

IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex rel.* SANDUSKIANS) CASE NO. 2022-1103
FOR SANDUSKY, *et al.*,)
)
)
Relators,)
)
vs.)
)
CITY OF SANDUSKY, OHIO *et al.*,)
)
)
Respondents.)

**MERIT BRIEF OF RESPONDENTS CITY OF SANDUSKY, LAW DIRECTOR
BRENDAN HEIL, RICHARD BRADY, DENNIS MURRAY, BLAKE HARRIS, MIKE
MEINZER, STEVE POGGIALI, WES POOLE, AND DAVE WADDINGTON**

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STATEMENT OF THE FACTS

Respondents City of Sandusky, Law Director Brendan Heil, Richard Brady, Dennis Murray, Blake Harris, Mike Meinzer, Steve Poggiali, Wes Poole, and Dave Waddington (collectively, “Respondents”) are an Ohio municipal corporation (“City”), its Law Director (“Heil” or “Law Director”), and its legislative body (the “City Commissioners”). Complaint, ¶ 4-12. Pursuant to Article XVIII of the Constitution of the State of Ohio, the City of Sandusky has adopted a Charter which contains several provisions applicable to the instant case, certified copies of each applicable provision are included in Respondents’ evidentiary materials submitted contemporaneously with this Merit Brief.

On August 3, 2022, the Clerk of the Sandusky City Commission received a “Petition for Submission of Proposed Amendment to Charter” (the “Petition”) expressly invoking the following legal authority to amend the Charter of the City of Sandusky: “Constitution of Ohio, Art. XVIII, Section [*sic*] 9 and 14; R.C. 731.28-.41, 3503.06.” Complaint, Attachment B to Exhibit 1. The Petition consisted of 21 separate parts, with a total of 619 signatures thereon. Complaint, ¶¶19 and Attachment A to Exhibit 1 of the Complaint (receipt for Petition from Finance Director for the City of Sandusky).

Each part of the Petition included the following identical language of the proposed amendment to the Charter of the City of Sandusky:

Be it Ordained by the Electors of the City of Sandusky.

An Amendment to Charter Section 25-Expenditures.

Amending Section 25 Paragraph 4 to read as follows:

Real property owned by the City, with the exception of existing or future park property owned by the City, may be sold or leased by the City with competitive bidding. Transparent negotiations for sale or lease of City property, by the City Manager, are required.

The City Manager and City Commission shall not approve the sale, lease or private development on existing or future park property, in whole or part thereof, including park property under lease during the circulating of this Charter Amendment process, without approval by a majority of the electors of the City voting on the question at a general election. This Charter Amendment shall take effect and be in force from and after the earliest date allowed by law.

Id. The Petition did not contain a full and complete copy of Section 25 of the Charter, as required by R.C. 731.31 (the very authority specifically referenced in the Petition itself). *Id.* Section 25 of the Charter of the City of Sandusky, which contains no numbered paragraphs, reads in its entirety as follows:

S 25 EXPENDITURES.

Until otherwise provided by the City Commission, the City Manager shall act as the purchasing agent for the City, by whom all purchases shall be made, and who shall approve all vouchers for the payment of the same. Such purchasing agent shall also conduct all sales of personal property which the City Commission may authorize to be sold as having become unnecessary or unfit for the City's use.

All purchases and sales shall conform to such regulations as the City may from time to time prescribe; but in either case, if an amount in excess of \$1,000 is involved, competitive quotations shall be obtained. When it is anticipated an expenditure will exceed \$10,000, formal competitive bidding shall be required; no such expenditure shall be split up for the sole purpose of evading this requirement.

When purchases or sales are made on joint accounts of separate departments, the purchasing agent shall apportion the charge or credit to each department. He or she shall see to the delivery of supplies to each department, and take, and retain the receipt of each department therefor.

Real property owned by the City may be sold or leased by the City without the need for competitive bids. Negotiations for the sale or lease of City property are permissible, where deemed appropriate by the City Manager, for the benefit of the City.

Competitive bidding shall not be required where the purchase consists of supplies, a replacement part or supplemental parts, or services for products, equipment or property owned or leased by the City and the only source of supply for such supplies, parts or services is limited to a single provider.

