

IN THE OHIO SUPREME COURT

STATE OF OHIO *ex rel.*
SANDUSKIANS FOR SANDUSKY, *et*
al.,

S.C. Case No. 2022-1103

Relators

vs.

CITY OF SANDUSKY, OHIO, *et al.*,
Respondent

REPLY BRIEF OF RELATORS

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SUPPLEMENTAL STATEMENT OF FACTS

Sandusky City Commissioners pass Ordinances regarding the submission of proposed amendments to the Charter of the City of Sandusky to the Electors of the City of Sandusky are done pursuant to Article XVIII, Section 9 of the Ohio Constitution and/or Section 82 of the Charter of the City of Sandusky. Such City Ordinances do not reference and are not passed based on R.C. 731.28-731.41.

Within the past two years Sandusky City Commissioners have passed Ordinance Nos. 20-109 to 20-113 (Relators' Exs. 9-13) and Ordinance No. 21-123. Ordinance No. 20-111 was regarding Sec. 25 of the City Charter, the same section that relators are seeking to amend. These Ordinances are regarding the submission of proposed amendments to the Charter of the City of Sandusky to the Electors of the City of Sandusky. Each specifically says that it was done pursuant to Article XVIII, Section 9 of the Ohio Constitution and/or Section 82 of the Charter of the City of Sandusky. None reference or state they are passed based on R.C. 731.28-731.41. (Relators' Ex. 6 – Affidavit of Timothy Schwanger, *passim* and Attachments A - Ordinance No. 20-111 & D - Ordinance No. 21-123) *See also* - links to City of Sandusky Ordinances regarding the submission of proposed amendments to the Charter of the City of Sandusky to the Electors of the City of Sandusky pursuant to Article XVIII, Section 9 of the Ohio Constitution and/or Section 82 of the Charter of the City of Sandusky and not any section of the Ohio Revised Code.

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<https://www.ci.sandusky.oh.us/CC%20Agendas/Ordinances/2020/20.113.pdf>

On or about August 4, 2021, the City of Sandusky Commissioners held a Special Session regarding the certification of a petition submitted by “Sandusky 4 Wards”. The petition used Form No. 6-B prescribed by the Ohio Secretary of State. Wherein at the top is says: **“Petition For Submission of Proposed Amendment to Charter**

Constitution of Ohio, Art. XVIII, Section 9 and 14, R.C. 731.25-41, 3506.06”

(Relators’ Ex. 6 – Affidavit of Timothy Schwanger at ¶¶ 5, 9, Attachs. B & D)

When “Sandusky 4 Wards” used this form: the City of Sandusky Commissions at the recommendation of Law Director Heil certified the Sandusky 4 Wards petition at a special session and within 48 hours of the petition being submitted to ensure they were sent to the Erie County Board of Elections in a timely matter to be placed on the November 2021 ballot. The petition *was not* held for 10 days after submission to the City. (Relators’ Ex. 6 – Affidavit of Timothy Schwanger at ¶¶ 5-8, Attachs. B - Sandusky 4 Wards Petition & C – Minutes from the Special Session on August 4, 2021 at the bottom of page 2)

At the special session on August 4, 2021 there was discussion about how Law Director Heil had an Ordinance prepared to present to the Commissioners. Commissioner Dick Brady even thanked Mr. Heil for “working to prepare this legislation and schedule this meeting in the past 48 hours so the process could continue and the deadlines met.” He went on to say “A “no” vote will not derail this, it is our intention to get this to the ECBOE [Erie County Board of Elections] by 4 p.m. today so the process can continue”. (Relators’ Ex. 6 – Affidavit of Timothy Schwanger at ¶¶ 5-8, Attachs. B & C at the bottom of page

2) See also recording of the special session on YouTube at <https://www.youtube.com/watch?v=XxhICRIbBFQ> at 2:38-6:13 and 8:10-8:57.

As a result of the special session for the “Sandusky 4 Wards” petition. Ordinance No. 21-123 (prepared by Law Director Heil) was passed by the City of Sandusky Commissioners. (Relators’ Ex. 6 – Affidavit of Timothy Schwanger at ¶¶ 9-10, Attach. D – Ordinance No. 21-123) See also recording of the special session on YouTube at <https://www.youtube.com/watch?v=XxhICRIbBFQ> at 2:38-6:13, 8:10-8:57 and 8:58 to 9:27.

