

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO EX REL.</b>	:	<b>Case No. 2019-1108</b>
<b>SHERRY L. FLEMING, et al.</b>	:	
	:	
<b>Relators,</b>	:	<b>Original Action in Mandamus</b>
	:	
<b>v.</b>	:	<b>Expedited Election Matter Pursuant to</b>
	:	<b>S.Ct.Prac.R. 12.08</b>
<b>MARK E. FOX, SR., et al.</b>	:	
	:	
<b>Respondents.</b>	:	

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**RESPONDENTS' MERIT BRIEF**

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## **INTRODUCTION**

Relators seek to submit a woefully deficient proposed county charter to the voters of Williams County, Ohio at the November 5, 2019 election. The Williams County Board of Elections and the Williams County Court of Common Pleas both independently determined that the proposed charter is invalid under Article X, Section 3 of the Ohio Constitution. Relators now seek this Court's intervention, but the Court need not address the proposal's numerous deficiencies. This is because Relators' requested writ of mandamus can be denied on alternative grounds: (1) Relators had an adequate remedy at law which they pursued by requiring Respondents to bring an action in the Common Pleas Court to have that court make an independent decision, but they have, to date, failed to see this remedy through by appealing the Common Pleas Court's decision; and (2) Relators unreasonably delayed in filing the instant action. For these reasons, and the reasons set forth more fully herein, Respondent members of the Williams County Board of Elections ("Respondents" or the "Board") respectfully request the Court to deny Relators' requested relief.

## **STATEMENT OF FACTS**

Relators filed a petition proposing a county charter with the Board on June 26, 2019. *See*, Respondents' Evidence, Exhibit A-06. At its July 8, 2019 meeting, the Board determined that, on its face, the Petition contained a sufficient number of valid signatures. *See*, Respondents' Evidence, Exhibit A-03, ¶ 7. However, the Board also determined that the Petition was invalid under Article X, Section 3 of the Ohio Constitution. *Id.*

Following the Board's July 8<sup>th</sup> meeting, Relators' counsel, pursuant to R.C. 307.94, requested the Board to file an action in the Williams County Court of Common Pleas to establish the validity or invalidity of the Petition. Under R.C. 307.94, the Board was required to commence such an action within three days of receiving such a request, and the Common Pleas Court was

required to make its determination by the 111<sup>th</sup> day before the election, which was July 17, 2019. Duty-bound, the Board filed the requested action on July 11, 2019. *See*, Respondents' Evidence, Exhibit A. The Common Pleas Court scheduled a hearing for July 16<sup>th</sup> (Respondents' Evidence, Exhibit B), and both the Board and Relators subsequently submitted briefs. Copies of these briefs are included in Respondents' Evidence, Exhibits C-D.

The Common Pleas Court held its hearing on July 16<sup>th</sup>.<sup>1</sup> At the hearing, counsel for the Board and Relators presented oral arguments, and the court received written testimony from several countywide elected officials. Copies of these affidavits are included in Respondents' Evidence, Exhibit E. The Williams County officers providing testimony consisted of the President of the Board of Commissioners, the Recorder, the Coroner, the Auditor, the Treasurer, the Sheriff, and the Engineer, and each of them highlighted what they viewed as significant omissions from Relators' proposed charter with respect to the powers and duties imposed upon them by law. *See, id.*

In accordance with the statutory deadline, the Common Pleas Court issued its final decision and order on July 17, 2019, holding that Relators' petition was invalid under Article X, Section 3 of the Ohio Constitution. *In re Petition Proposing County Charter Filed June 26, 2019*, Williams C.P. No. 19 CI 060 (July 17, 2019), a copy of which is included in Respondents' Evidence, Exhibit F-05. Specifically, the court found that the proposed charter fails to provide for the performance of all duties imposed upon county offices and officers by law; it fails to completely provide which offices shall be elected and the manner of their election; and portions of the proposed charter are beyond the authority of a county to enact under Ohio law, noting further that the proposed

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<sup>1</sup> Relators failed to file a transcript of the Common Pleas Court's July 16<sup>th</sup> hearing in their evidence.

restrictions “cannot be overlooked as they are an indispensable part of the proposed charter and are not merely aspirational.” *Id* at \*2-3.

Relators never appealed the Common Pleas Court’s July 17<sup>th</sup> decision. Instead, on July 29, 2019, Relators delivered a letter to the Board seeking to protest the Board’s July 8<sup>th</sup> determination with the Ohio Secretary of State. *See*, Exhibit E to Relators’ Complaint. The Board’s Director responded on July 30, 2019, explaining that, based on prior advice from the Ohio Secretary of State, the Board could not accept the protest because they had already pursued their alternative remedy in the Common Pleas Court. A copy of the Board’s response, which includes the Secretary’s prior advice, is included in Respondents’ Evidence, Exhibit F. Then, on Friday, August 2, 2019, Relators delivered another letter to the Board, again requesting a protest of the Board’s July 8<sup>th</sup> determination with the Secretary. *See*, Exhibit G to Relators’ Complaint. On Monday, August 5<sup>th</sup>, the Board’s Director again responded that the Board could not accept the protest based on the Secretary’s prior advice. *See*, Exhibit H to Relators’ Complaint. Relators then commenced the instant action on August 9, 2019.

## **LAW AND ARGUMENT**

### **I. Relators’ Claims are Barred by Laches.**

As an initial matter, Relators’ claims are barred by laches. Laches bars relief in an election-related matter if the party seeking relief has “failed to act with the utmost diligence.” *State ex rel. Citizens for Responsible Green Govt. v. Green*, 155 Ohio St.3d 28, 2018-Ohio-3489, 118 N.E.3d 236, ¶ 16 (internal citations and quotations omitted). The elements of a laches defense 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. *Id.*



**A. Relators unreasonably delayed in filing the instant action.**

Here, there was an unreasonable delay or lapse of time in Relators' asserting their purported right to seek a writ of mandamus. The Court has previously barred relief in election-related matters for delays as short as nine days. *See, Paschal v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St. 3d 141, 142, 656 N.E.2d 1276 (1995). The Board determined that the Relators' petition was invalid on July 8, 2019, which was 120 days before the November 5, 2019 general election. The Common Pleas Court issued its final decision and order on July 17, 2019, which was 111 days before the November 5, 2019 general election. Relators did not file the instant action until August 9, 2019, which was 32 days after the Board's determination, 23 days after the Common Pleas Court's decision, and 89 days before the November 5, 2019 general election.

**B. Relators lack an excuse for their delay.**

Relators have no valid excuse for their unreasonable delay. In their brief, Relators contend that the time in between the Board's July 8<sup>th</sup> determination and the Common Pleas Court's July 17<sup>th</sup> decision is excusable on the basis that they had to exhaust their statutorily available remedies. Relators' Brief at 16. Ordinarily, this might be a valid excuse. In the instant action, however, Relators are seeking this Court's review of the Board's July 8<sup>th</sup> determination, and, oddly, not a review of the Common Pleas Court's July 17<sup>th</sup> decision.<sup>2</sup> Thus, if Relators seek to challenge Respondents' July 8<sup>th</sup> determination, then the clock started to run immediately after Respondents made their determination on July 8<sup>th</sup>.

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<sup>2</sup> In Section II.A. of Respondents' Argument, Respondents argue that Relators' requested relief for mandamus should be denied on the basis that they have an adequate remedy at law in the form of an appeal of the Common Pleas Court's decision to the 6<sup>th</sup> District Court of Appeals for the State of Ohio—a remedy they never pursued.

Relators also contend that the delay following the Common Pleas Court’s July 17<sup>th</sup> decision is attributable to their subsequent efforts on July 29<sup>th</sup> (12 days after the court’s decision) and August 2<sup>nd</sup> (16 days after the court’s decision) to seek to protest the Board’s July 8<sup>th</sup> decision with the Secretary of State. Relators’ Brief at 16. Relators again contend that they had to do this in order to exhaust their statutorily available remedies. *Id.* However, a protest with the Secretary of State is not an available remedy for petitioners after they pursue a remedy in the county court of common pleas. *See*, R.C. 307.94. As the Board’s Director twice explained to Relators, the Secretary of State previously advised boards of elections that, under R.C. 307.94, petitioners are “barred” from filing a protest of a board’s determination that a county charter petition is invalid if the petitioners previously requested the board to file an action in the county court of common pleas to establish the validity or invalidity of the same petition. The Secretary’s reasoning was clear: the plain language of R.C. 307.94 provides petitioners with two “mutually exclusive” avenues for contesting a board’s determination, and the petitioners must choose one—they do not get “a second bite at the apple.” Pursuant to this advice, the Board informed Relators that their letters of protest were improperly

In their brief, Relators cite *Jones v. Husted*, 147 Ohio St.3d 341, 2016-Ohio-5681 for the proposition that, under R.C. 307.94, petitioners are required to pursue both a common pleas action and a protest with the Secretary of State in order to exhaust their remedies. Relators’ Brief at 17. But this not what the Court held in *Jones*. Instead, *Jones* held that petitioners are required to pursue one of these available remedies, and the relators in that action had not pursued either of them. *Jones*, ¶ 11-14. As a result, the Court concluded the relators had an adequate remedy in the ordinary course of law through either of these remedies, and, therefore, denied the requested writ of mandamus. Here, Relators pursued one of their two remedies provided for by R.C. 307.94, and as

the court explained in *Jones*, the availability of that remedy was an adequate remedy foreclosing the extraordinary relief of mandamus. Therefore, the Court’s holding in *Jones* actually supports Respondents.

In short, Relators lack an excuse for their delay. By improperly filing letters of protest with the Board, Relators were not exhausting their remedies—they were impermissibly seeking a second bite at the apple.

**C. Relators knowingly delayed and caused prejudice to the Board.**

Relators’ drawn out efforts to impermissibly seek a second bite at the apple before filing the instant action indicates that Relators intentionally ran out the clock so that their matter would be automatically expedited under the Court’s rules. S.Ct.Prac.R. 12.08(A)(1) provides that election matters filed within 90 days of the relevant election shall be automatically expedited, requiring the parties to litigate the matter on a tight timeframe due to the looming election. For this reason, when a relator’s unreasonable delay in filing a mandamus case causes the matter to become an expedited election matter, “that delay is presumed to constitute prejudice for laches purposes.” *Citizens for Responsible Green Govt.*, ¶ 25.

Relators delayed 32 days after the Board’s July 8<sup>th</sup> determination and 23 days after the Common Pleas Court’s July 17<sup>th</sup> determination before filing the instant action on August 9<sup>th</sup>, the 89<sup>th</sup> day before the election. This delay, which Relators appear to have precisely timed evidencing their knowledge of the injury or wrong, caused the instant action to become an expedited election matter. Therefor, Relators’ delay is presumed to constitute prejudice for laches purposes. *Id.* Moreover, the Board has, in fact, been materially prejudiced by Relators’ delay in that it has forced

the Board to delay its own efforts to finalize the ballot and prepare for the November 5, 2019 election.<sup>3</sup>

For these reasons, Relators' claims for relief are barred by laches.