When an expenditure, other than the compensation of persons employed by the City, exceeds \$10,000, such expenditure shall first be authorized and directed by ordinance or resolution of the City Commission, and no contract involving an expenditure in excess of such sum shall be made or awarded, except upon approval of the City Commission.

The Petition's failure to comply with the very legal authority it expressly invoked, R.C. 731.31, paired with the fact that the language used within the Petition make it impossible to determine

precisely how the Petitioners want to “amend” Section 25 of the Charter led the City of Sandusky Law Director, Brendan Heil, to determine that the Petitions were legally insufficient and fatally flawed. Affidavit of Law Director Brendan Heil.

Separate from this deficiency in the Petition, Relators’ August 3, 2022 submittal to the City presented the City with a separate problem—*timeliness*. Relators allege that the Petition was required to be submitted to the Board of Elections by the City no later than August 10, 2022. Compl., ¶19. Relators do not specifically identify the legal authority for that deadline in the Complaint or their Merit Brief. However, another statutory provision expressly referenced in the Petition itself, R.C. 731.28, requires submittals to the Board of Elections within ninety (90) days before the next general election (*i.e.*, August 10, 2022). Importantly, R.C. 731.28 requires the City Auditor or Clerk of Council to hold any petitions submitted for a period of ten (10) days before transmitting a copy of such petitions to the Board of Elections. The Petitions were not submitted to the City with a sufficient amount of time for the City to comply with R.C. 731.28.

Notwithstanding the facial deficiencies in the Petition and the apparent untimeliness of the submittal, the City of Sandusky submitted the Petition to the Erie County Board of Elections for verification of signatures on August 11, 2022. Complaint, ¶19. The Erie County Board of Elections verified that the Petition contained 466 valid signatures. Complaint, ¶20.

On August 24, 2022, Relator Craig McCloskey II hand delivered a letter to the City of Sandusky Law Director, Brendan Heil, requesting that he initiate a writ of mandamus pursuant to R.C. 733.58 and 733.59 et seq., and on September 2, 2022, Mr. Heil sent an email to Mr. McCloskey’s legal counsel informing her that he would not be initiating a mandamus action against the City Commission as he has no legal duty to do so. Complaint, ¶22-24 and Exhibit 3 to Complaint.

On September 8, 2022, Relators filed the within Complaint for Writ of Mandamus and Award of Attorney Fees. The same day, this Court issued a scheduling order requiring Respondents to answer the Complaint on September 9, 2022 and file their Merit Brief by September 15, 2022. Respondents timely answered the Complaint. Respondents' Merit Brief follows now.

LAW AND ARGUMENT

A. Standard of Review.

To be entitled to a writ of mandamus, a petitioner must establish a clear legal right to the requested relief, a clear legal duty on the part of a respondent to grant the relief, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Pennington v. Bivens*, 166 Ohio St.3d 241, 243, 2021-Ohio-3134, 185 N.E.3d 41; citing *State ex rel. Commt. for Charter Amendment Petition v. Maple Hts.*, 140 Ohio St.3d 334, 2014-Ohio-4097, 18 N.E.3d 426, ¶ 17. To prevail, petitioners must show that Law Director Brendan Heil abused his discretion in finding that the petition was insufficient. *State ex rel. Sinay v. Soddors*, 80 Ohio St.3d 224, 232, 685 N.E.2d 754 (1997).

B. Relators do not have a clear legal right to have the Petition submitted to the Board of Elections, and Respondents do not have a clear legal duty to pass an ordinance to forthwith certify the Petition to the Board of Elections.

i. Relators should be estopped from asserting that R.C. 731.28 through 731.41 do not apply to its Petition.

Relators asked Respondents to review the Petition under the authority set forth in R.C. 731.28 through 731.41. *See* Petition (expressly invoking the legal authority of R.C. 731.28 through 731.41), *see also* Relators' determination under R.C. 731.28 that the deadline to submit the Petition to the Board of Elections was August 10, 2022. Respondents acquiesced to Relators' request, and

determined the Petition did not comply with those requirements.¹ Relators should be estopped from now coming to this Court and obtaining the extraordinary relief of a writ of mandamus on the grounds that R.C. 731.28 through R.C. 731.41 do not apply.