See also recording (and below transcription) of the special session on YouTube at <https://www.youtube.com/watch?v=XxhICRIbBFQ> at 2:38 where Mr. Heil states “Um we also asked the board of elections at that time for kind of a determination because for most elections, the board of elections deadline is August 4th. So today at 4:00 pm um, by which petitions must be filed”. “[O]ur charter and the Ohio constitution required that upon receiving 10 percent of the previous total vote in the previous municipal election um varied valid signatures ... this legislative authority is required to submit that petition for the ballot at the next upcoming municipal election which would be November 2nd”. “We reviewed them for our charter requirements as we’re required to and then very quickly the next day by noon. Passed them along to the board of elections because the board of elections”

0:09 – Commissioner Brady states “Prior to tonight’s meeting, we will have an invocation offered by Commissioner Wyatt followed by the pledge of allegiance”

0:16 to 0:38 – The Pledge of Allegiance was stated by all parties

0:39 to 1:04 – Commissioner Brady has Commission Clerk, Mrs.Kressler take the role call of members present

1:05 - Commissioner Brady states “Mrs.Kressler, are there any uh resident uh questions that you’ve received in writing regarding uh our one agenda item tonight?”

1:14 – Commission Clerk Mrs.Kressler states “No, Mr. President, I have not”.

1:17 – Commissioner Brady states “ There any residents that wish to speak, uh come to the podium and speak regarding the agenda”

1:22 – Paused to see if anyone would come forward

1:24 – Commissioner Brady states “It appears not. Commissioners, I think what we have to do next is uh accept communication from staff recommending just one piece of legislation that I have a motion to accept this communication. So second a motion and a second discussion an objection that motion is the approved. Hearing no objection, that motion is approved. We will turn to our one item that is on our agenda this evening. Mrs. Kressler, will you present that one item?”

2:01 - Commission Clerk Mrs.Kressler states “Yes. This is an ordinance providing for the submission to the electors of the city of Sandusky. As set forth in a petition submitted to the city commission and declaring an emergency”

2:18 - Commissioner Brady states “Commissioners, having heard the ordinance, how do you wish to proceed?”

2:20 – Commissioner Murray states “Mr. Chairman”

2:21 – Commissioner Brady states “Commissioner Murray”

2:22 - Commissioner Murray states “I move for the adoption of this ordinance under section 14 of the city’s charter”

2:25 – The rest of the commissioners second the motion.

2:27 - Commissioner Brady states “A motion in the second discussion..... Mr. Heil, you are the author of uh this piece of legislation. I wonder if you’d share with us both the contents of the legislation and the chronology that got us here”

2:38 – Law Director Heil states “Sure. Um through you commission president uh before you, you have an ordinance that would basically accept the petitions that have been submitted contingent on the validity of their signatures and submit that to the board of elections to be placed on the November 2nd ballot. What we have here today, what happened was basically um we received citizen petitions uh on Monday at 3 30 p.m. um and our charter and the Ohio constitution required that upon receiving 10 percent of the previous total vote in the previous municipal election um varied valid signatures which is actually which is 351 signatures that this legislative authority is required to submit that petition for the ballot at the next upcoming municipal election which would be November 2nd um. So we were, we received these which is the first step um Monday at 3 30 p.m. The finance director and myself received them from the citizens who are leading this petition drive. We reviewed them for our charter requirements as we’re required to and then very quickly the next day by noon. Passed them along to the board of elections because the board of elections is actually the entity that verifies and confirms the validity of the signatures and gives us a final signature count to determine whether or not that 10 % threshold has been met. Um we also asked the board of elections at that time

for kind of a determination because for most elections, the board of elections deadline is August 4th. So today at 4:00 pm um, by which petitions must be filed um and and we asked them to you know clarify that deadline if it just needed to be the petitions or if it needed to be the entire authorizing ordinance with the ballot language as well and they were unable to provide us an answer before this meeting started. Their legal counsel did not give us that opinion uh couldn't explain to me that she did not have enough time. So we basically have before us in an abundance of caution we have drafted the ordinance um with the understanding that it's contingent on the board verifying the 351 signatures um so that we can submit that if it's commissions' pleasure, to the board of elections by four to hopefully comply with their deadlines um as quickly as possible and avoid any confusion or ambiguity to make sure that if if the citizen petition is is enough signatures it will be on the November election um. Regarding today's vote, um there's very little generally very little discretion that legislative authorities have in determining the validity or of the actual language it's not a subjective decision. We're actually required by our charter so long as all the procedural requirements are met to submit it on the ballot and that is what we are here to do today. If there are any questions or anything that might require some extra clarification, I'm happy to answer those as well but that is what you have before you in your packet. You have the ordinance with the proposed ballot language which is in the center uh section, some authorizing sections and then also attached is the actual petition with the actual language that was submitted to us verbatim"

6:14 - Commissioner Murray states "Mr. Chairman"

6:15 - Commissioner Brady states "Commissioner Murray"

6:16 - Commissioner Murray states "So, Mr. Heil, I want to and I think probably the entire commission wants to do this in a way that makes certain that this is more likely to get on the ballot than not."