## **II. Relators are Not Entitled to a Writ of Mandamus**

Relators are seeking an extraordinary writ of mandamus. To prevail on their mandamus claim, Relators must establish (1) the lack of an adequate remedy in the ordinary course of law; (2) a clear legal right to have their proposed charter placed on the November 5, 2019 ballot; and (3) a corresponding clear legal duty by the Board to place the proposed charter on the ballot. *See, e.g., Jones*, ¶ 9. As to the last two requirements, the standard for reviewing the decision of a county board of elections is whether the board engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions. *State ex rel. McGinn v. Walker*, 151 Ohio St.3d 199, 2017-Ohio-7714, ¶ 12. Further, Relators must prove their case by clear and convincing evidence. *See e.g., State ex rel. Guest v. Husted*, 153 Ohio St.3d 630, 2018-Ohio-3161, ¶ 11. Relators cannot meet this burden.

### **A. Relators have an adequate remedy at law in the form of an appeal to the Sixth District Court of Appeals.**

Relators' request for a writ of mandamus should be denied because they have an adequate remedy at law in the form of an appeal of the Common Pleas Court's July 17<sup>th</sup> decision to the Sixth District Court of Appeals for the State of Ohio. It is "fundamental that an extraordinary writ of mandamus may be issued only when a party lacks an adequate remedy at law." *McGinn*, ¶ 27 (DeWine, J. concurring in judgment only) citing *State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 28, 647 N.E.2d 155 (1995).

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<sup>3</sup> The Board is required by law to have UOCAVA absentee ballots ready by the 45<sup>th</sup> day before the election, which is September 21, 2019. R.C. 3511.04.

**1. R.C. 307.94 allows petitioners to seek an independent determination from the county common pleas court, and the common pleas court's decision may, in turn, be appealed to the respective court of appeals.**

Under R.C. 307.94, petitioners proposing a county charter have two mutually exclusive remedies to challenge a board's refusal to certify their petition. R.C. 307.94 provides, in part:

If the petition is certified by the board of elections to be invalid or to have insufficient valid signatures, or both, the petitioners' committee may [1] protest such findings or solicit additional signatures as provided in section 307.95 of the Revised Code, or both, or [2] request that the board of elections proceed to establish the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures in an action before the court of common pleas in the county.

(Emphasis added.)

Pursuant to this provision, Petitioners' remedies are to file a protest with the Secretary of State pursuant to R.C. 307.95, or they may request that the board establish the validity or invalidity of the petition before the county common pleas court. *See, Jones*, ¶ 11. They can only choose one, and both have expedited timelines and processes for appeals.

When petitioners request the board to file an action in the county common pleas court, the board is required by R.C. 307.94 to do so within three days of receiving such request. *See, R.C. 307.94*. Upon the filing of such an action, the county common pleas court must determine whether the petition is valid or invalid, and this determination contemplates a de novo review. *See, In re Protest of Brooks*, 154 Ohio App.3d 739, 2003-Ohio-5241, 798 N.E.2d 1118, ¶ 18 (10th Dist) (finding that a near-identical remedy under the now-former version of R.C. 3519.16, which concerned statewide petitions, "contemplates a de novo review by the trial court."). The common pleas court must then make its determination within "sufficient time" to permit the board of county commissioners to perform its duty to certify the petition, if it is determined by the court to be valid, to the board of elections no later than 4 p.m. on the 111<sup>th</sup> day before the election. *See, R.C. 307.94*.

A county common pleas court's decision under R.C. 307.94 may be appealed to the respective court of appeals. *See*, Article IV, Section 3(B)(2) of the Ohio Constitution; R.C. 2502.02. Indeed, nothing in R.C. 307.94 precludes such an appeal. By comparison, the General Assembly has affirmatively eliminated appellate review in other election processes, including the alternative protest remedy available to county charter petitioners under R.C. 307.95, which provides that the "determination by the secretary of state is final." R.C. 307.95(C) (emphasis added). There is no such language in R.C. 307.94 with respect to an action filed in the county common pleas court, and, accordingly, a common pleas court's determination that a county charter petition is invalid can be appealed.

**2. Despite having the opportunity to appeal the Common Pleas Court's decision, Relators, to date, have chosen not to pursue this available remedy.**

Relators chose the remedy of pursuing an expedited challenge of the Board's July 8<sup>th</sup> determination in the Williams County Court of Common Pleas. The subsequent matter resulted in a sizable record, including briefs, evidence, and oral arguments—none of which Relators provided in their evidence to this Court. The matter also resulted in a final, appealable order from the Common Pleas Court that Relators' Petition is invalid under Article X, Section 3 of the Ohio Constitution. Despite this, Relators chose not to appeal the decision to the Sixth District Court of Appeals.

In an effort to explain this, Relators contend that an appeal of the common pleas court ruling cannot provide an adequate remedy at law "because Ohio's courts of appeal have no obligation to accelerate consideration of ballot issue appeals." Complaint, ¶ 45. This argument, however, overlooks App.R. 11.2 and 6th Dist. Loc.App.R. 12, both of which allow for expedited appeals on an accelerated calendar. Given that the Common Pleas Court's decision was issued 111 days before the November 5, 2019 general election—and more than two months before the Board

is required to have its UOCAVA ballots ready on the 45<sup>th</sup> day before the election on September 21, 2019<sup>4</sup>—Relators had ample time to pursue such an appeal. But they chose not to.

Further, there is no evidence that an appeal would be significantly less speedy than a mandamus action. *See, e.g., State ex rel. Sohi v. Williams*, 80 Ohio St.3d 492, 687 N.E.2d 454 (1997) (holding, in the analogous context of administrative appeals, that absent special circumstances, a post-judgment appeal constitutes a complete, beneficial, and speedy remedy that precludes extraordinary relief in mandamus). Relators cite *State ex rel. Thurn v. Cuyahoga Cty Bd. of Elections*, 72 Ohio St.3d 289, 649 N.E.2d 1205 (1995) for the proposition that “any appellate process would last well past the election.” Relators’ Brief at 16. But *Thurn* is inapposite for at least two reasons. First, the relator in *Thurn* truly did not have time for an appeal. The Court’s docket for *Thurn*, Case No. 1995-0638, states that the complaint was filed on March 28, 1995, which was 35 days before the May 2, 1995 election at which the relator was seeking to submit a ballot issue. In contrast, the Relators, here, could have filed an appeal beginning on the 111<sup>th</sup> day before the election—they had more than three times as many days to pursue an appeal as the relator in *Thurn*. Second, *Thurn* concerned a petition proposing a municipal ordinance under R.C. Chapter 731 and the North Royalton, Ohio City Charter, neither of which provided petitioners with the remedy to challenge the decision of a board of elections with the county common pleas court. Thus, it does not shed any light on the special remedy available to petitioners under R.C. 307.94, and it fails to support Relators’ contention that an appeal would not be timely resolved.

Relators chose to pursue an expedited challenge in the Common Pleas Court. “Having chosen their remedy—and having already received one level of legal review—they can hardly

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<sup>4</sup> Relators’ brief incorrectly states that “the ballot must be prepared by 60 days prior to the election (approximately September 6, 2019).” Relators’ Brief at 17 (emphasis added).

complain about the appeals process that was part of the remedy those chose.” *McGinn*, ¶ 30 (DeWine, J. concurring in judgment). Because Relators “failed to avail themselves” of an appeal (*Jones*, ¶ 13), the Court should find that Relators had an adequate remedy at law and deny the requested relief.

**B. Relators do not have a clear legal right to have their proposed charter placed on the November 5, 2019 ballot.**

Relators’ requested relief should be denied for the additional reason that they do not have a clear legal right to have their proposed charter placed on the November 5, 2019 ballot. This is because it fails to satisfy the constitutional prerequisites for a proposed county charter set forth in Article X, Section 3 of the Ohio Constitution, which provides in relevant part:

The people of any county may frame and adopt or amend a charter as provided in this article but [1] the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter [2] 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. It [3] shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law.

As explained by the Court in *McGinn*, the process to submit a proposed county charter to the voters “begins with the submission of a petition proposing the form of a county charter to the county board of elections.” *McGinn*, ¶ 7 citing R.C. 307.94. Once a petition is filed, the board of elections “must immediately ‘determine whether the petition and the signatures on the petition meet the requirements of law.’” *Id.* quoting R.C. 307.94. Subsequently, “[i]f the petition is certified by the board of elections to be valid and to have sufficient valid signatures, then the county board of commissioners must, by resolution, certify the petition to the board of elections for submission



to the electors at the next general election.” *Id.* quoting R.C. 307.94. “Thus, R.C. 307.94 imposes a duty on the county elections boards to assess the ‘validity’ of petition.”<sup>5</sup> *Id.* at ¶ 8.

The boards’ duty under R.C. 307.94 to assess the validity of a petition proposing a county charter is “echoed” in other provisions of Ohio law. *McGinn*, at ¶ 8. For instance, prior to the enactment of 2016 Sub.H.B. 463, effective April 6, 2017, (“H.B. 463”), R.C. 3501.11(K) required boards to “[r]eview, examine, and certify the sufficiency and validity of petitions.” *See, id.* at ¶ 8, 11. And following the enactment of H.B. 463, R.C. 3501.11(K)(2) now requires boards to

Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

Similarly, R.C. 3501.38(M)(1)(b) requires boards to examine a petition filed under R.C. 307.94 to determine:

Whether the petition falls within the scope of a county's authority to enact via initiative, including whether the petition conforms to the requirements set forth in Section 3 of Article X of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county officers by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot.\* \* \*

Additionally, R.C. 3501.39(A)(3) provides that a board of elections shall accept any petition described in R.C. 3501.38, “unless”:

In the case of an initiative petition received by the board of elections, the petition falls outside the scope of authority to enact via initiative or does not satisfy the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the

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<sup>5</sup> This duty has existed since at least 1979 when R.C. 307.94 was first adopted by the General Assembly. *See*, 1979 Am. Sub. S.B. 169 of the 113<sup>th</sup> General Assembly.

Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

Under these provisions, a board of elections is required to invalidate a petition proposing a county charter if it fails to satisfy the statutory or constitutional prerequisites for a ballot measure. *See, McGinn*, ¶ 23 (holding that a board of elections had authority to invalidate a charter petition that did not “provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law,” as required by Article X, Section 3 of the Ohio Constitution); *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, ¶ 24 (holding that the Secretary of State had authority to invalidate charter petitions that did not “set forth the form of government,” as required by Article X, Section 3 of the Ohio Constitution). This was the case even under pre-H.B. 463 law. *See, McGinn*, ¶ 14 citing *State ex rel. Coover v. Husted*, 148 Ohio St.332, 2016-Ohio-5794, ¶ 11 (“Even under pre-H.B. 463 law, a county elections board had authority to determine whether a proposed charter petition satisfied this constitutional prerequisite.”) In making this determination, however, a board of elections is not permitted to invalidate a county charter petition that the board “believed would be unlawful or unconstitutional in its effects if approved.” *McGinn*, ¶ 10.