The doctrine of judicial estoppel prohibits a party from raising an argument inconsistent with one successfully and unequivocally asserted by the same party earlier. *State v. Washington*, 137 Ohio St.3d 427, 434, 2013-Ohio-4982, 999 N.E.2d 661; *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 331-332, 2007-Ohio-6442, 879 N.E.2d 174. Relators successfully and unequivocally asked Respondents to review a Petition under R.C. 731.28-41 and were successful in having Respondents review the Petition under that authority. *See* Affidavit of Law Director Brendan Heil. Respondents should be estopped from claiming now that the City was wrong to do exactly what they asked for, just because they are unhappy with the result.²

Alternatively, the doctrine of equitable estoppel should operate as a bar to Relators arguing that R.C. 731.28 through R.C. 731.41 do not apply. Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.³ *State ex rel. Chavis v. Sycamore City Sch. Dist. Bd. of Educ.*, 71 Ohio St.3d 26, 34-35 (1994). Here, Relators' Petition induced Respondents to

¹ An explanation of the reasons why the Petition fails to comply with R.C. 731.28 through R.C. 731.41 follows *supra* in Section B.iii of the Law and Analysis section of this Merit Brief.

² Even if this Court were to decide that the doctrine of judicial estoppel does not apply, the fact that Relators have now changed their argument so dramatically, and now claim that R.C. 731.28 through 731.41 do not apply, demonstrates that Relators do not have a clear legal right and Respondents did not have a clear legal duty to submit the Petition to the Board of Elections.

³ Although the doctrine of equitable estoppel generally requires actual or constructive fraud, *State ex rel. Richard v. Bd. of Trustees of Police & Firemen's Disability and Pension Fund*, 69 Ohio St.3d 409, 414, (1994), this case should serve as one of the circumstances where actual or constructive fraud need not be present for the doctrine to apply.

analyze the Petition under R.C. 731.28-.41. Relators should be estopped from now arguing that R.C. 731.28-.41 do not apply.

Application of either of the equitable doctrines of estoppel to bar Relators from asserting that the legal authority invoked in the Petition itself *does not* apply to the Petition itself allows this Court to dispose of this case without the necessity of reaching any issue of the constitutional issues implicated by Relators' "new" argument that R.C. 731.28 through 731.41 *do not* apply. Well settled precedent of this Court holds that "[a] court will not exercise its power to determine the constitutionality of a legislative enactment where other issues are apparent in the record, the determination of which will dispose of the case on its merits." *Greenhills Home Owners Corp. v. Village of Greenhills*, 5 Ohio St.2d 207, 215 N.E.2d 403 (1966), paragraph one of the syllabus (declining to rule on the constitutionality of a zoning ordinance and deciding that the party seeking to have the ordinance ruled unconstitutional was estopped from making such an argument where that party had previously aided in procuring the legislation now challenged); *State v. Talty*, 103 Ohio St.3d 177, 179, 2004-Ohio-4888, 814 N.E.2d 1201 ("It is well settled that this court will not reach constitutional issues unless absolutely necessary."). This Court should find that Relators are estopped from asserting their new theory that only Article XVIII Sections 8 and 9 of the Constitution and Section 82 of the Charter apply, and R.C. 731.28 through R.C. 731.41 do not apply. Consistent with that finding, and as discussed below, this Court should find that the Relators failed to demonstrate a clear legal right to have the Petition submitted to the Board of Elections for placement on the ballot in the November 8, 2022 general election because the Petition failed to comply with R.C. 731.31, and Respondents had no clear legal duty to submit the Petition to the Board of Elections because the Petition failed to comply with R.C. 731.31.

ii. Relators do not have a clear legal right to have the untimely Petition submitted to the Board of Elections and Respondents do not have a clear legal duty to submit the untimely Petition to the Board of Elections.