6:27 - Law Director Heil states "Sure"

6:28 - Commissioner Murray states "And um I want to make sure I explore with you what the contingency is because what we really don't want to do is have the city incur the expense of a special election if that can be avoided. So, the contingency as I understand it as you have described it and as I see here though I might be wrong is that the board of election just has to do its job and make sure that it verifies the signatures. We're not saying that has to be done today that can be done anytime they deem appropriate and then this gets paired with the petitions that they're approved"

7:03 - Law Director Heil states "Correct. The board of elections technically has 10 days to verify signatures. They're informed us that they expect it to be done by tomorrow or Friday but upon their verification and certification that the requisite number of signatures had been submitted. This ordinance would become effective and we would subm... they would be required to submit the ballot language for the November election"

7:25 - Commissioner Murray states "Okay that satisfies my question, thank you"

7:28 - Commissioner Brady states “Additional comments or questions, commissioners”

7:32 - Commissioner Murray states “Mr. Chairman, I’m just going to note that um, I think this is a really important right it’s a sacred right to uh to take something like this by petition to the ballot, that’s really important. I don’t agree with the proposed charter change. It’s not the time to explore that today, there’ll be plenty of opportunity for that in the months ahead but this is a really important right that the citizens have and that’s why I’m taking a vote to make sure it goes on the ballot but I want to make sure it’s also clear that I don’t agree with the proposal and would vote it down as a... as a citizen.”

8:05 - Commissioner Brady states “Thank you, Mr. Murray. Any additional comments or questions, Commissioners?” “Pauses and continues when none is presented”

8:10 - Commissioner Brady states “Mr. Heil and uh uh Mr. Orzik, I want to commend you both for uh the speed with which you pulled this together uh in really literally less than 48 hours from receiving uh these uh petitions. We have moved at uh for government at warp next speed I will say that uh and and I appreciate your efforts in doing that. Uh our efforts here tonight uh might be for functionary because I don’t think our vote really counts or matters. A no vote is not going to derail this and it’s not our intention to derail it. It’s our intention to get this, get this legislation forwarded before four o’clock tonight to the board of elections and the process can continue. Mrs. Kressler, will you call the roll on the motion please?”

8:58 to 9:27 – They proceed to take a roll call, pass the ordinance and refer to the board of elections. Meeting adjourned.

<https://www.youtube.com/watch?v=XxhICRIbBFQ>.

Sanduskians for Sandusky used the same Form No. 6-B prescribed by the Ohio Secretary of State as “Sandusky 4 Wards”. Wherein at the top is says:

“Petition For Submission of Proposed Amendment to Charter

Constitution of Ohio, Art. XVIII, Section 9 and 14, R.C. 731.25-41, 3506.06”

(Relators’ Ex. 1 – Craig McCloskey II Affidavit at 6, Attach. B)

Member of Sanduskians for Sandusky and residents of Sandusky Craig McCloskey II and Jennifer Ashburn were aware of how quickly the City certified the “Sandusky 4 Wards” petitions and ensured said petitions was submitted to the Erie County Board of Elections on time. They relied on this when they submitted the Petition for Sanduskians

for Sandusky on August 3, 2022, five days for the next regularly scheduled Commission meeting on August 8, 2022 (Relators Exs. 7-8)

LAW AND ARGUMENT

A. *Pennington v. Bivens* is the controlling authority regarding this Writ and as such, the Petitions in question are valid and must be certified and submitted to the electorate.

City of Sandusky Respondents and Law Director Heil are being disingenuous regarding their argues. They insist that since Relators herein used a standardized Secretary of State petition form that has R.C. 731.25-41 printed on that Relators’ specifically referred those section. City of Sandusky Respondents and Law Director Heil ignore that R.C. 731.41 states “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.” (emphasis added). Based on City of Sandusky Respondents and Law Director Heil argument; Relators did reference the appropriate R.C. when the Petition list R.C. 731.41. See *State ex rel. Ebersole v. City of Powell*, 2014-Ohio-4078, ¶ 5, 141 Ohio St. 3d 9, 10, 21 N.E.3d 267, 268 holding that:

statutory requirements governing referendum and initiative petitions also apply to charter amendments, insofar as those statutory requirements do not conflict with the Ohio Constitution or the city charter. See *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050, ¶ 31; *State ex rel. Spadafora v. Toledo City Council*, 71 Ohio St.3d 546, 549, 1994 Ohio 473, 644 N.E.2d 393 (1994).

