three county Charter Proposals. Supplementing the details about county commissioners within the charter language, for instance, county commissioners "shall be nominated and elected in the manner provided by general law for county officers. . . . " Their compensation "shall be in accordance with ORC 325.10 as may be amended." County commissioners shall have those powers and duties "in accordance with general law." Similarly, County Auditors shall be "elected in the manner provided by general law for county officers," with a salary "in accordance with ORC 325.03, as may be amended," and powers and duties "in accordance with general law." Similarly, the County Treasurer shall "be elected in the manner provided by general law for county officers," with compensation "in accordance with ORC 325.04, as may be amended." and duties and powers "in accordance with general law." The County Prosecutor shall, among other things, "possess the same qualifications set forth under the General Laws of the State of Ohio for the county offices of Prosecuting Attorney." The Prosecutor shall be nominated and elected "in the manner provided by general

law for county officers.” Compensation “shall be in accordance with ORC 325.11, as may be amended.” and powers and duties “in accordance with general law.” The County Engineer shall, *inter alia*, “possess the same qualifications set forth under the General Laws of the State of Ohio for the county offices of Engineer” and “be elected in the manner provided by general law for county officers.” Compensation “shall be in accordance with ORC 325.14, as may be amended.” County Engineer powers and duties shall be “in accordance with general law.” The County Recorder shall “be elected in the manner provided by general law for county officers,” with compensation “in accordance with ORC 325.09, as may be amended.” Powers and Duties shall be “in accordance with general law.” The County Coroner shall “possess the same qualifications set forth under the General Laws of the State of Ohio for the county offices of Coroner” and “be elected in the manner provided by general law for county officers.” Compensation “shall be in accordance with ORC 325.15, as may be amended,” and powers and duties shall be “in accordance with general law.” The County Sheriff’s qualifications “will at least meet those of general laws in ORC 311.” Compensation “shall be in accordance with ORC 325.06, as may be amended.” and the Sheriff’s powers and duties shall be “in accordance with general law.” The County Clerk of Courts “shall meet the requirements created by the county commissioners, provided that such requirements will at least meet those of general laws.” Compensation “shall be in accordance with ORC 325.08, as may be amended.” and powers and duties shall be “in accordance with general law.”

Relators have provided extensive detail within the four corners of their Petitions, and further incorporated Ohio law by reference, repeatedly. “All powers” are covered and included. Respondent SOS’ ruling against Relators on this basis is illegitimate. He had no discretion conduct his inquiry to see that “all powers” were included. A writ of mandamus is wholly warranted.

D. <u>Proposition of Law No. IV:</u> The SOS and BOE functions respecting the Petition are limited and ministerial and do not permit inquiries into substantive legality.

In *State ex rel. Walker v. Husted*, 2015-Ohio-3749 (2015), the county charter proposals at issue contained a mere 77-word paragraph as the complete description of the "form of government:"

> The offices and duties of those offices, as well as the manner of election to and removal from County offices, and every other aspect of county government not prescribed by this Charter, or by amendments to it, shall be continued without interruption or change in accord with the Ohio Constitution and the laws of Ohio that are in force at the time of the adoption of this Charter and as they may subsequently be modified or amended.

Id. at ¶ 23. The Court disapproved. But the plethora of information in the Charter Proposals before the Court (Exhs. A, B and C to the Verified Complaint) eclipse the parsimonious information in the *Walker* case. In the matter at bar, the Secretary of State and three boards of elections are quibbling over whether the voluminous information is ***enough*** to define a county government system set up via charter. In parsing the voluminous officeholder detail, Respondents are making innumerable legal and constitutional determinations, which is forbidden. Under O.R.C. § 3501.11, the Secretary of State and boards of elections have limited, ministerial functions. O.R.C. § 3501.11(K) requires boards of elections to "[r]eview, examine, and certify the sufficiency and validity of petitions . . . ". The operative term here is "petitions," which are not solely the charter proposals appearing within the petitions. The Secretary of State is similarly limited: O.R.C. § 307.95 directs that "The secretary of state . . . shall determine the validity or invalidity of the ***petition*** and the sufficiency or insufficiency of the signatures." (Emphasis added). *Walker* did not expand or extend any powers to the SOS: "R.C. 307.95(C) confers no authority upon the secretary of state to invalidate charter petitions based upon his assessment of the legality or constitutionality of the measure, if enacted." *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749 ¶ 21 (2015). "[T]his authority to determine