Relators allege that they submitted the Petition to Respondents on August 3, 2022. Relators also admit that the Petition had to be submitted to the Board of Elections no later than August 10, 2022. The source of the August 10, 2022 deadline which Relators admit applies is found in R.C. 731.28. Importantly, R.C. 731.28 also contains a mandatory requirement that the Clerk of Council hold the petition for ten days prior to transmittal to the Board of Elections. The purpose of this inspection period is to allow the electors and other interested persons an opportunity to inspect the petition, determine whether the names of the petition are electors of the municipality, or whether the petition complies with law, and for the further purpose of giving electors the opportunity to withdraw their names if they so desire. *State ex rel Thurn v. Cuyahoga Cty. Bd. of Elections* 72 Ohio St.3d 289, 294 (1995); *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 18 (1918). Further, it is well settled that compliance with R.C. 731.28 is mandatory and strict compliance is required. *Thurn*, at 294. Indeed, a certification prior to the ten-day period could not lawfully occur. *Id.* Under the law set forth in the Petition, the August 3, 2022 submission to the City was not timely, as a lawful certification to the Board of Elections could not occur until after Respondents held the Petitions for the ten-day period required by R.C. 731.28, August 13, 2022, three days *after* the August 10, 2022 deadline for submission to the Board of Elections set forth in R.C. 731.28.⁴

iii. Relators do not have a clear legal right, and Respondents do not have a clear legal duty to pass an ordinance to forthwith certify/approve the Petition because the Petition is insufficient and invalid under Ohio Revised Code Section 731.31.

⁴ The City submitted the Petition to the Board of Elections on August 11, 2022, 8 days after receiving it. According to R.C. 731.28, the City should have submitted the Petition on a date after August 13, 2022. The failure to hold the Petition for the full 10 days did not, however, result in any prejudice to Relators because Relators' submittal of the Petition on August 3, 2022 was already untimely where the intention was to place the Petition on the November 8, 2022 ballot.

The Petition is a proposed “amendment” to “Section 25 Paragraph 4” of the Charter of the City of Sandusky. *See* Petition. However, the Petition does not contain a full and correct copy of the text of Section 25. The Petition’s failure to include the entire text of Section 25 is a fatal flaw under established jurisprudence from this Court and R.C. 731.31.

In *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 114, 2002-Ohio-5334, 776 N.E.2d 1050, 1056, this Court clearly instructs that a municipality has no duty to transmit a petition for charter amendment to a county board of elections where the petition does not fully and substantially present the proposed amendment to the electors, as required by R.C. 731.31. In *Hackworth*, this Court interpreted the language of Sections 8 and 9 of Article XVIII which require the legislative authority of a city upon petition of ten percent of the electors to “forthwith” authorize by ordinance an election on a proposed charter amendment. *Hackworth*, ¶30. The Court recognized that the failure of a municipal legislative authority to transmit a legally sufficient petition will entitle the complaining party to extraordinary relief in mandamus. *Id.* However, as the Court explained, there is no duty to submit a proposed charter amendment to the electorate unless all statutory requirements were met. *Id.* at ¶31.

Section 731.31 of the Ohio Revised Code requires that “...each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure.” Section 731.31 of the Ohio Revised Code applies to charter amendment petitions. *State ex rel. Becker, et al. v. Eastlake*, 93 Ohio St.3d 502, 506, 756 N.E.2d 1228, 1232 (2001) (in which this Court held that omitting the title of a proposed charter amendment is a fatal defect in an initiative petition because it interferes with the petition's ability to fairly and substantially present the issue and might mislead electors). Because none of the twenty-one (21) part-petitions

comprising the Petition contains a full and correct copy of the title and text of Section 25, the Petition fails to comply with R.C. 731.31.

Under R.C. 731.28, a board of elections' duty to put a measure on the ballot arises only "after the auditor or clerk certifies the sufficiency and validity of the initiative petition to the board of elections." A city council need not submit a proposed charter amendment to the electorate unless it is satisfied with the sufficiency of the petitions and that all statutory requirements are fairly met. *State ex rel. Spadafora v. Toledo City Council*, 71 Ohio St.3d 546, 549, 644 N.E.2d 393, 395 (1994); *Semik v. Cuyahoga Cty. Bd. of Elections*, 67 Ohio St.3d 334, 335-336, 617 N.E.2d 1120, 1122 (1993). Portions of pertinent statutes that do not conflict with the Ohio Constitution and the city charter apply. *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 55, 641 N.E.2d 1075, 1078 (1994).

