

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel* ) Case No. 2016-1164  
Katherine S. Jones, et al., )  
 )  
Relators, )  
 )  
-vs- ) **RELATORS' MOTION FOR**  
 ) **RECONSIDERATION**  
 )  
Jon Husted, )  
Secretary of the State of Ohio, et al., )  
 )  
Respondents. ) **Expedited Election Case Pursuant to**  
 ) **S.Ct.Prac.R. 12.08**  
 )

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September 9, 2016

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| State of Ohio, <i>ex rel</i>            | ) | Case No. 2016-1164  |
| Katherine S. Jones, et al.,             | ) |   |
| Relators,                               | ) |   |
| -vs-                                    | ) | <b>RELATORS' MOTION FOR RECONSIDERATION</b>                   |
| Jon Husted,                             | ) |   |
| Secretary of the State of Ohio, et al., | ) |   |
| Respondents.                            | ) | <b>Expedited Election Case Pursuant to S.Ct.Prac.R. 12.08</b> |
|   | ) |   |

**MOTION FOR RECONSIDERATION**

Relators Katharine S. Jones, Elizabeth A. Jarrell, Lynn Kemp, Georgia Kimble, and Emilie Ann Judy (“Relators”), proceeding by and through counsel, hereby move the Court, pursuant to S.Ct.Prac.R. 18.02(B) to reconsider, vacate and set aside its *per curiam* decision dated September 6, 2016 and captioned as *State ex rel. Jones v. Husted*, Slip Opinion No. 2016-Ohio-5681 (“Opinion”). The Opinion is fundamentally flawed because it relies upon and interprets a statute which had no legal applicability to the then-pertaining circumstances, which involved a tie, 2-2 vote by the Medina County Board of Elections on the question of the “validity” of the proposed petition. The statutory court-review procedure of O.R.C. § 307.94 relates only to circumstances where there has been a final determination of petition validity rendered by a county board of elections, which did not happen with the 2-2 tie vote. Moreover, even if the O.R.C. § 307.94 court-review procedure was potentially applicable, the relevant statutory time period for so invoking it expired 13 days before the Secretary broke the tie.

Relators are excused from pursuing a legal nullity. They possessed no other adequate remedy at law than this mandamus action.. A Memorandum in Support follows.

Respectfully submitted,

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| Katherine S. Jones, et al.,             | ) |  |
| Relators,                               | ) |  |
| -vs-                                    | ) | <b>RELATORS' MEMORANDUM IN</b>             |
|   | ) | <b>SUPPORT OF MOTION FOR</b>               |
| Jon Husted,                             | ) | <b>RECONSIDERATION</b>                     |
| Secretary of the State of Ohio, et al., | ) |  |
| Respondents.                            | ) | <b>Expedited Election Case Pursuant to</b> |
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**MEMORANDUM IN SUPPORT**

Relators Katharine S. Jones, Elizabeth A. Jarrell, Lynn Kemp, Georgia Kimble, and Emilie Ann Judy (“Relators”) hereby set forth the grounds for their Motion for Reconsideration of the Court’s September 6, 2016 decision.

**I. Facts and Procedural Background**

A committee of registered voters in Medina County initiated, circulated, and filed a petition containing a County Charter proposal for placement on the November 8, 2016 general election ballot. Approval of the proposal by voters would establish a charter form of government in Medina County, which is not presently a charter county.

On June 30, 2016 the petitioners turned in part petitions bearing 5,501 valid signatures to the Medina County Board of Elections (“MCBOE”). A total of 4,814 valid signatures were required.

On July 11, 2016, the MCBOE deadlocked 2-2 in the formal vote on whether to certify the Petition to the Medina County Commissioners for placement on the ballot. The tie vote was referred to the Ohio Secretary of State to break the tie, as required by O.R.C. § 3501.11(X).



On July 14, 2016, the MCBOE reported the deadlock to the SOS, including position statements from the respective sides.

On August 2, 2016, the SOS ruled to bar the Petition from being placed on the ballot. August 2, 2016 was the 98th day before the November 8, 2016 general election.

On August 9, 2016, Relators filed a Verified Complaint for a Writ of Mandamus in this Court. The case was expedited, briefs were timely filed by Relators, Respondents and amici curiae, and on September 6, 2016, the court issued its decision of dismissal (2016-Ohio-5681).