Here, the Board and the Common Pleas Court both determined that Relators’ proposed charter fails to satisfy the three prerequisites for county charters established by Article X, Section 3 of the Ohio Constitution—each providing an independent basis for invalidating the Petition. Both found that Relators’ proposal (1) fails to provide for the form of government and fails to include workable provisions for the manner in which the county officers will be elected; (2) fails to provide for the exercise of all powers, and the performance of all duties, imposed on counties and county officers by law; and (3) exceeds the scope of a county’s authority to act by initiative.

**1. The proposed charter fails to provide for the form of government and fails to include workable provisions for the manner in which the county officers will be elected as required by Article X, Section 3 of the Ohio Constitution.**

Relators' proposed charter fails to satisfy the threshold requirement for a county charter to provide the form of a government of the county and to determine which of its officers are elected and the manner of their election.<sup>6</sup> Article X, Section 3 of the Ohio Constitution provides that county charters 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." This is the "sine qua non of a valid charter initiative," and the failure to do so is a basis for invalidating such an initiative, even under pre-H.B. 463 law. *Walker*, at ¶ 24.

Relators' proposed charter is woefully deficient with respect to this requirement. Most problematic, it fails to include workable provisions for the manner of electing the elective county officers. Additionally, the proposed charter fails to adequately provide for an alternative form of government. For these independent reasons—and as discussed *infra*—the proposed charter fails to adequately provide for the form of county government as required by Article X, Section 3 of the Ohio Constitution.

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<sup>6</sup> Relators baldly contend that because the Board did not assert this argument as a specific affirmative defense in its Answer, Board is prohibited from making the argument in its Brief. Relators' Brief at 11. Relators cite no authority for requiring the Board to include specific, detailed arguments in their affirmative defenses. Further, Respondents affirmatively asserted that Relators failed to state a claim upon which relief can be granted (Respondents' Affirmative Defenses, ¶ 2), that Relators do not have a clear legal right to the relief requested (*Id.*, ¶ 11), that Respondents do not have a clear legal duty to perform the act sought by Relators (*Id.*, ¶ 10), and that Respondents have not abused their discretion nor acted contrary to law (*Id.*, ¶ 12), each of which encompass Respondents' legal arguments.

**a. The proposed charter fails to include workable provisions for the manner in which the members of the board of county commissioners will be elected.**

Relators' proposed charter fails to include workable provisions for the manner in which the county commissioners will be elected. Section 3.3 of the proposed charter provides that the board of county commissioners shall consist of three elected at-large members. As to their election, Section 3.3.1 provides in relevant part:

The County Commissioners shall be elected to four year terms that will commence on the following days, (1) January 2, 2019, (2) January 3, 2020, and (3) January 1, 2021. The incumbents who currently hold appointments in these terms shall remain until the expiration of their current term. Candidates that are running for the Commissioner openings concurrent with this Charter shall assume the role in accordance with this Charter.

The process set forth in Section 3.3.1 reads as though it was intended to be on the ballot in 2018, not 2019. As a result, it is unworkable. For instance, it refers to candidates who are running for the "Commissioner openings concurrent with this Charter," but there are no candidates running for county commissioner "concurrent with this Charter" at the November 5, 2019 election. Further, it provides that the term for one of the county commissioners elected will commence on January 2, 2019 and that another term will commence on January 3, 2020. The former commencement date has long passed, and the latter is quickly approaching with no intervening election for county commissioner scheduled to occur. Thus, if the proposed charter is adopted, it is not clear when the next county commissioners would be elected or when they would take office.

Additionally, the beginning dates of the terms set forth in the proposed charter conflict with the subsequent provision that the current incumbents shall remain in office until the expiration of their current terms. Of the current incumbents, one Commissioner's term began on January 1, 2019 and will end on December 31, 2022 (with the subsequent term beginning January 1, 2023); another commissioner's term began on January 2, 2017 and will end on January 1, 2021 (with the

subsequent term beginning January 2, 2021); and another Commissioner’s term began on January 3, 2017 and will end on January 2, 2021 (with the subsequent term beginning January 3, 2021).<sup>7</sup> None of the end dates for the current terms line up with the beginning dates set forth in the proposed charter; indeed, they overlap. This would create a situation where, at certain times, there would be more than three county commissioners with the right to hold office, which, in turn create a conflict with the proposed charter’s requirement that there be only three commissioners.

For these reasons, the proposed charter fails to include workable provisions for the manner in which the board of county commissioners will be elected.

**b. The proposed charter fails to include workable provisions for the manner in which the county auditor will be elected.**

Relator’s proposed charter also fails to provide a workable provision for the initial election of the county auditor under the proposed charter. Section 3.4.1 of the proposed charter states in relevant part:

The County Auditor shall be elected quadrennially, commencing their term on the second Monday in March after their election. The incumbent who currently holds this position shall remain until the expiration of their term. The Auditor may run for reelection, in the next general election for their position.

The language used in Section 3.4.1 creates a conflict as to when the county auditor would first be elected under the proposed charter, if adopted. In one sentence, it states that the current incumbent shall remain in office until the expiration of their term; the current Auditor was just elected to a four-year term at the 2018 election, and her term will not expire until March 10, 2023. But in the next sentence, the proposed charter states that “the Auditor may run for reelection, in the next general election for their position.” If the proposed charter is adopted at the November 5,

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<sup>7</sup> See, Williams County Board of Elections, “County Wide Elected Officials,” available at <http://www.co.williams.oh.us/DocumentCenter/View/1203/Williams-County-Elected-Officials>.

2019 election, then the “next general election” would be the 2020 general election. This would effectively convert the incumbent Auditor’s current term from a four-year term to a two-year, despite the prior sentence stating that the incumbent Auditor shall remain until the expiration of her [four-year] term. Given the conflicting and unclear language used in Section 3.4.1 of the proposed charter, the proposed charter fails to include workable provisions for the manner in which the auditor will be elected.

**c. The proposed charter fails to include workable provisions for the manner in which the county treasurer, prosecuting attorney, engineer, recorder, sheriff, and clerk of courts will be elected.**

Relators’ proposed charter also fails to include workable provisions for the manner in which the county treasurer, prosecuting attorney, engineer, recorder, sheriff, and clerk of courts will be elected. For each of these offices, the proposed charter provides that they shall be elected quadrennially but fails to provide when they shall first be elected under the proposed charter. Instead, and for each of these offices, the proposed charter states that “[t]he candidate who wins the election concurrent with the adoption of this Charter, shall assume the position in accordance with this Charter. *See*, Proposed Charter, Sections 3.5.1; 3.6.1; 3.7.1; 3.8.1; 3.9.1; and 3.10.1. But as with the similar provision for county commissioners, there are no candidates running for these offices at the “election concurring with the adoption of this Charter” on November 5, 2019.

Short of requiring a subsequent election to amend the charter—a proposal that could itself be defeated—it is unclear how any of these flawed election provisions could be fixed if the proposed charter is adopted at the November 5, 2019 election. Relators may suggest that the courts can resolve these flaws, but this would effectively require the courts to rewrite the charter, deciding on their own when the new officers would be elected and when the current incumbents would end their existing terms. But this is not what Article X, Section 3 envisions. For these reasons, Relators’

proposed charter fails to include workable provisions for the manner in which the elected officers shall be elected.

**d. The proposed charter fails to include either an elective county executive or an appointive county executive.**

Additionally, and as the Common Pleas Court held, Relators' proposed charter also fails to adequately provide for an alternative form of government. *In re Petition Proposing County Charter Filed June 26, 2019*, Williams C.P. No. 19 CI 060 at \*2-3 (July 17, 2019). This is because the proposed charter fails to include either an elective county executive or an appointive county executive as required by R.C. 302.02. *See*, R.C. 302.02 (requiring an alternative form of government to "include either an elective county executive...or an appointive county executive").

The Ohio Secretary of State has repeatedly interpreted similar proposed county charters as attempting to establish an alternative form government. *See, Walker*, ¶ 22 (applying R.C. 302.02 even though the proposed charter "purport[ed] to maintain the status quo on matters of county officers, officers, and their duties"); *Coover*, ¶ 6 ("[the Secretary] indicated that while the petitions could be interpreted as attempting to establish an alternative form of government under R.C. Chapter 302"); *see also, McGinn*, ¶ 3 (noting that the Athens County Board of Elections rejected the proposed charter for failing to provide for a county executive under R.C. 302.02). Moreover, the Summit and Cuyahoga County Charters, which Relators rely upon elsewhere as a reference point for their proposed charter (*see*, Relators' Brief at 10-11), both provide for a county executive.

Here, the Board and the Common Pleas Court interpreted Relators' proposed charter as attempting to establish an alternative form of government. The proposed charter, however, does not provide for a county executive. Relators contend that they do not have to, but the mandate in R.C. 302.02 is clear. For this reason, Relators' proposed charter fails to adequately provide for an alternative form of government.

**2. Relators’ proposed charter fails to provide for the exercise of all powers, and the performance of all duties, imposed on counties and county officers by law as required by Article X, Section 3 of the Ohio Constitution.**

Relators’ proposed charter fails to meet the threshold requirement to provide for the exercise of all powers vested in, and the performance of all duties, imposed upon counties and county officers by law.<sup>8</sup> This Court has emphasized that, under Article X, Section 3 of the Ohio Constitution, a proposed county charter must provide “for the exercise of *all* powers” and the “performance of *all* duties” imposed upon counties and county officers by law. *McGinn*, ¶ 23 (italics original). In other words, the county charter must individually delineate each of the powers imposed upon the county and county officers by law. *Coover*, ¶ 17. Overly general references to the powers and duties of county officials will not suffice (*McGinn*, at ¶ 15; *Coover*, at ¶ 17 quoting *Walker*, ¶ 2), and the failure to delineate even one duty imposed upon a county or county officer by law requires the entire petition to be invalidated. *See, McGinn*, at ¶ 23 (invalidating an entire petition for failing to provide for all the powers and duties imposed by law upon county prosecuting attorneys).