R.C. 731.31 does not conflict with the Ohio Constitutional provisions which authorize charter amendments by initiative petition. Those provisions are:

XVIII.09 Amendments to charter; submission; approval

Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. **The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission;** and copies of proposed amendments may be mailed to the electors as hereinbefore provided for copies of a proposed charter, or pursuant to laws passed by the general assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

and

XVIII.08 Submission of question of election of charter commission; approval

The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors **shall forthwith, provide by ordinance for the submission to the electors**, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

Emphasis added.

R.C. 731.31 provides, pertinent part, as follows:

Any initiative or referendum petition may be presented in separate parts, **but each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure**, and each part of any referendum petition shall contain the number and a full and correct copy of the title of the ordinance or other measure sought to be referred.

R.C. 731.31 does not conflict with the Ohio Constitutional authority for petition of the electors to amend a city charter, because Sections 8 and 9 of Article XVIII do not address the form in which a proposed charter amendment is to be submitted to the electors.

The purpose of R.C. 731.31's requirement to contain the title and full text of an initiative petition (or charter amendment, *see Becker, supra*) is to "fairly and substantially present the issue to electors in order to avoid misleading them." *Stutzman v. Madison Cty. Bd. of Elections*, 93 Ohio St.3d 511, 514, 757 N.E.2d 297, 302 (2001), citing *Christy v. Summit Cty. Bd. of Elections*, 77

Ohio St.3d 35, 38, 671 N.E.2d 1, 4 (1996). The Petition’s omission of the entirety of the text of Section 25 is a fatal defect because it interferes with the Petition’s ability to fairly and substantially present the issue of the proposed Charter amendment to the electors, resulting in the possibility that electors will be misled.

There is a real possibility of misleading voters where the language in this Petition does not incorporate the entirety of the charter provision it purports to amend because the context for the amendment is lacking. The Petition directs the reader to “Paragraph 4” of Charter Section 25. Charter Section 25, the provision of the Sandusky Charter to be amended, is not divided into numbered paragraphs, that is, there is no paragraph 4 labeled in that section. There is a real question as to whether the fourth paragraph of Section 25 is to be replaced with the proposed language or whether the existing fourth paragraph will become a fifth paragraph. There is no way to determine exactly how paragraph 4 is to be amended, where there is no indication whether some of the existing language will be repealed or whether the proposed language will simply supplement the existing language of paragraph 4. Further, without the full text of Section 25 being included, there is also no guidance provided as to how the rest of Section 25 will be affected, if at all, by this amendment. Because the Petition does not “fairly and substantially present the proposed amendment to the electorate” in violation of R.C. 731.31, the City has no duty to present the deficient proposed charter amendment to the electors. *Hackworth*, 97 Ohio St.3d at 115.

“In general, election statutes in Ohio are mandatory and require strict compliance unless the statute specifically permits substantial compliance.” *Stutzman*, 93 Ohio St. 3d at 514. “In accordance with this general rule, because R.C. 731.31 does not expressly allow substantial compliance, we normally require strict compliance with it, [citation omitted], including the requirement that the petition contain a full and correct copy of the title of the ordinance.” *Id.* citing

to *State ex rel. Esch v. Lake Cty. Bd. of Elections*, 61 Ohio St.3d 595, 597, 575 N.E.2d 835, 836-837 (1991). The Petition does not strictly comply with the requirements of R.C. 731.31. The City of Sandusky has no legal duty to present the Petition to the electors.

Notwithstanding the fact that R.C. 731.28-.41 are *specifically invoked* in the Petition, and the fact that Relators have determined the deadline to submit the Petition to the Board of Elections based upon R.C. 731.28, Relators now urge that the City is obligated to submit the charter amendment to the electors *without complying with R.C. 731.28-.41* because Section 82 of the Charter imposes a mandatory obligation upon the City Commission to present any proposed amendment to the electors upon petition signed by 10% of the electors of the City.⁵

Section 82 of the Charter, reads as follows:

Amendments to this Charter maybe submitted to the electors of the City by a 2/3 vote of the City Commission, and, upon petition signed by 10% of the electors of the City setting forth any such proposed amendment, shall be submitted by such City Commission. The ordinance providing for the submission of any such amendment shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than 60 nor more than 120 days after its passage; otherwise it shall provide for the submission of the amendment at a special election to be called and held within the time aforesaid. Not less than 30 days prior to such election the Clerk of the City Commission shall mail a copy of the proposed amendment to each elector whose name appears upon the poll or registration books of the last regular municipal or general election. If such proposed amendment is approved by a majority of the electors voting thereon it shall become a part of the Charter at the time fixed therein. (Emphasis added).