The 111th day before the November 8, 2016 election was July 20, 2016, thirteen days before the Secretary resolved the Board's tie vote with his decision to deny the petition to be put on the ballot.

## II. Argument

The Court found that it need not proceed to a decision on the merits “because relators have failed to establish that they meet all the requirements to obtain a writ of mandamus.”

Opinion, 2016-Ohio-5681 at ¶ 9. Specifically, the court ruled as follows:

{¶ 11} The secretary of state resolved the tie vote of the board under R.C. 3501.11(X), resulting in a determination by the board that the petition was invalid. Relators then had two statutory procedures through which they could have challenged the board's decision: (1) a protest of the board's decision before the secretary of state under R.C. 307.95 or (2) a request that the board bring an action in the common pleas court to establish the validity of the petition—which action must then be brought within three days—under R.C. 307.94.

{¶ 12} Relators argue that filing a protest of the board's decision when, as here, the secretary of state cast the tie-breaking vote is an insufficient remedy, because a protest must be heard and decided by the secretary of state. They claim that protesting the secretary's tie-breaking vote to the secretary would be “illogical and redundant.”

{¶ 13} However, filing a protest that would be decided by the secretary of state was not their only alternative. Relators had, but failed to avail themselves of, an alternate procedure. Pursuant to R.C. 307.94, they could have requested that the board bring an action in the common pleas court to establish the validity of the petition. Instead, they filed the instant action seeking extraordinary relief.

Opinion, 2016-Ohio-5681 at ¶¶ 11-13.

This ruling is mistaken as a matter of law, for the below reasons.

- A. ***An O.R.C. § 307.94 review of the Board of Elections ruling in common pleas court is only available when the Board has actually ruled that a petition is invalid, and in any event is precluded when the Secretary of State renders a decision pursuant to O.R.C. § 3501.11(X).***

The Court erroneously considered the Secretary of State's tie-breaking decision under O.R.C. § 3501.11(X) to be the "board's decision" - *i.e.*, the Medina County Board of Elections' decision. Opinion, 2016-Ohio-5681 at ¶¶ 11, 12. That characterization is contradicted by the statute, which says that once the matter of a tie vote is referred to the Secretary for decision, the ultimate ruling is the Secretary's decision, and it is final:

(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.***

O.R.C. § 3501.11(X) (Emphasis added).

Because the Secretary's decision is not the board's decision, O.R.C. § 307.94 is inapplicable. The pertinent part of O.R.C. § 307.94 says:

***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.

(Emphasis added). The Medina County Board of Elections never certified the petitions to be invalid - a necessary precondition to invoke the court-review remedy - so court review was never even available. The only reported decision interpreting O.R.C. § 307.94 similarly recognized that the committee cannot be faulted for failing to exhaust its legal remedies when those remedies are unavailable. *See, e.g., State ex rel. Meigs Cty. Home Rule Commt. v. Meigs Co. Bd. of Commrs.*,

2015-Ohio-3701, ¶ 10, 44 N.E.3d 950, 953 (Fourth Dist. 2015):

The Commissioners argue that the mandamus petition is barred because the Committee failed to exhaust its legal remedies when it failed to file suit in the Meigs County Common Pleas Court in accordance with the procedure provided in R.C. 307.94. However, ***that procedure governs committee protests where a board of elections has found the petition to be invalid or to have insufficient valid signatures. . . .***

(Emphasis added).

***B. Even if the O.R.C. § 307.94 court review procedure were theoretically available here, the court would not have been able to issue a ruling within the time line contemplated by the statute.***

There is another compelling reason that the court-review portion of O.R.C. § 307.94 did not provide Relators with a plain and adequate remedy in the ordinary course of the law: the timetable for invoking it had run out by August 2, 2016. O.R.C. § 307.94 requires a court challenge to be heard by a judge “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.***” (Emphasis added).

The 111th day before the November 8, 2016 election was July 20, 2016. The Secretary of State issued his decision on August 2, 2016, which was the 98th day before the election. The O.R.C. § 3501.11(X) impasse-breaking procedure is mandatory and one over which Relators had no control. For the duration of the § 3501.11(X) decision-making process (which ran from July 14 through August 2, 2016), Relators were obliged to wait to learn the result.

The obvious rationale for the 111th day rule for a court-review ruling is to guarantee opponents of the petition the right to file a protest with the Secretary of State to try to preclude the measure from the ballot. Consequently, the 111th-day deadline is a mandatory one which cuts

off the court-review option if not timely requested.