Relators’ proposed charter is woefully deficient with respect to providing for the exercise of all powers and the performance of all duties imposed upon counties and county officers by law. This is the case with respect to each of the elected county officers in the proposed charter: the board of commissioners; the engineer; the recorder; the prosecuting attorney; the auditor; the clerk

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<sup>8</sup> Relators again baldly contend that because the Board did not assert this argument as a specific affirmative defense in its Answer, Board is prohibited from including the argument in its Brief. Relators’ Brief at 8. As with the other instance, Relators cite no authority for requiring the Board to include specific, detailed arguments in their affirmative defenses. And, again, Respondents affirmatively asserted that Relators failed to state a claim upon which relief can be granted (Respondents’ Affirmative Defenses, ¶ 2), that Relators do not have a clear legal right to the relief requested (*Id.*, ¶ 11), that Respondents do not have a clear legal duty to perform the act sought by Relators (*Id.*, ¶ 10), and that Respondents have not abused their discretion nor acted contrary to law (*Id.*, ¶ 12), each of which encompass Respondents’ legal arguments.



of courts; the sheriff; and the treasurer. Under the Court's decisions in *Walker*, *Coover*, and *McGinn*, all of which relied upon pre-H.B. 463 law, each omission is fatal to Relators' petition.

**a. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county commissioners by law.**

The most egregious instance in Relators' proposed charter of failing to provide for all the powers and duties imposed by a law upon a county officer is with respect to the powers and duties of the board of county commissioners. Chapters 305 and 307 of the Revised Code are replete with powers and duties imposed upon the board of county commissioners, yet very few of them are specifically delineated in the proposed charter or otherwise accounted for.

The proposed charter fails to provide for many of the most basic powers and duties imposed on county boards of commissioners—or the County, more generally—by law, including the following: to provide buildings, offices, and equipment for the County government (R.C. 307.01-.02); to award contracts for supplying County buildings with light, heat, or power (R.C. 307.04-.042); to establish different forms of emergency medical service system (R.C. 307.05); to procure real estate for the County (R.C. 307.08-.084); to sell, lease or rent the County's real estate (R.C. 307.09-.092); to contract with other governmental entities and political subdivisions (R.C. 307.14-.19); to purchase or lease motor vehicles for the County (R.C. 307.41); to contract for, purchase, or otherwise procure and pay all or any part of the cost for group health insurance for county officers and employees (R.C. 305.171); to establish a countywide public safety communications system (R.C. 307.63); and to employ legal counsel, engineers, and maintenance workers, and to fix such employees' compensation (R.C. 305.14-.17).

At the Common Pleas Court's July 16<sup>th</sup> hearing, Terry N. Rummel, the President of the Williams County Board of Commissioners, provided written testimony that explained the significance of some of these omitted powers and duties. With respect to the power to contract

with other governmental entities (R.C. 307.14-.19), for instance, Commissioner Rummel explained that this authority “is essential to a great deal of County business, including acquiring grant funding, cooperative infrastructure projects, like road projects, and the incarceration of prisoners.” *See*, Respondents’ Evidence, Exhibit E-02, Affidavit of Terry N. Rummel, ¶ 3, With respect to power to provide emergency medical services (R.C. 307.05) and emergency communications systems (R.C. 307.63), Commissioner Rummel explained that “these powers directly affect the ability of the county government to provide for the physical safety of the citizens during both routine medical emergencies and wide-scale disasters.” *See*, Respondents’ Evidence, Exhibit E-02, Affidavit of Terry N. Rummel, ¶ 4. Despite the significance of these powers and duties, the proposed charter is silent with respect to them.

In addition, the proposed charter also fails to delineate which boards, agencies, commissions, departments, and authorities the county board of commissioners is authorized and/or required by law to establish and manage. Other than the department of jobs and family services and a board of trustees for sinking funds, the Petition is silent, requiring one to look to sources outside the proposed charter to determine what is required. As examples, it fails to provide for entities like the office of economic development (R.C. 307.07); the child fatality review board (R.C. 307.621); a joint a community improvements board (R.C. 307.282); the county law library resources board (R.C. 307.5); the county board of building appeals (R.C. 307.381); the county microfilming board (R.C. 307.80); and the county automatic data processing board (R.C. 307.84). These are all important to the operation of the County.

For these reasons, the proposed charter fails to provide for the exercise of all powers, and the performance of all duties imposed by law on boards of county commissioners.

**b. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county engineers by law.**

The proposed charter also egregiously fails to provide for all the powers and duties imposed by law upon county engineers. Indeed, it fails to specifically delineate virtually every power and duty that the General Assembly has imposed upon county engineers, including the following: to construct, reconstruct, and improve the bridges, highways, and roads in the county (R.C. 5543.01); to make all emergency repairs on all roads, bridges, and culverts in the county, including state highways (R.C. 315.13); to inspect all public improvements in the county (R.C. 315.14); to inspect bridges in the county (R.C. 5543.20); to report to the board of county commissioners on the condition of the county roads, bridges, and culverts in the county, and to estimate the costs to maintain and repair or to construct any new roads, bridges, or culverts required in the county (R.C. 5443.02); to name and number all the public roads of the county; the duty to erect and maintain signposts in the county (R.C. 5543.18); and to trim or remove any and all trees, shrubs, and other vegetation growing in or encroaching on the right-of-way of the county roads (R.C. 5543.14). Chapters 315 and 5543 of the Revised Code are replete with additional powers and duties imposed upon the county engineers that are not specifically delineated in the Petition.

At the Common Pleas Court's July 16<sup>th</sup> hearing, Todd J. Roth, the Williams County Engineer, provided written testimony that explained the significance of some of these omissions. With respect to the duty to inspect bridges in the county (R.C. 5543.20), for instance, Engineer Roth explained that this is a "a direct protection for the personal safety of Ohio residents." Respondents' Evidence, Exhibit E-20, Affidavit of Todd J. Roth, ¶ 3. With respect to the duty to report to the board of county commissioners on the condition of the county roads, bridges, and culverts in the county, and to estimate the costs to maintain and repair or to construct any new roads, bridges, or culverts required in the county (R.C. 5543.02), Engineer Roth explained that

“[t]his report is [the] primary mechanism by which unsafe roadway conditions are monitored and repaired.” Respondents’ Evidence, Exhibit E-20, Affidavit of Todd J. Roth, ¶ 4. Despite the significance of these powers and duties, the proposed charter is silent with respect to them.

Relators’ proposed charter does vaguely provide that the county engineer shall have the power and duty to “[p]erform for the county all duties to be done by a registered professional engineer or registered surveyor.” Section 3.7.4.1 of the Proposed Charter. However, this is the very sort of “overly general reference to the powers and duties of a county official” that the Supreme Court has repeatedly said “will not suffice.” *McGinn*, ¶ 15 citing *Coover* at ¶ 16-17.

For these reasons, the proposed charter fails to provide for the exercise of all powers, and the performance of all duties imposed by law on county engineers.

**c. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county recorders by law.**

Relators’ proposed charter also fails to provide for the exercise of all powers, and the performance of all duties, imposed by law on county recorders.

For instance, Relators’ proposed charter fails to sufficiently identify which “instruments” the county recorder shall record in the official records. Section 3.8.3.2 of the proposed charter provides the county recorder with the power or duty to “[r]ecord in the official records instruments, such as deeds, mortgages, judgments or decrees, declarations and bylaws, affidavits, certificates, conveyances of conservation and agricultural easements, presented for recording, upon payment of prescribed fees.” (Emphasis added). The use of “such as” implies that there are other types of instruments not delineated in the proposed charter that the county recorder is required to record but fails to identify what they are. And, indeed, there are other “instruments” other than those discussed in the proposed charter that county recorders are required by law to record.

In written testimony provided to the Common Pleas Court at its July 16<sup>th</sup> hearing, Williams County Recorder Patti Rockey identified 28 additional types of documents that county recorders are required by law to record but that are omitted from Relators' proposed charter. Respondents' Evidence, Exhibit E-05, Affidavit of Patti Rockey, ¶ 4. These documents include powers of attorney (R.C. 317.08(A)(23)); certain restrictions on the use of property (R.C. 317.08(A)(14); easements (R.C. 317.08(A)(15)); environmental covenants (R.C. 317.08(A)(16)); leases (R.C. 317.08(A)(25); and corrupt activity liens (R.C. 317.08(A)(28). Respondents' Evidence, Exhibit E-05, Affidavit of Patti Rockey, ¶ 4. Recorder Rockey explained that many of these documents omitted from the proposed charter are "crucial to normal personal and professional life," and that "[f]or instance, if a county recorder was not required to record leases and easements, utter chaos in property law would occur." Respondents' Evidence, Exhibit E-05, Affidavit of Patti Rockey, ¶ 5. (emphasis added).

Relators' proposed charter also fails to require the county recorder to keep and maintain an official seal for official documents as required under R.C. 317.04. In her written testimony, Recorder Rockey testified that "[t]he lack of a required county seal would cripple all real estate and commercial transactions in the county as documents would no longer be required to be certified in a recognized manner." Respondents' Evidence, Exhibit E-05, Affidavit of Patti Rockey, ¶ 7. (emphasis added).

Relators' proposed charter also wholly fails to authorize the county recorder to refuse to record an instrument of writing presented for recording when the instrument is not required or authorized by law to be recorded or when the county recorder has reasonable cause to believe the instrument is materially false or fraudulent. R.C. 317.13(B). Instead, the proposed charter contains

language stating that the county recorder shall record all instruments that are presented for recording so long as payment has been provided. *See*, Section 3.8.3.2 of the proposed charter.

For these reasons, the proposed charter fails to provide for the exercise of all powers, and the performance of all duties imposed by law on county recorders.

**d. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county prosecuting attorneys by law.**

Relators' proposed charter also fails to provide for the exercise of all powers, and the performance of all duties, imposed by law on county prosecuting attorneys. This is the case in several respects. For instance, the proposed charter fails to provide the county prosecuting attorney with the following powers and duties: to establish a law enforcement trust fund or equivalent fund (R.C. 2981.13(C)(1)); to request funds from a furtherance of justice fund or equivalent fund (R.C. 325.12); and to serve on the County Budget Commission (R.C. 5705.27).

Additionally, the proposed charter also fails to provide that the county prosecuting attorney shall, in conjunction with the Attorney General, prosecute cases in the Ohio Supreme Court arising in Williams County, except for those cases required to be prosecuted by a special prosecutor. R.C. 309.08(A). Instead, the proposed charter provides only that the county prosecutor shall prosecute cases in the "probate court, court of common pleas, and court of appeals." Section 3.6.4.6 of the Proposed Charter.

The proposed charter also fails to sufficiently provide that the county prosecutor may reward persons who provide drug-related tips to law enforcement. R.C. 309.08(B). The Petition contains language concerning rewards for drug-related tips but limits such power to the context of the county prosecutor's involvement with an organized crime task force. *See*, Section 3.6.4.10 of the Proposed Charter (stating the prosecutor has the power and duty to "[p]articipate, as a member of the investigatory staff of an organized crime task force that has jurisdiction in this county in an

investigation of organized criminal activity, including authority to pay a reward to persons who provide drug related tips to law enforcement.”) (Emphasis added).

For these reasons, the proposed charter fails to provide for the exercise of all powers, and the performance of all duties imposed by law on county prosecuting attorneys.