The Sandusky City Charter also provides, with respect to the incorporation of the general laws of the State of Ohio:

S 65 STATE LAWS TO APPLY.

The provisions for the initiative and referendum in municipal corporations, now in force or hereafter enacted, as prescribed by the general laws of the State, shall govern.

⁵ At a minimum, Relators' dramatic and abrupt abandonment of R.C. 731.28-.41 is an admission that the legal rights and duties at issue in this mandamus action are far from "clear" and do not warrant the extraordinary relief requested.

and

S 75 GENERAL LAWS TO APPLY.

All general laws of the State applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this Charter, or with ordinances or resolutions hereafter enacted by the City Commission, shall be applicable to this City; provided that nothing contained in this Charter shall be construed as limiting the power of the City Commission to enact any ordinance or resolution not in conflict with the constitution of the State or with the express provisions of this Charter.

Read together, the Sandusky City Charter expresses that, although it has enacted specific provisions for charter amendments, the City intends that general laws of the State of Ohio will apply to the process for initiative and referendum, in particular, and to all other matters where those laws are not in conflict with the provisions of the Sandusky City Charter.

The Relators argue that, pursuant to R.C. 731.41, Section 82 of the Charter renders R.C. 731.31 inapplicable, and the City is required to submit the Petition to the electors. This argument is unconvincing, and it is important to explain why. Section 731.41 of the Ohio Revised Code provides:

Sections 731.28 to 731.41, inclusive, of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures.

The City of Sandusky adopted its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures. That provision expressly incorporates the general laws of the State of Ohio, stating that those laws shall govern. Sections 731.28 to 731.41, inclusive, therefore apply to the City's process for initiative and referendum. And, to remove all doubt that the general laws of Ohio apply to fill any gaps in the Sandusky Charter, Section 75 of the Charter provides that "[a]ll general laws of the State applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this Charter, or with

ordinances or resolutions hereafter enacted be the City Commission, shall be applicable to this City.”

This Court, in interpreting R.C. 731.41, holds that where a city charter supplants the provisions of 731.28, et seq. of the state code with its own comprehensive provisions regulating referendum or initiative, R.C. 731.41 will be applied. *State ex rel. Pennington v. Bivens*, 166 Ohio St.3d 241, 2021-Ohio-3134, ¶¶15-17. But, where a charter provides *some* rules for initiative or referendum that differ from state law and provides that all other matters with respect to referendum and initiative shall be regulated by the general laws of the state, then only those regulations which differ from state code will be applied and the remaining state code rules will also be applied. *Id.*

The City of Sandusky’s Charter does not contain a comprehensive set of provisions regulating what must be included in a petition for Charter amendment. There is nothing in the Charter which states that a petition does not need to contain full and correct copy of the title and text of the proposed Charter amendment, as required by R.C. 731.31. Nor is there anything in the Charter expressly stating that a petition is sufficient when, as is the case here, it only includes selected paragraphs from the Charter Section which the petition seeks to “amend.” Rather, Section 65 of the Charter, titled State Laws to Apply, the only section in the “Initiative and Referendum” portion of the Charter, expressly states that “[t]he provisions for the initiative and referendum in municipal corporations, now in force or hereafter enacted, as prescribed by the general laws of the State, shall govern.” Section 75 of the Charter further provides that all State laws applicable to municipal corporations which are not in conflict with the provisions of the Charter shall be applicable to the City of Sandusky.

Under *Pennington, supra*, Section 82 does not supplant R.C. 731.28, et seq., with the City’s own comprehensive provisions for what must be included in a petition for a charter amendment

via initiative petition. As such, the argument that R.C. 731.41 renders R.C. 731.31 inapplicable to the Petition is meritless. The *Pennington* opinion includes a discussion of the Court’s precedents regarding the application of state law to municipal process for initiative and referendum, which held that when the charter is silent on the pre-circulation requirements set out in R.C. 731.32, nothing in the charter conflicts with R.C. 731.32 and the statute controls.