whether a ballot measure falls within the scope of the constitutional power of referendum (or initiative) does not permit election officials to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms." *Id.* ¶ 15.

See, e.g., State ex rel. Kilby v. Summit Cty. Bd. of Elections, 977 N.E.2d 590, 595 (Ohio S.Ct. 2012) ("any claims challenging the validity of the proposed charter amendment are premature when made before the amendment is approved by the electorate.").

E. <u>Proposition of Law No. V:</u> There is no requirement that the county government be changed in order to enact a Charter; the SOS confuses a 'charter form of government' with the statutory option of an 'alternative form of government'

As an alternate ground for rejecting the three ballot protests, Secretary Husted resuscitates the vacuous argument that "the Petitions do not provide for either an elective or appointive county executive." Husted Ruling, Exh. J to Verified Compl., p. 8. In support of that basis for invalidating the Petitions, the SOS cites *State ex. rel. Walker v. Husted*, ¶ 22. But Respondent SOS is merely quoting the *Walker* Court's description of the SOS's own argument as though it were part of the Court's ruling:

> However, Husted presented an alternative basis for invalidating the charter petitions, namely, that the charters do not satisfy the threshold requirements that define a charter initiative. Specifically, Article X, Section 3 of the Ohio Constitution requires that every county charter "shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election." And R.C. 302.02 mandates that an alternative form of county government "shall include either an elective county executive * * * or an appointive county executive."

State ex rel. Walker v. Husted, ¶ 22. The very next paragraph of *Walker* contains the Court's ruling, and shows indisputably that Respondent Husted's assertion that O.R.C. § 302.02 "mandates" a county executive played no part in the basis for the decision. The petitioners' use of a blanket incorporation-by-reference to describe the form of county government was the only reason the Court struck the charter proposals from the ballot:

While purporting to maintain the *status quo* on matters of county offices, officers,

> and their duties and manner of election, these proposed charters do not "provide the form of government of the county" or "determine which of its officers shall be elected and the manner of their election." ***One must look to sources outside the proposed charters to determine the form of government they purport to establish, and therefore they do not satisfy the legal prerequisites.***

Walker, ¶ 23 (emphasis added).

Here, the SOS and the Respondent boards of elections indulge this skewed interpretation of *Walker* to deny certification of the Petitions to the ballot. They persist in violating their non-discretionary duty to certify the Petitions for placement on the ballot because of a fatally flawed reading of Ohio Const. Art. X, § 3 and O.R.C. Chapter 302. Ohio Const. Art. X, § 3 does not require that the "form" of a county's government be changed in order to enact a Charter. The SOS and boards of election confuse a "charter form of government" with an "alternative form of government," when in fact these are completely separate alternatives.

Presently, each of the three counties is governed by a statutory board of county commissioners as provided by O.R.C. Title 3 and Article X, § 1 of the Ohio Constitution. Their powers are enumerated in O.R.C. Chapter 307. Ohio electors may establish a county charter and maintain the Board of Commissioners for executive governance. According to "Charters and Alternative Forms of County Government," Chapter 10, Ohio Secretary of State, Ballot Questions and Issues Handbook[30]:

> The Ohio Constitution authorizes the adoption of charters by counties and municipal corporations; many Ohio municipalities, and two of its counties, operate under charters approved by the voters. Additionally, the Ohio Revised Code provides for other alternative plans of government that may be adopted by municipalities, townships and counties.