**e. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county auditors by law.**

The proposed charter also fails to provide for the exercise of all powers and the performance of all duties imposed by law upon county auditors.

For instance, the proposed charter fails to provide for the calculation and certification of tax valuations for the purpose of governmental entities submitting the questions of property tax levies and bond issues to voters. This is a duty imposed upon county auditors by Ohio law for property tax levies (R.C. 5705.03) and school levies (*see*, R.C. 5705.195, R.C. 5705.213). These omissions were highlighted by Vickie L. Grimm, the Williams County Auditor (and former Williams County Treasurer), in written testimony submitted to the Common Pleas Court at its July 16<sup>th</sup> hearing. Respondents’ Evidence, Exhibit E-11, Affidavit of Vickie L. Grimm, ¶ 5.

The proposed charter is also silent with respect the powers and duties imposed upon by county auditors by law to serve as the fiscal agent/officer of several governmental entities, including: the Alcohol, Drug Addiction, and Mental Health Service District or Joint-County District (R.C. 340.10); a County or Joint Solid Waste Management District, if appointed (R.C. 343.01); a Joint Soil & Water Conservancy District (R.C. 940.32); and any juvenile detention center located in the county (R.C. 2152.41). Auditor Grimm highlighted these omissions to the Common Pleas Court, as well. Respondents’ Evidence, Exhibit E-12, Affidavit of Vickie L. Grimm, ¶ 6.

The proposed charter is also silent with respect to the duty imposed by law upon the county auditor, or the auditor's designee, to serve on the County Budget Commission (R.C. 5705.27) and the County Board of Revision (R.C. 5715.02). Auditor Grimm highlighted these omissions to the Common Pleas Court, as well. Respondents' Evidence, Exhibit E-11, Affidavit of Vickie L. Grimm, ¶ 3-4

For these reasons, Relators' proposed charter fails to provide for all the powers and duties imposed by law upon county auditors.

**f. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county clerks of courts by law.**

Relators' proposed charter also fails to provide for the exercise of all powers and the performance of all duties imposed by law upon county clerks of courts. For instance, the Petition fails to provide for the following: that clerk of court may appoint one or more deputies (R.C. 2303.05); that the clerk may "administer oaths and take and certify affidavits, depositions, and acknowledgements of deeds, mortgages, powers of attorney, and other instruments in writing" (R.C. 2303.07); that the clerk shall make a complete record, when ordered to do so, within six months after final judgment or order of the proper court (R.C. 2303.17).

For these reasons, the proposed charter fails to provide for all the powers and duties imposed by law upon county clerks of court.

**g. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county sheriffs by law.**

Relators' proposed charter also fails to provide for the exercise of all powers and the performance of all duties imposed by law upon county sheriffs. For instance, and as highlighted by Steve Towns, the Williams County Sheriff, in written testimony submitted to the Common Pleas Court at its July 16<sup>th</sup> hearing, the proposed charter: fails to provide for the duty of newly



elected or appointed sheriffs to attend and successfully complete a basic training course conducted by the Ohio Peace Officer Training Commission as required by R.C. 311.01(D); fails to provide for the duty of sheriffs to attend and successfully complete at least sixteen hours of continuing education in each calendar year as required by R.C. 311.01(E); and fails to provide for the duty of sheriffs to successfully complete a firearms requalification program each year as required by R.C. 109.801(A)(1). Respondents' Evidence, Exhibit E-17, Affidavit of Steve Towns, ¶ 3-5.

In addition to the issues highlighted by Sheriff Towns, the proposed charter also fails to provide for the power of the sheriff to request funds from a furtherance of justice fund (R.C. 325.071) and the power and duty to establish a law enforcement trust fund (R.C. 2981.13(C)(1)). As is apparent, these training requirements are essential to public safety.

For these reasons, the proposed charter fails to provide for all the powers and duties imposed by law upon county sheriffs.

**h. The proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed upon county treasurers by law.**

The proposed charter also fails to provide for the exercise of all powers and the performance of all duties imposed by law upon county treasurers. For instance, the proposed charter is silent with respect to the duty imposed by law upon the county treasurer, or the treasurer's designee, to serve on the County Budget Commission (R.C. 5705.27) and the County Board of Revision (R.C. 5715.02). This omission was highlighted by Kellie Gray, the Williams County Treasurer, in written testimony provided to the Common Pleas Court at its July 16<sup>th</sup> hearing. Respondents' Evidence, Exhibit E-14, Affidavit of Kellie Gray, ¶ 3-4. The proposed charter is also silent with respect to the power and duty imposed by law upon county treasurers to enforce liens for delinquent tax payments (R.C. 5705.62). Respondents' Evidence, Exhibit E-14, Affidavit of Kellie Gray, ¶ 5. This process is essential to the collection of taxes.

For these reasons, the proposed charter fails to provide for the exercise of all powers and the performance of all duties imposed by law upon county treasurers.

**i. The proposed charter fails to indicate which powers and duties imposed by law on the county and county officers are mandatory and which are permissive.**

With respect to the powers and duties imposed by law upon the county and county officers that are delineated in Relator’s proposed charter, the proposed charter fails to indicate which are required duties and which are permissive powers. *See*, Article X, Section 3 of the Ohio Constitution (requiring charters to provide for the permissive “exercise of all powers” and the required “performance of all duties”). Instead, and for each of the county officers, the proposed charter states that the officers have “the following powers and duties” and then lists the powers and duties without any additional language indicating which are required by law, such as by the use of “shall,” and which are permitted by law, such as by the use of “may.” *See*, Sections 3.3.3; 3.4.3; 3.5.3; 3.6.4; 3.7.4; 3.8.3; 3.10.3; and 3.11.3 of the proposed charter. As a result, the proposed charter fails to sufficiently provide for the permissive exercise of all powers and the required performance of all duties imposed upon the county and county officers by law.

**j. The proposed charter’s “catch-all” clause does not satisfy Article X, Section 3 of the Ohio Constitution.**

Relators’ proposed charter also contains an overly general, catch-all clause providing for the exercise of powers and the performance of duties imposed by law upon counties and county officers, but it does not satisfy Article X, Section 3 of the Ohio Constitution.

Section 3.2 of the proposed charter states:

County officers, boards, commissions, and authorities exercise the same powers and perform the same acts, duties, or functions that are to be exercised or performed under the Ohio Constitution or sections of the Revised Code (including as hereinafter amended) applicable to the officer, board, commission, or authority in counties that have not adopted a charter, unless this Charter expressly assigns the

power, duty, or function to another county officer, board, commission, or authority.

Under this Court’s precedent, the proposed charter’s “catch-all” clause is the very type of “overly general references to the powers and duties of county officials” that “will not suffice” for purposes of Article X, Section 3 of the Ohio Constitution. *McGinn*, ¶ 15. This is because it requires one to “look to sources outside the proposed charter” to determine the powers and duties of the county officials. *Id.* quoting *Walker*, ¶ 15.

Relators contend in their brief that the Court, in *McGinn*, invalidated a proposed county charter “because” it lacked a catch-all provision. Relators’ Brief at 11. But this is inaccurate. The relevant issue in *McGinn* was that the petitioners claimed they had a catch-all provision in their proposed charter when, in fact, they did not. *McGinn*, ¶ 22. The Court in *McGinn* simply took note of the fact that something the petitioners claimed was in their petition was not actually in it. *Id.* What prompted the Court to note that the proposed charter “comes close” to satisfying Article X, Section 3 of the Ohio Constitution is that the parties to the litigation identified just *three* powers and duties imposed upon counties and county officers by law that had been omitted from the proposed charter. *Id.* at ¶ 19-21. Here, however, the Board has identified more than 50 powers and duties imposed upon counties and county officers by law that Relators did not account for in their proposed charter.

Relators also cite the county charters for Summit and Cuyahoga Counties as authority for their argument that their proposed charter’s overly general, catch-all clause satisfies Article X, Section 3 of the Ohio Constitution. Relators’ Brief at 10-11. However, Relators cite no case law evidencing that either county charter was challenged on this basis prior to its adoption. Moreover, the Court’s decisions in *McGinn* and *Walker*, in which the Court held that overly general, catch-all clauses do not satisfy Article X, Section 3 of the Ohio Constitution, both occurred subsequent

to the adoption of the charters in Summit (1979) and Cuyahoga (2009) Counties. Thus, the language of the Summit and Cuyahoga County Charters does not support Relators' contention.

Under *McGinn*, the catch-all clause in Relators' proposed charter does not make up for the proposed charter's woeful failure to provide for the performance of all powers and the exercise of all duties imposed upon counties and county officers by law. For this reason, which is based on pre-H.B. 463 law, Relators' proposed charter is invalid under Article X, Section 3 of the Ohio Constitution. *See, McGinn*, ¶ 23-24.

**3. The proposed charter exceeds the scope of Williams County's authority to enact by initiative.**

Relators' proposed charter exceeds the scope of Williams County's authority to enact via initiative in several respects. The source of the power to propose a county charter by initiative petition is Article X, Section 3 of the Ohio Constitution, which limits the authority to act by initiative to "all matters which such county may now or hereafter be authorized to control by legislative action." In this vein, the Ohio Secretary of State has advised the boards of elections that "[t]he petition is invalid if any portion of the petition does not fall within the authority to enact via initiative." Ohio Secretary of State's Ohio Ballot Questions and Issues Handbook, Chapter 10, Page 10-24. (Emphasis added).

Here, Respondents and the Williams County Court of Common Pleas determined that the proposed charter exceeds the scope of the County's authority to enact via initiative. The Common Pleas Court found that Relator' proposed charter "creates new causes of action which do not exist under current or constitutional authority," and "contains provisions which place restrictions on the administration of existing State and Federal laws beyond the authority of a county to enact under Ohio law." *In re Petition Proposing County Charter Filed June 26, 2019*, Williams C.P. No. 19 CI 060 at \*3 (emphasis original). As to the latter, the Common Pleas Court stated further that "[t]he

proposed restrictions cannot be overlooked as they are an indispensable part of the proposed charter and are not merely aspirational.” *Id.*

**a. The proposed charter creates new private causes of action.**

As the Common Pleas Court held, the proposed charter is invalid because it seeks to create new private causes of action. *See, In re Petition Proposing County Charter Filed June 26, 2019*, Williams C.P. No. 19 CI 060 at \*3. Indeed, much of the proposed charter is devoted to creating these causes of action. Section 1.1 of the proposed charter provides that the citizens of Williams County may “bring an action to enforce” the many rights set forth in the proposed charter, and that such citizens shall be entitled to recover all costs of litigation, including “without limitation” expert and attorney’s fees. Under Ohio law, counties have no authority or power to create new private causes of action. This power rests with the State. *See, Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶ 150 (“state law. . . determines what injuries are recognized and what remedies are available.”) (emphasis added). Accordingly, and as the Common Pleas Court held, the proposed charter’s attempts to create new private causes of action are beyond the scope of the County’s authority to enact via initiative, and Relators’ petition is invalid as a result.