**C. An O.R.C. § 307.95 protest of the Secretary’s decision under O.R.C. § 3501.11(X) is redundant and not legally required.**

The Court mentioned the option of an O.R.C. § 307.95 protest of the Secretary’s decision made under O.R.C. § 3501.11(X) as a possible option, but it is not clear whether the Court was ruling that O.R.C. § 307.95 provided a second plain and adequate remedy in the ordinary course of law in this instance. The Court acknowledged Relators’ argument that it would be “illogical and redundant.” In the next paragraph, the Court continued by saying: “However, filing a protest that would be decided by the secretary of state was not their only alternative.” Opinion, 2016-Ohio-5681 at ¶¶ 12,13.

Relators respectfully state that it is unclear whether the Court essentially agreed with Relators’ argument regarding the inapplicability of the protest procedures in O.R.C. § 307.95 or whether the Court was suggesting that O.R.C. § 307.95 provided a remedy in the ordinary course of law. The phrase “not their only alternative” could mean that O.R.C. § 307.95 was not available, but that another alternative was, or the phrase could mean that O.R.C. § 307.95 was available in addition to another alternative. Relators believe it must be the former (for the reasons set forth in their Reply Brief at pp. 11-13). However, without the Court clarifying this portion of its decision, it is difficult to decipher the Court’s holding on this issue. For the reasons previously argued in the Reply Brief, Relators maintain that a “final decision” under O.R.C. § 3501.11(X), which cannot be directly appealed but only challenged collaterally, if at all, is not further required to be protested under O.R.C. § 307.95.

**CONCLUSION**

Under S.Ct.Prac.R. 18.02, the Court uses its reconsideration authority to “correct decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995); *Dublin City*

*Schools Bd. of Education v. Franklin County Bd. of Revision*, 139 Ohio St.3d 212, 11 N.E.3d 222, 2014-Ohio-1940, ¶ 9 (2014). The basis of the September 6, 2016 Opinion reveals that the decision was made in error. The two options which the Court determined were “plain and adequate remedies at law” are inapropos and legally inadequate when analyzed in the contexts of the facts and of timing. The point in time at which the Secretary of State made his ruling precluded any option except mandamus.

Courts do not expect overtly futile options to be pursued by mandamus relators in service of creating a record akin to administrative exhaustion. “The ‘ordinary course of the law’ doctrine does not comprehend that a relator in a mandamus action be obliged to follow the suicidal course of filing a cross-complaint in his opponent's different action in another court which would foreclose his own suit in mandamus.” *State ex rel. Tulley v. Brown*, 29 Ohio St. 2d 235, 237, 281 N.E.2d 187, 189 (1972). Similarly, seeking a second ruling from the Secretary on the identical issue but using a different statutory procedure conflicts with the statutory finality of the first decision and the bars of *res judicata* and collateral estoppel. By requiring endless procedural hoop-jumping as election preparation deadlines close in, the Court would make it impossible for citizens seeking the simple relief of a public and binding vote for their initiative to ever get to the ballot. The court-review procedure by definition could never be invoked inside the statutory 111 days preceding the election. Requiring redundant protests of the same decision fatally crowds the printing and distribution of election ballots and yields no just result.

*Amici* Ohio Chamber of Commerce was the only entity to raise the question of whether the court-review procedure had to be followed. The procedure has been on the books for at least four decades, yet *Amici* could not cite a single case in which the court refused to entertain a request for mandamus relief on the grounds that relators should have (either instead or first) requested that a board of elections proceed to establish the validity or invalidity of the petition in

an action before the court of common pleas. The argument is so plainly wrong that neither the Secretary nor Medina County raised the same argument in their briefs.

The common pleas court review and O.R.C. § 307.95 procedures are not “plain and adequate remedies” which should have been pursued. There is only one legal pathway of recourse here - mandamus - which Relators have timely pursued. It is incumbent on the Court to reverse Opinion 2016-Ohio-5681, to decide this lawsuit on its merits, and to accord Medina County’s electors the initiative vote which is their hard-earned constitutional right.

**WHEREFORE**, Relators pray the Court, upon reconsideration, to find that its September 6, 2016 Opinion in this case was decided in error, and that the Court reverse it and rule on the merits in favor of Relators.

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