According to the Ohio County Commissioners Handbook, "Ohio counties have two options for structural change – county charters and a statutory alternative form of county

30 *Available at* electionsonthe.net/oh/clark/pdfs/IncomeTaxMuniSchool.pdf (accessed Aug. 29, 2016).

government." *Id.*, Chapter 2, "County Structural Options" (Aug. 2010).[31] The Ohio Attorney General views adoption of a county charter as a way by which "the people of any county may increase the authority of their county government." OAG 85-047.

Establishing a charter is distinct and discrete from the process to establish an alternative form of county government. The very title assigned to O.R.C. § 302.01 says, "Electors ***may*** adopt alternative form of county government." (Emphasis added.) Section 302.01 continues:

> The electors of any county ***may*** adopt an alternative form of county government authorized by the provisions of sections 302.01 to 302.24, inclusive, of the Revised Code. Upon adoption as provided by such sections, said alternative form of government shall take the place of the form of government then existing in such county and the provisions of sections 302.01 to 302.24, inclusive, of the Revised Code, applicable to the adopted alternative form of government shall be controlling in such county as to all matters to which they relate, and other provisions of the general laws of the state shall be operative therein only insofar as they are not inconsistent with the aforesaid provisions.

(Emphasis added). The word "may" implies discretion. *See, e.g., Creed v. Sauline*, 74 Ohio St.3d 402, 407-408 (1996). And Article X, § 3 of the Ohio Constitution states that "The people of any county ***may*** frame and adopt or amend a charter . . .," and that "[e]very such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election."(Emphasis added). "The word 'may' connotes discretion." *Thomas v. Thomas*, 2004-Ohio-2136, 03AP1106, 04-LW-1828 (10th Dist.); *Coleman Young Motors, Inc. v. Limbach*, 51 Ohio App.3d 117, 121 (11th Dist. 1988).

Relators in this case discretionarily drafted charter provisions which legislate certain county-wide laws and also retain the statutory county elected officers. Nowhere does the Ohio Constitution require the alteration of the form of county government away from a board of commissioners to the creation of a new county executive position as a prerequisite for the passage of a charter proposal. All that is required is that the form of that government be

---

31 *Available at* www.ccao.org/userfiles/HDBKCHAP002-2010.pdf (accessed Aug. 29, 2016).

sufficiently detailed within the petition so that a voter need not look outside the document to understand what is being proposed. This is the essence of the holding in *State ex rel. Walker v. Husted*.

F. <u>Proposition of Law No. VI:</u> No Laches Defense Is Available Here

Respondent Husted asserts as his Sixth Defense that the Complaint is barred by laches. Husted Answer at 8. He is wrong. Respondent issued his Decision on the three counties' protests on August 15, 2016. Relators filed suit four days later, on August 19, 2016. "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. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, (1995). A delay as brief as nine days can preclude its consideration of the merits of an expedited election case. *State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88 Ohio St.3d 187, 189, 724 N.E.2d 775 (2000). But here, four days passed between the Decision and filing of the mandamus case. Relators had to gather evidence and more than a dozen affidavits, review legal precedent and draft and file the suit. They have caused no delay in bringing or pursuing this lawsuit. Prejudice is essential for laches to apply. *State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205, ¶ 11. But here, there is no prejudice.

"[T]he fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits." *State ex rel. Becker v. Eastlake*, 93 Ohio St.3d 502, 505 (2001). Laches is inapplicable here; this case must be considered on its merits.

G. <u>Proposition of Law No. VII:</u> This Court will issue a Writ of Mandamus to require the Secretary of State to validate a petition when the petition meets procedural requirements.