**b. The proposed charter asserts jurisdiction over parts of other counties, as well as parts of Indiana and Michigan.**

One way in which the proposed charter “places restrictions on the administration of existing State and Federal laws,” as the Common Pleas Court explained, is that it asserts jurisdiction over the entirety of the “Michindoh Aquifer.”<sup>9</sup> Section 1.8 of the proposed charter provides, in relevant part:

All people of the County of Williams, along with the ecosystems in the County...possess the right to clean air, water, and soil; to exist,

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<sup>9</sup> The Michindoh Aquifer is a name given to a water source that extends into counties that neighbor Williams County, as well as into parts of Indiana and Michigan.

flourish, and naturally evolve; and to be free from activities that would violate these rights. Activities that would violate these rights include, but are not limited to: commercialization of water from the Michindoh Aquifer for financial gain outside of the Michindoh Aquifer boundaries; the extraction, removal, sale, lease, transportation or distribution of water from the Michindoh Aquifer by any business or government entity to any individual, business, or government entity outside the Michindoh Aquifer boundaries. \* \* \*

(Emphasis added.)

Under Ohio law, counties have no authority to assert jurisdiction over geographic areas in other counties or in other states. Accordingly, this assertion of jurisdiction is beyond the scope of the County’s authority to enact via initiative, and Relators’ petition is invalid as a result.

**c. The proposed charter purports to grant the County the authority to remove the rights of corporations that violate its provisions.**

Another way in which the proposed charter “places restrictions on the administration of existing State laws,” is that purports to authorize the County to remove the rights of corporations that violate its provisions.

State law is the fundamental source of corporate law—not county law. *See*, Article XIII, Section 2, Ohio Constitution (“Corporations may be formed under general laws”); *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), paragraph 2 of syllabus (“Section 2, Article XIII of the Constitution grants full and complete authority to the General Assembly to provide, by general laws, for the formation of corporations and changes in the organization or structure of existing corporations.”); R.C. Chapters 1701-1703.

However, Relators’ proposed charter purports to authorize the County to remove the rights of corporations that violate its provisions. For instance, Section 1.15 of the proposed charter provides:

**Right to Govern Corporate Activities.** As corporations are chartered and licensed by the State in the name of the people, and as

all political power is inherent in the people, the people of this County have and retain the power to make laws, rules, and regulations directly, or through their local representatives, to modify the rights, powers, privileges, immunities, or duties of corporations that act within the County when those corporate rights, powers, privileges, immunities, or duties conflict with the rights of the people or nature.

(Bold emphasis original. Underline emphasis added.)

Additionally, Section 1.16 of the proposed charter provides, in relevant part:

**Rights Secured against Corporations.** \* \* \* Corporations and other business entities that violate rights secured by this Charter or other local law, or that seek to violate those rights, shall not be deemed to be juristic “persons” to the extent that such treatment would infringe the rights secured, or violate the protections of rights imposed, by this Charter or other local law. \* \* \*

(Bold emphasis original.)

Under Ohio law, counties patently lack the ability to “modify the rights, power, privileges, immunities, or duties of corporations” and they cannot refuse to recognize any corporation filed otherwise established with the State. Accordingly, these provisions are beyond the scope of the County’s authority to enact via initiative, and Relators’ Petition is invalid as a result.

**d. The proposed charter states that Williams County will not be subject to constraints imposed by the State of Ohio on county “lawmaking.”**

Another way in which the proposed charter “places restrictions on the administration of existing State laws” is by declaring that, under the proposed charter, the County will not subject to constraints on county lawmaking imposed by the State. Section 4.3 of the proposed charter provides in relevant part:

State authorized powers of such local governmental bodies are distinct and apart from the people’s right of local community self-government. The people’s right is not dependent upon state delegation of powers, nor can the right be diminished or infringed by the state. This Charter is an enactment of the people of Williams County, and the government it creates is not the result of state action. Local communities, when exercising the people’s right of local

community self-government, are not subject to constraints on local lawmaking imposed by state and federal governments when local laws are enacted to secure and protect the people's civil, political, and community rights. Such inapplicable constraints include: preemption of local lawmaking by state and federal laws or international treaties, the conferral of constitutional rights onto corporations, when those "rights" infringe the rights of people and communities, and the doctrine that local governments can legislate only as authorized by state government.

The notion that the County will exist free from State control is in direct conflict with the Ohio Constitution, which provides that the counties are creatures of statute. Article X, Section 1 of the Ohio Constitution provides in relevant part that "The General Assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government." In other words, the County's ability govern is entirely dependent upon state authority, and the proposed charter's attempt to free the County from state control is well beyond the scope of the County's authority to enact via initiative.

**e. The proposed charter attempts to limit the ability of the county board of elections, the Ohio Secretary of State, and other governmental bodies to review County initiative, referendum, recall, and charter amendment petitions.**

Another way in which the proposed charter "places restrictions on the administration of existing State laws" is by attempting to limit the ability of the county board of elections, the Ohio Secretary of State, and "other governmental bod[ies]," to review county initiative, referendum, recall, and charter amendment petitions. Section 4.4(3) of the proposed charter. However, the County has no authority to limit the power of these governmental bodies, and this provision is beyond the scope of the County's authority to enact via initiative.

Relators' proposed charter includes several provisions that are beyond the scope of the County's authority to enact via initiative, and, as a result, Relators' entire petition is invalid.



**C. Respondents lack a corresponding clear legal duty to place Respondents’ issue on the November 5, 2019 ballot.**

Because Relators’ proposed charter is invalid under Article X, Section 3 of the Ohio Constitution—and because the Board must comply with the Common Pleas Court’s decision—Relators cannot demonstrate that Respondents have a clear legal duty to place their proposed charter on the November 5, 2019 ballot. For this reason, Relators’ requested writ of mandamus must be denied.

**III. Relators’ Constitutional Challenges Lack Merit**

Relators make several arguments that H.B. 463’s amendments to R.C. 3501.11(K)(2), R.C. 3501.38(M)(1)(b), and R.C. 3501.39(A)(3) are unconstitutional. However, the Court need not address these constitutional challenges given that the Board had authority to find Relators’ petition invalid under pre-H.B. 463 law. *McGinn*, ¶ 24 (“And because we hold that the boards had the authority to find these petitions invalid under pre-H.B. 463 law, we need not address the constitutionality of the statutory amendments.”); *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 48, quoting *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 7, 716 N.E.2d 1114 (1999) (“Courts decide constitutional issues only when absolutely necessary.”). If the Court determines, however, that it must address Relators’ constitutional challenges, then the Court should reject each of them.

**A. The Court Should Decline Relators’ Invitation to Extend *Maxcy* to County Charter Petitions.**

Relators make much of the Court’s decision in *State ex rel. Maxcy v. Lucas Cty. Bd. of Elections* in which the Court held that, for purposes of a municipal charter petition, the board of elections has only a ministerial role in placing the proposal on the ballot. *Maxcy*, 155 Ohio St.3d

496, 2018-Ohio-4035, 122 N.E.3d 1165, ¶ 19. Relators seek to extend this principle to county charter petitions (Relators' Brief at 3-8), but the Court should reject this proposition.

The crux of Relators' argument is that municipal charter petitions are synonymous with county charter petitions. Relators' Brief at 6. However, that is just not true. The municipal initiative power derives from an entirely different part of the Ohio Constitution (Article XVIII) than the county initiative power (Article X), and these provisions have critical distinctions.

Article XVIII, Sections 8 and 9, for instance, specifically vest the municipal legislative body with the sole authority to determine whether a municipal charter petition satisfies the legal requirements for submission to the voters. *State ex rel. Abernathy v. Lucas Cty. Bd. of Elections*, 156 Ohio St.3d 238, 2019-Ohio-201, 125 N.E.3d 832, ¶ 8. That is why, in *Maxcy*, the Court held that a board of elections has no legal authority to review the substance of a proposed municipal charter amendment and has no discretion to block the measure from the ballot based on an assessment of its suitability. *Abernathy*, ¶ 7 citing *Maxcy*, ¶ 13, 18-19. Also, Article XVIII, Sections 8 and 9, do not set forth substantive requirements for what a proposed municipal charter must contain, perhaps because of the home rule powers that municipalities possess under Article XVIII, Section 3.

In contrast, Article X, Section 3 sets forth three substantive prerequisites that proposed county charters must satisfy to qualify for placement on the ballot. These are: (1) to provide for the form of government, including determining which of its officers shall be elected and the manner of their election; (2) to provide for the exercise of all powers, and the performance of all duties, imposed on counties and county officers by law; and (3) to not exceed the scope of a county's authority to act by initiative.

Further, the General Assembly, pursuant to its power to enact laws governing elections, has specifically given county boards of elections the duty to determine whether proposed charters satisfy the substantive prerequisites set forth in Article X, Section 3. *See, e.g.*, R.C. 307.94. In providing boards with this duty, the General Assembly also provided for multiple layers of judicial review of the boards' decisions. Under R.C. 307.94, Petitioners have the option to challenge a board's decision in an expedited action before the county court of common pleas which provides a de novo review of the board's determination.<sup>10</sup> Alternatively, petitioners can protest the board's determination before the Secretary of State whose decision on the protest is reviewable by the courts in a mandamus action, which the U.S. Court of Appeals for the Sixth Circuit recently described as "essentially" providing a de novo review. *Schmitt v. LaRose*, \_\_\_ F.3d \_\_\_, No. 19-3196, 2019 U.S., 2019 U.S. App. LEXIS 23594, at \*16, 20 (6th Cir. Aug. 7, 2019).

Given the differences between the constitutional provisions authorizing municipal charter petitions and county charter petitions, it would be nonsensical to extend the Court's holding in *Maxcy*, which rests upon the provisions of Article XVIII, Sections 8 and 9 governing municipal charters, to county charter petitions. For this same reason, Relators' heavy reliance upon the Court's holding in *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 154 Ohio St.3d 1, 2017-Ohio-8223, which also concerned the municipal initiative power under Article XVIII, is misplaced.

Accordingly, the Court should reject Relators' proposition to extend the Court's holding in *Maxcy* that county boards of elections have nothing but a ministerial duty to place municipal charter petitions on the ballot to county charter petitions.

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<sup>10</sup> *See, In re Protest of Brooks*, 154 Ohio App.3d 739, 2003-Ohio-5241, 798 N.E.2d 1118, ¶ 18 (10th Dist) (finding that a near-identical remedy under the now-former version of R.C. 3519.16, which concerned statewide petitions, "contemplates a de novo review by the trial court.")

**B. Relators abandoned their separation of powers argument.**

The Fourth Cause of Action in Relators' Complaint alleges a separation of powers argument with respect to H.B. 463. Complaint, ¶¶ 36-38. However, this argument was not included in their merit brief. Accordingly, they have abandoned it, and they should be prohibited from making the argument in their Reply Brief.