Pennington ultimately hinged on the particular language of the Whitehall City Charter, which actually does clearly and completely supplant R.C. 731.28, et seq., with the City of Whitehall’s own procedures for the manner of circulating *referendum* petitions. As the court explained:

The language of the Whitehall City Charter leaves no room for statutes to overlay additional procedures on top of those adopted by the voters of Whitehall. Section 14 of the charter states that “ordinances and resolutions adopted by Council shall be subject to referendum to the extent and *in the manner provided in the Charter.*” (Emphasis added.) This language makes the default procedures established in R.C. 731.28 through 731.41 inapplicable to the city of Whitehall, because the charter—and the charter only—provides the manner for circulating referendum petitions. The charter does not impose any requirement to submit to the city auditor the ordinance that the petitioner seeks to refer to the people. Rather, the process in the charter provides for referendum petitions to be filed with the city attorney *after* they have been circulated. *See* Whitehall City Charter, Sections 15(a) through (c) and 16(b).

Pennington, 166 Ohio St. 3d at 246. The Sandusky Charter *does not* contain analogous language. Unlike the Whitehall City Charter, the Sandusky Charter does not preclude the applicability of the general laws of the State of Ohio. The general laws therefore operate as an overlay to provide procedures where the Sandusky Charter does not. The provisions of Chapter 731, in particular R.C. 731.31, provide a procedure where there is none set forth in a municipal charter to require the printing of a full and correct copy of the title and text of a charter provision, so as to guaranty that those voters presented with a charter amendment will be fairly and substantially apprised of the substance of the proposed amendment. Importantly, R.C. 731.31 provides a necessary

safeguard to protect the electorate from incomplete statements of the proposed language of a charter amendment that, like the language of the within Petition, only lead to confusion.

The City Commission is not obligated to submit a fatally defective petition for a Charter amendment to the electors of the City, in light of (a) this Court's holding in *Hackworth*, which applied the requirements of R.C. 731.31 as not inconsistent with the Ohio Constitutional requirement under Article XVIII, Sections 8 and 9 which require the legislative authority of a city upon petition of ten percent of the electors to "forthwith" authorize by ordinance an election on a proposed charter amendment; (b) the strong policy against misleading or confusing electors; and (c) the fact that Sections 65 and 75 of the Sandusky Charter incorporate state law into the City's Charter when no conflict arises.

iv. Relators are not entitled to attorneys' fees.

Not only are the holdings in *Hackworth*, *Becker*, *Spadafora*, *Semik*, and *Morris v. Macedonia* the proper precedents for the Law Director's analysis of whether the Petition was sufficient and valid under the law, but Relators filed the Petition pursuant to the authority of R.C. 731.28-.41, as printed on the face of the Petition. To say that Relators are entitled to attorneys' fees because the Law Director applied R.C. 731.28-.41 flies in the face of equity and reason. Further, the Law Director's determination that the Petition must be interpreted under R.C. 731.31 is proper under *Pennington*. The Sandusky Charter does not conflict with R.C. 731.31, and the Charter does not preclude the application of the general laws of the State of Ohio to the charter amendment process, unlike the City of Whitehall's charter in *Pennington*.

CONCLUSION

Relators have no entitlement to a writ of mandamus compelling the City to take any action in connection with the Petition. The City has no clear legal duty to present the Petition to the

electors because the Petition does not meet the legal requirements necessary to present a proposed Charter amendment to the electors of the City. The Petition is fatally flawed because it does not contain a full and correct copy of the text of Charter Section 25, as required by R.C. 731.31. Further, Relators should be estopped from arguing that R.C. 731.31 does not apply to examine the sufficiency and validity of the Petition where Relators invoked the provisions of R.C. 731.28 -.41 in submitting their Petition to the City.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Merit Brief of Respondents City of Sandusky, Law Director Brendan Heil, Richard Brady, Dennis Murray, Blake Harris, Mike Meinzer, Steve Poggiali, Wes Poole, and Dave Waddington has been electronically filed with the Court. A copy of the foregoing has been served electronically upon all parties of record this 14th day of September, 2022. A copy will also be served via U.S. Mail, postage prepaid, to the following on September 15, 2022:

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