Mandamus relief is appropriate where (1) the respondents have a clear legal duty, (2) the petitioners have a clear legal right to the relief sought, and (3) there is no plain and adequate

remedy in the ordinary course of the law. *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 45, 693 N.E.2d 794 (1998). This Court grants writs of mandamus to compel placement of proposed charter provisions on the next general ballot. *E.g., State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 53, 572 N.E.2d 649 (Ohio 1991) (proposed charter amendment ordered onto ballot despite delay caused by objections to amendment's substantive content). "In extraordinary actions challenging the decisions of the Secretary of State and boards of elections, the standard is whether they engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions." *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3 d 216, 2002-Ohio-5923, 778 N.E.2d 32, ¶ 11. Respondents have acted in clear disregard of applicable legal provisions.

H. Proposition of Law No. VIII: Expedited relief is warranted in election matters concerning what measures go onto the ballot.

Relators have promptly, timely, diligently, and responsibly acted to bring and pursue this litigation. Relators' efforts to seek adoption of their county charter proposal at the ballot box would be seriously undermined by a delay in the election where the matter is put to a vote. The ballot must be prepared by 60 days prior to the election (approximately September 8, 2016). Expedited review is essential to secure the people's right to participate in their community governance.

Mandamus actions are frequently used in the election context, because there is no adequate remedy at law. *See, e.g., State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 26, 941 N.E.2d 782, 793 (2011) ("because of our recognition of mandamus as the appropriate remedy and the need to resolve this election dispute in a timely fashion, relators lack an adequate remedy in the ordinary course of the law"). Relators seek a Writ of Mandamus to compel the Secretary of State and Athens, Meigs and Portage County Boards of Elections to comply with their non-discretionary duty to certify the respective Petitions to the November 8, 2016 general election

ballot. The electors have the right to vote on the proposed charter. Damages cannot provide adequate compensation for a violation of voters' fundamental rights to vote on a County Charter.

IV. CONCLUSION

Constitutionally and statutorily, Respondents are foreclosed from conducting any more than the merest ministerial review. When they stray beyond the review and validation of the Relators' Petitions for form, Respondents encounter deep constitutional history and Article I, § 2 of the Ohio Constitution. The federal First Amendment and its Ohio counterpart also bulwark the Petitions and proposed County Charters from any meddling under the guise of "all powers" or other reviews. The Secretary of State and the boards of election may not engraft their flawed interpretation of "alternate form of county government" onto their review.

The Court must issue a peremptory writ of mandamus, or alternatively, an alternate writ, pursuant to R.C. Chapter 2731, which requires Respondents Ohio Secretary of State, Athens County Board of Elections, Meigs County Board of Elections and the Portage County Board of Elections to comply with the requirements of O.R.C. §§ 307.94 and 307.95 and the Ohio Constitution by immediately certifying the Petitions to the November 8, 2016 ballot for a public vote in the respective three counties.

Respectfully submitted,

/s/ James Kinsman
James Kinsman, Esq. (S.Ct. #0090038)
P.O. Box 24313
Cincinnati, OH 45224
(513) 549-3369
james@jkinsmanlaw.com

/s/ Terry J. Lodge
Terry J. Lodge, Esq. (S.Ct. #0029271)
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
(419) 205-7084
Fax (440) 965-0708
lodgelaw@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, I sent a copy of the foregoing "Relators' Merit Brief" via electronic mail to the following:

Keller J. Blackburn (0080777)
Zachary L. Saunders (0088223)
keller.blackburn@athenscountyprosecutor.org
zach.saunders@athenscountyprosecutor.org

Collen S. Williams (0065079)
Jeremy Fisher (0090031)
cwilliams@meigscountyprosecutor.com
jfisher@meigscountyprosecutor.com

Victor V. Vigluicci (0012579)
Denise L. Smith (0017811)
Charmine Ballard (0074689)
vvigluicci@portageco.com
dsmith@portageco.com
cballard@portageco.com

Nicole M. Koppitch (0082129)
Brodi J. Conover (0092082)
nicole.koppitch@ohioattorneygeneral.gov
brodi.conover@ohioattorneygeneral.gov

/s/ Terry J. Lodge
Terry J. Lodge, Esq. (S.Ct. #0029271)