**C. Relators' single-subject challenge would not entitle them to their requested relief.**

Relators allege that H.B. 463 violates the single-subject rule set forth in Article II, Section 15(D) of the Ohio Constitution. Relators' Brief at 14-15. Even if Relators are successful on this challenge, however, it would not entitle them to their requested relief. Again, this is because under pre-H.B. 463 law, boards of elections still had the authority to determine whether proposed county charter petitions satisfied the constitutional prerequisites set forth in Article X, Section 3 of the Ohio Constitution. Invalidating H.B. 463's amendments would not change this, and Relators' proposed charter would still be woefully deficient under Article X, Section 3.

With respect to any remaining constitutional arguments made by Relators that are not specifically addressed herein, Respondents adopt the responsive arguments set forth in the Amicus Brief to the Court by the Ohio Attorney General on August 20, 2019. This includes the Attorney General's argument that this Court lacks jurisdiction, in a mandamus proceeding, to entertain a request for declaratory relief or prohibitory injunction.

**CONCLUSION**

The Court need not address the multiple deficiencies in Relators' proposed charter or the constitutional arguments raised by Relators as there are alternative grounds for denying Relators' requested mandamus relief. These alternative grounds are: (1) Relators had an adequate remedy at law which they pursued by requiring Respondents to bring an action in the Common Pleas Court

to have that court make an independent decision, but they have, to date, failed to see this remedy through by appealing the Common Pleas Court's decision (Section II.A of Respondents' Argument); and (2) Relators unreasonably delayed in filing the instant action (Section I of Respondents' Argument). For these reasons, the Court should deny Relators' request for mandamus.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of Respondents' Merit Brief and Appendix of Cited Authority was served via email on August 22, 2019 upon the following:

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/s/ Derek S. Clinger  
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**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO EX REL.</b>	:	<b>Case No. 2019-1108</b>
<b>SHERRY L. FLEMING, et al.</b>	:	
	:	
<b>Relators,</b>	:	<b>Original Action in Mandamus</b>
	:	
<b>v.</b>	:	<b>Expedited Election Matter Pursuant to</b>
	:	<b>S.Ct.Prac.R. 12.08</b>
<b>MARK E. FOX, SR., et al.</b>	:	
	:	
<b>Respondents.</b>	:	

**RESPONDENTS' APPENDIX OF CITED  
CONSTITUTIONAL PROVISIONS AND STATUTES**

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Ohio Constitution, Article II, Section 15(D)

No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.



Ohio Constitution, Article IV, Section 3(B)(2)

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

### Ohio Constitution, Article X, Section 3

The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every 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. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of power vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon. In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not included within any township any part of its area lying within a municipality).

Ohio Constitution, Article XIII, Section 2

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

Ohio Constitution, Article XVIII, Sections 8-9

Section 8

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.

Section 9

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.

## R.C. 302.02

An alternative form of county government shall include either an elective county executive as provided for by section 302.15 of the Revised Code or an appointive county executive as provided by section 302.16 of the Revised Code, and all those provisions of sections 302.01 to 302.24, inclusive, of the Revised Code, which have not been specifically designated as applicable only to the elective county executive plan or the appointive county executive plan. The alternative form of county government providing for the office of the elective county executive shall be known as the elective executive plan, and the alternative form providing for the office of appointive county executive shall be known as the appointive executive plan.

R.C. 307.94

Electors of a county, equal in number to ten per cent of the number who voted for governor in the county at the most recent gubernatorial election, may file, not later than one hundred fifteen days before the date of a general election, a petition with the board of county commissioners asking that the question of the adoption of a county charter in the form attached to the petition be submitted to the electors of the county. The petition shall be available for public inspection at the offices of the county commissioners during regular business hours until four p.m. of the one hundred eleventh day before the election, at which time the board shall, by resolution, certify the petition to the board of elections of the county for submission to the electors of the county, unless the signatures are insufficient or the petitions otherwise invalid, at the next general election.

Such electors may, in the alternative not later than the one hundred thirtieth day before the date of a general election, file such a petition with the board of elections of the county. In such case the board of elections shall immediately proceed to determine whether the petition and the signatures on the petition meet the requirements of law and to count the number of valid signatures and to note opposite each invalid signature the reason for the invalidity. The board of elections shall complete its examination of the petition and the signatures and shall submit a report to the board of county commissioners not later than the one hundred twentieth day before the date of the general election certifying whether the petition is valid or invalid and, if invalid, the reasons for invalidity, whether there are sufficient valid signatures, and the number of valid and invalid signatures. The petition and a copy of the report to the board of county commissioners shall be available for public inspection at the board of elections. If the petition is certified by the board of elections to be valid and to have sufficient valid signatures, the board of county commissioners shall forthwith and not later than four p.m. on the one hundred eleventh day before the general election, by resolution, certify the petition to the board of elections for submission to the electors of the county at the next general election. If the petition is certified by the board of elections to be invalid or to have insufficient valid signatures, or both, the petitioners' committee may protest such findings or solicit additional signatures as provided in section 307.95 of the Revised Code, or both, or request that the board of elections proceed to establish the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures in an action before the court of common pleas in the county. Such action must be brought within three days after the request has been made, and the case shall be heard forthwith by a judge or such court whose decision shall be certified to the board of elections and to the board of county commissioners in sufficient time to permit the board of county commissioners to perform its duty to certify the petition, if it is determined by the court to be valid and contain sufficient valid signatures, to the board of elections not later than four p.m. on the one hundred eleventh day prior to the general election for submission to the electors at such general election. A county charter to be submitted to the voters by petition shall be considered to be attached to the petition if it is printed as a part of the petition. A county charter petition may consist of any number of separate petition papers. Each part shall have attached a copy of the charter to be submitted to the electors, and each part shall otherwise meet all the requirements of law for a county charter petition. Section 3501.38 of the Revised Code applies to county charter petitions. The petitioners shall designate in the petition the names and addresses of a committee of not fewer than three nor more than five persons who will represent them in all matters relating to the petition. Notice of all matters or proceedings pertaining to such petitions may be served on the

committee, or any of them, either personally or by certified mail, or by leaving it at the usual place of residence of each of them.

R.C. 307.95

(A) When a county charter petition has been certified to the board of elections pursuant to section 307.94 of the Revised Code, the board shall 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, and to count the number of valid signatures. The board shall note opposite each invalid signature the reason for the invalidity. The board shall complete its examination of the petition and the signatures not later than ten days after receipt of the petition certified by the board of county commissioners and shall submit a report to the board of county commissioners not less than one hundred days before the election certifying whether the petition is valid or invalid and, if invalid, the reasons for the invalidity, whether there are sufficient valid signatures, and the number of valid and invalid signatures. The petition and a copy of the report to the board of county commissioners shall be available for public inspection at the board of elections. If the petition is determined by the board of elections to be valid but the number of valid signatures is insufficient, the board of county commissioners shall immediately notify the committee for the petitioners, who may solicit and file additional signatures to the petition pursuant to division (E) of this section or protest the board of election's findings pursuant to division (B) of this section, or both.

(B) Protests against the findings of the board of elections concerning the validity or invalidity of a county charter petition or any signature on such petition may be filed by any elector eligible to vote at the next general election with the board of elections not later than four p.m. of the ninety-seventh day before the election. Each protest shall identify the part of, or omission from, the petition or the signature or signatures to which the protest is directed, and shall set forth specifically the reason for the protest. A protest must be in writing, signed by the elector making the protest, and shall include the protestor's address. Each protest shall be filed in duplicate.

(C) The board of elections shall deliver or mail by certified mail one copy of each protest filed with it to the secretary of state. The secretary of state, within ten days after receipt of the protests, shall determine the sufficiency or insufficiency of the signatures and the validity or invalidity of the petition, including whether the petition conforms to the requirements set forth in Section 3 of Article X and Section 3 of Article XVIII of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county offices by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power. The secretary of state may determine whether to permit matters not raised by protest to be considered in determining such validity or invalidity or sufficiency or insufficiency, and may conduct hearings, either in Columbus or in the county where the county charter petition is filed. The determination by the secretary of state is final.

(D) The secretary of state shall notify the board of elections of the determination made under division (C) of this section not later than four p.m. of the eighty-first day before the election. If the petition is determined to be valid and to contain sufficient valid signatures, the charter shall be placed on the ballot at the next general election. If the petition is determined to be invalid, the secretary of state shall so notify the board of county commissioners and the board of county commissioners shall notify the committee. If the petition is determined by the secretary of state to be valid but the number of valid signatures is insufficient, the board of elections shall immediately notify the committee for the petitioners and the committee shall be allowed ten



additional days after such notification to solicit and file additional signatures to the petition subject to division (E) of this section.

(E) All additional signatures solicited pursuant to division (A) or (D) of this section shall be filed with the board of elections not less than seventy days before the election. The board of elections shall examine and determine the validity or invalidity of the additional separate petition papers and of the signatures thereon, and its determination is final. No valid signature on an additional separate petition paper that is the same as a valid signature on an original separate petition paper shall be counted. The number of valid signatures on the original separate petition papers and the additional separate petition papers shall be added together to determine whether there are sufficient valid signatures. If the number of valid signatures is sufficient and the additional separate petition papers otherwise valid, the charter shall be placed on the ballot at the next general election. If not, the board of elections shall notify the county commissioners, and the commissioners shall notify the committee.