Within the past two years Sandusky City Commissioners have passed Ordinance Nos. 20-109 to 20-113 and Ordinance No. 21-123. Ordinance No. 20-111 was regarding Sec. 25 of the City Charter, the same section that relators are seeking to amend. These

Ordinances are regarding the submission of proposed amendments to the Charter of the City of Sandusky to the Electors of the City of Sandusky. Each specifically says that it was done pursuant to Article XVIII, Section 9 of the Ohio Constitution and/or Section 82 of the Charter of the City of Sandusky. None reference or state they are passed based on R.C. 731.28-731.41. (Relators' Ex. 6 – Affidavit of Timothy Schwanger, *passim* and Attachments A - Ordinance No. 20-111 & D - Ordinance No. 21-123) *See also* - links to City of Sandusky Ordinances regarding the submission of proposed amendments to the Charter of the City of Sandusky to the Electors of the City of Sandusky pursuant to Article XVIII, Section 9 of the Ohio Constitution and/or Section 82 of the Charter of the City of Sandusky and not any section of the Ohio Revised Code.

Furthermore, the Petition in question in *Pennington v. Bivens*, 2021-Ohio-3134 used Form No. 6-B prescribed by the Ohio Secretary of State wherein at the top is says: **“Petition For Submission of Proposed Amendment to Charter** Constitution of Ohio, Art. XVIII, Section 9 and 14, R.C. 731.25-41, 3506.06” and this Court found that the city charter applied. (Relators Ex. 8)

Relators are not estopped because a Law Director decided the Petitions were insufficient. The cases cited by City of Sandusky Respondents and Law Director Heil regarding estoppel, are when the issue has been litigated in court.

Relators are adamant that *Pennington v. Bivens* is controlling and as such the Petitions are valid. If this Court disagrees, Relators ask that this Court follow *State ex rel. Ohioans for Wildlife Conservation v. Taft*, No. 98AP-1008, 1998 Ohio App. LEXIS 4274, at *21-22 (Ct. App. Sep. 16, 1998)

However, the statutory provisions at issue in such cases, R.C. 731.31 and R.C. 305.32, do contain similar language to the constitutional provision applicable here (*i.e.* -- -- the requirement of a "full and correct copy of the title and text" of the proposed law or ordinance). Hence, what we can take from cases such as *Esch* and *Burech* is that the purpose of such "full text" requirement is to apprise the electors and/or signers of the nature of the proposed legislation and to prevent misleading the electors and/or signers. What is important is that the petition fairly and substantially present the issue(s) to the electors.

The petition here included the entire subsection (S), which defines "game birds" but did not set forth the remaining forty-eight definitions under the section. The only proposed change was to subsection (S). The petition is clear as to the nature of the proposed legislation and is not misleading. Thus, the petition fairly and substantially presents the issue.

We note that the Ohio Constitution reserves to the people the right to propose legislation by initiative. As such, the power of initiative should be liberally construed to effectuate the rights reserved. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St. 3d 1, 4-5, 591 N.E.2d 1186. The only authority directly on point herein, Article II, Sections 1b and 1g, indicates that the full text of the *proposed* law must be set forth in the petition. In the case at bar, co-respondent, in the first part of its petition, proposed a change only to R.C. 1531.01(S) -- -- to simply delete the words "mourning doves" from the definition of "game birds" and to delete the last sentence in R.C. 1531.01 regarding the hunting season for mourning doves. For all of the reasons discussed above, such petition meets the constitutional requirements.

B. Relators are Entitled to Attorneys' Fees

Herein, the City Commissioners have passed numerous to amend the City charter wherein the do so based on Sec. 82 of the City Charter and not R.C. 731.25-731.41. Moreover Law Dir. Heil has prepared at least one of these Ordinances. Additionally, Respondents' City Commissioners and Law Dir. Heil have previously certified a petition for a charter amendment in two 2 days and not held it for 10 days. By their past actions, Respondents' City Commissioners and Law Dir. Heil knew that their actions are not reasonably supported by law.

CONCLUSION

Accordingly, for the reasons set forth above, Relators respectfully request this Court to issue a Writ of Mandamus to compel Respondents City of Sandusky Law Director Heil and the City of Sandusky Commissioners to certify the Petitions and recommend the same for placement on the November 8, 2022. Issue a Writ of Mandamus requiring the Erie County Board of Elections to place the issue in the Petitions on the ballot for the on the November 8, 2022 election. This is despite that they were submitted a day late, as this was out of Relators control and the fault of the City of Sandusky Law Director Heil. Or in the alternative Issue a Writ of Mandamus requiring a special election.

Additionally, Relators request the Court to assess the costs of this action against all Respondents (except the Erie County Board of Elections).; order all Respondents (except the Erie County Board of Elections). To pay Relators their attorneys' fees and expenses, pursuant to R.C. 733.61; and award such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Reply and evidence was sent via e-mail pursuant to S.Ct.Prac.R. 12.08 to the following on this the 16th day of August, 2022 to:

Benjamin Grant Chojnacki at bchojnacki@walterhav.com

Lisa Mack at lmack@walterhav.com

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