R.C. 2502.02

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

R.C. 3501.11

Each board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall do all of the following:

- (A) Establish, define, provide, rearrange, and combine election precincts;
- (B) Fix and provide the places for registration and for holding primaries and elections;
- (C) Provide for the purchase, preservation, and maintenance of booths, ballot boxes, books, maps, flags, blanks, cards of instructions, and other forms, papers, and equipment used in registration, nominations, and elections;
- (D) Appoint and remove its director, deputy director, and employees and all registrars, precinct election officials, and other officers of elections, fill vacancies, and designate the ward or district and precinct in which each shall serve;
- (E) Make and issue rules and instructions, not inconsistent with law or the rules, directives, or advisories issued by the secretary of state, as it considers necessary for the guidance of election officers and voters;
- (F) Advertise and contract for the printing of all ballots and other supplies used in registrations and elections;
- (G) Provide for the issuance of all notices, advertisements, and publications concerning elections, except as otherwise provided in division (G) of section 3501.17 and divisions (F) and (G) of section 3505.062 of the Revised Code;
- (H) Provide for the delivery of ballots, pollbooks, and other required papers and material to the polling places;
- (I) Cause the polling places to be suitably provided with voting machines, marking devices, automatic tabulating equipment, stalls, and other required supplies. In fulfilling this duty, each board of a county that uses voting machines, marking devices, or automatic tabulating equipment shall conduct a full vote of the board during a public session of the board on the allocation and distribution of voting machines, marking devices, and automatic tabulating equipment for each precinct in the county.
- (J) Investigate irregularities, nonperformance of duties, or violations of Title XXXV of the Revised Code by election officers and other persons; administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and report the facts to the prosecuting attorney or the secretary of state;
- (K)
  - (1) Review, examine, and certify the sufficiency and validity of petitions and nomination papers, and, after certification, return to the secretary of state all petitions and nomination papers that the secretary of state forwarded to the board;
  - (2) Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.
- (L) Receive the returns of elections, canvass the returns, make abstracts of them, and transmit those abstracts to the proper authorities;
- (M) Issue certificates of election on forms to be prescribed by the secretary of state;

- (N) Make an annual report to the secretary of state, on the form prescribed by the secretary of state, containing a statement of the number of voters registered, elections held, votes cast, appropriations received, expenditures made, and other data required by the secretary of state;
- (O) Prepare and submit to the proper appropriating officer a budget estimating the cost of elections for the ensuing fiscal year;
- (P) Perform other duties as prescribed by law or the rules, directives, or advisories of the secretary of state;
- (Q) Investigate and determine the residence qualifications of electors;
- (R) Administer oaths in matters pertaining to the administration of the election laws;
- (S) Prepare and submit to the secretary of state, whenever the secretary of state requires, a report containing the names and residence addresses of all incumbent county, municipal, township, and board of education officials serving in their respective counties;
- (T) Establish and maintain a voter registration database of all qualified electors in the county who offer to register;
- (U) Maintain voter registration records, make reports concerning voter registration as required by the secretary of state, and remove ineligible electors from voter registration lists in accordance with law and directives of the secretary of state;
- (V) Give approval to ballot language for any local question or issue and transmit the language to the secretary of state for the secretary of state's final approval;
- (W) Prepare and cause the following notice to be displayed in a prominent location in every polling place:

NOTICE

Ohio law prohibits any person from voting or attempting to vote more than once at the same election.

Violators are guilty of a felony of the fourth degree and shall be imprisoned and additionally may be fined in accordance with law.

(X) In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the director or chairperson shall submit the matter in controversy, not later than fourteen days after the tie vote or the disagreement, to the secretary of state, who shall summarily decide the question, and the secretary of state's decision shall be final.

(Y) Assist each designated agency, deputy registrar of motor vehicles, public high school and vocational school, public library, and office of a county treasurer in the implementation of a program for registering voters at all voter registration locations as prescribed by the secretary of state. Under this program, each board of elections shall direct to the appropriate board of elections any voter registration applications for persons residing outside the county where the board is located within five days after receiving the applications.

(Z) On any day on which an elector may vote in person at the office of the board or at another site designated by the board, consider the board or other designated site a polling place for that day. All requirements or prohibitions of law that apply to a polling place shall apply to the office of the board or other designated site on that day.

(AA) Perform any duties with respect to voter registration and voting by uniformed services and overseas voters that are delegated to the board by law or by the rules, directives, or advisories of the secretary of state.

R.C. 3501.38

All declarations of candidacy, nominating petitions, or other petitions presented to or filed with the secretary of state or a board of elections or with any other public office for the purpose of becoming a candidate for any nomination or office or for the holding of an election on any issue shall, in addition to meeting the other specific requirements prescribed in the sections of the Revised Code relating to them, be governed by the following rules:

(A) Only electors qualified to vote on the candidacy or issue which is the subject of the petition shall sign a petition. Each signer shall be a registered elector pursuant to section 3503.01 of the Revised Code. The facts of qualification shall be determined as of the date when the petition is filed.

(B) Signatures shall be affixed in ink. Each signer may also print the signer's name, so as to clearly identify the signer's signature.

(C) Each signer shall place on the petition after the signer's name the date of signing and the location of the signer's voting residence, including the street and number if in a municipal corporation or the rural route number, post office address, or township if outside a municipal corporation. The voting address given on the petition shall be the address appearing in the registration records at the board of elections.

(D) Except as otherwise provided in section 3501.382 of the Revised Code, no person shall write any name other than the person's own on any petition. Except as otherwise provided in section 3501.382 of the Revised Code, no person may authorize another to sign for the person. If a petition contains the signature of an elector two or more times, only the first signature shall be counted.

(E)

(1) On each petition paper, the circulator shall indicate the number of signatures contained on it, and shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code. On the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition, the circulator shall identify the circulator's name, the address of the circulator's permanent residence, and the name and address of the person employing the circulator to circulate the petition, if any.

(2) As used in division (E) of this section, "statewide candidate" means the joint candidates for the offices of governor and lieutenant governor or a candidate for the office of secretary of state, auditor of state, treasurer of state, or attorney general.

(F) Except as otherwise provided in section 3501.382 of the Revised Code, if a circulator knowingly permits an unqualified person to sign a petition paper or permits a person to write a name other than the person's own on a petition paper, that petition paper is invalid; otherwise, the signature of a person not qualified to sign shall be rejected but shall not invalidate the other valid signatures on the paper.

(G) The circulator of a petition may, before filing it in a public office, strike from it any signature the circulator does not wish to present as a part of the petition.

(H) Any signer of a petition or an attorney in fact acting pursuant to section 3501.382 of the Revised Code on behalf of a signer may remove the signer's signature from that petition at any

time before the petition is filed in a public office by striking the signer's name from the petition; no signature may be removed after the petition is filed in any public office.

(I)

(1) No alterations, corrections, or additions may be made to a petition after it is filed in a public office.

(2)

(a) No declaration of candidacy, nominating petition, or other petition for the purpose of becoming a candidate may be withdrawn after it is filed in a public office. Nothing in this division prohibits a person from withdrawing as a candidate as otherwise provided by law.

(b) No petition presented to or filed with the secretary of state, a board of elections, or any other public office for the purpose of the holding of an election on any question or issue may be resubmitted after it is withdrawn from a public office or rejected as containing insufficient signatures. Nothing in this division prevents a question or issue petition from being withdrawn by the filing of a written notice of the withdrawal by a majority of the members of the petitioning committee with the same public office with which the petition was filed prior to the sixtieth day before the election at which the question or issue is scheduled to appear on the ballot.

(J) All declarations of candidacy, nominating petitions, or other petitions under this section shall be accompanied by the following statement in boldface capital letters: **WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.**

(K) All separate petition papers shall be filed at the same time, as one instrument.

(L) If a board of elections distributes for use a petition form for a declaration of candidacy, nominating petition, or any type of question or issue petition that does not satisfy the requirements of law as of the date of that distribution, the board shall not invalidate the petition on the basis that the petition form does not satisfy the requirements of law, if the petition otherwise is valid. Division (L) of this section applies only if the candidate received the petition from the board within ninety days of when the petition is required to be filed.

(M)

(1) Upon receiving an initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, concerning a ballot issue that is to be submitted to the electors of a county or municipal political subdivision, the board of elections shall examine the petition to determine:

(a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power; or

(b) Whether the petition falls within the scope of a county's authority to enact via initiative, including whether the petition conforms to the requirements set forth in Section 3 of Article X of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county officers by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The finding of the board shall be subject to challenge by a protest filed pursuant to division (B) of section 307.95 of the Revised Code.

(2) After making a determination under division (M)(1)(a) or (b) of this section, the board of elections shall promptly transmit a copy of the petition and a notice of the board's determination

to the office of the secretary of state. Notice of the board's determination shall be given to the petitioners and the political subdivision.

(3) If multiple substantially similar initiative petitions are submitted to multiple boards of elections and the determinations of the boards under division (M)(1)(a) or (b) of this section concerning those petitions differ, the secretary of state shall make a single determination under division (M)(1)(a) or (b) of this section that shall apply to each such initiative petition.

R.C. 3501.39

(A) The secretary of state or a board of elections shall accept any petition described in section 3501.38 of the Revised Code unless one of the following occurs:

(1) A written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition is invalid, in accordance with any section of the Revised Code providing a protest procedure.

(2) A written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition violates any requirement established by law.

(3) In the case of an initiative petition received by the board of elections, the petition falls outside the scope of authority to enact via initiative or does not satisfy the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

(4) The candidate's candidacy or the petition violates the requirements of this chapter, Chapter 3513. of the Revised Code, or any other requirements established by law.

(B) Except as otherwise provided in division (C) of this section or section 3513.052 of the Revised Code, a board of elections shall not invalidate any declaration of candidacy or nominating petition under division (A)(4) of this section after the sixtieth day prior to the election at which the candidate seeks nomination to office, if the candidate filed a declaration of candidacy, or election to office, if the candidate filed a nominating petition.

(C)

(1) If a petition is filed for the nomination or election of a candidate in a charter municipal corporation with a filing deadline that occurs after the ninetieth day before the day of the election, a board of elections may invalidate the petition within fifteen days after the date of that filing deadline.

(2) If a petition for the nomination or election of a candidate is invalidated under division (C) (1) of this section, that person's name shall not appear on the ballots for any office for which the person's petition has been invalidated. If the ballots have already been prepared, the board of elections shall remove the name of that person from the ballots to the extent practicable in the time remaining before the election. If the name is not removed from the ballots before the day of the election, the votes for that person are void and shall not be counted.



R.C. 3511.04

(A) If a director of a board of elections receives an application for uniformed services or overseas absent voter's ballots that does not contain all of the required information, the director promptly shall notify the applicant of the additional information required to be provided by the applicant to complete that application.

(B) Not later than the forty-sixth day before the day of each general or primary election, and at the earliest possible time before the day of a special election held on a day other than the day on which a general or primary election is held, the director of the board of elections shall mail, send by facsimile machine, send by electronic mail, send through internet delivery if such delivery is offered by the board of elections or the secretary of state, or otherwise send uniformed services or overseas absent voter's ballots then ready for use as provided for in section 3511.03 of the Revised Code and for which the director has received valid applications prior to that time.

Thereafter, and until twelve noon of the third day preceding the day of election, the director shall promptly, upon receipt of valid applications for them, mail, send by facsimile machine, send by electronic mail, send through internet delivery if such delivery is offered by the board of elections or the secretary of state, or otherwise send to the proper persons all uniformed services or overseas absent voter's ballots then ready for use.

If, after the seventieth day before the day of a general or primary election, any other question, issue, or candidacy is lawfully ordered submitted to the electors voting at the general or primary election, the board shall promptly provide a separate official issue, special election, or other election ballot for submitting the question, issue, or candidacy to those electors, and the director shall promptly mail, send by facsimile machine, send by electronic mail, send through internet delivery if such delivery is offered by the board of elections or the secretary of state, or otherwise send each such separate ballot to each person to whom the director has previously mailed or sent other uniformed services or overseas absent voter's ballots.

A board of elections that mails or otherwise delivers uniformed services or overseas absent voter's ballots to an elector under this section shall not prepay the return postage for those ballots. In mailing uniformed services or overseas absent voter's ballots, the director shall use the fastest mail service available, but the director shall not mail them by certified mail.