

IN THE SUPREME COURT OF OHIO

CASE NO. 2021-0878

**Original Action in Mandamus
Election Matter filed Pursuant to S. Ct. Rule 12.04**

STATE OF OHIO EX REL. SCHMITT, et al.,

Relators,

V.

VILLAGE OF BRIDGEPORT, et al.,

Respondents,

RELATORS' BRIEF

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Statement of the Case

Parties

Relator, Dean Michael Barrath, is a citizen, resident, qualified elector, and taxpayer of the Village of Bridgeport, Ohio who resides at 210 Willow Avenue in Bridgeport, Ohio 43912. Complaint at ¶¶ 1, 2; Relators' Evidence, Affidavit of Barrath at ¶ 1. Relator-Barrath is also a supporter of the Sensible Marihuana Ordinance Initiative (hereinafter "Initiative"), that was circulated in the Village of Bridgeport in order to be placed on the November 2, 2021 general election ballot, signed the petition, and is ready and able to vote in its favor. Complaint at ¶ 2; Relators' Evidence, Affidavit of Barrath at ¶¶ 2, 3. Relator, William Schmitt, a citizen, a resident and qualified elector of the State of Ohio, resides at 4646 Harrison Street, Bellaire, Ohio 43906. Relator-Schmitt was also a circulator of the Initiative that Relators have attempted to have placed on the Village of Bridgeport's November 2, 2021 election ballot. Complaint at ¶¶ 3, 4; Relators' Evidence, Affidavit of Schmitt at ¶¶ 1,2.

Respondent- Mayor of Bridgeport is the Mayor of the Village of Bridgeport, Complaint at ¶5; Answer of Respondents-Bridgeport at ¶ 5 (admitting), and was at all relevant times in this matter directing the actions of the Clerk of the Village of Bridgeport or was acting as the Clerk of the Village of Bridgeport. Complaint at ¶¶ 5, 29, 39, 41; Relators' Evidence, Affidavit of Schmitt, at ¶¶ 17, 28, 31. Respondent-Clerk of Bridgeport, is the Clerk of the Village of Bridgeport, Complaint at ¶ 6; Answer of Respondents-Bridgeport at ¶ 6 (admitting), and is responsible under Chapter 731 of the Revised Code for accepting the filings of initiatives and supporting signatures on behalf of Respondent-Village of Bridgeport. Complaint at ¶ 6. Both Respondent-Mayor of Bridgeport and Respondent-Clerk of Bridgeport are sued in their official capacities. *See* Ohio R. Civ. P. 25(D). Complaint, at ¶ 8; Respondents' Answer at ¶ 8 (admitting).

Respondent-Village of Bridgeport is a Village organized under Ohio law that is subject to the requirements and duties regarding citizen initiatives imposed by Chapter 731 of the Revised Code. Complaint at ¶ 7. Respondent- Belmont County Board of Elections, is responsible for verifying the signatures collected by Relators to support the Initiative and for placing the Initiative on the Village of Bridgeport's November 2, 2021 general election ballot.¹ Complaint at ¶ 9; Separate Answer of Respondent, Belmont County Board of Elections at Complaint at ¶ 2 (admitting).

Facts

On April 28, 2021 Relator-Schmitt timely delivered to Respondent-Clerk of Bridgeport a certified copy of the Initiative as required by R.C. § 731.32. Complaint at ¶ 21; Answer of Respondents-Bridgeport at ¶ 21 (admitting); Relators' Evidence, Affidavit of Schmitt at ¶¶ 5, 6, 7. Pursuant to the authority granted by R.C. § 731.34 ("The petitioners may designate in any initiative or referendum petition a committee of not less than three of their number"), Relators chose not to appoint a committee for the Initiative. Because Relator-Schmitt had properly complied with Ohio law, Respondent- Clerk of Bridgeport, through its agent who was present in the Office when the Initiative was hand-delivered by Relator-Schmitt, properly accepted the Initiative with the authority of the Respondent-Clerk to do so, Complaint at ¶ 21; Respondents' Answer at ¶ 21 (admitting); Relators' Evidence, Affidavit of Schmitt at at ¶ 5, 6, 7, and also provided Relator-Schmitt a receipt for the filing. Complaint at ¶¶ 21, 22 & Attachment 3; Relators' Evidence, Affidavit of Schmitt at ¶ 6 & Attachment 3.

¹ In *State ex rel. Harris v. Rubino*, 155 Ohio St.3d 123, 127, 2018-Ohio-3609, 119 N.E.3d 1238, 1243 (2018), upon which Relators pattern their original action and argument, the Cuyahoga County Board of Elections was also joined as a respondent. Relators accordingly have joined the Belmont County Board of Elections as a necessary Respondent here in order to allow the Court to enter the same relief it ordered in *Rubino*. Relators do not seek costs or attorney's fees from Respondent, Belmont County Board of Elections.

The person in Respondent-Clerk of Bridgeport's Office who accepted this filing and initialed the receipt on April 28, 2021 did not identify herself by name to Relator-Schmitt but held herself out as either the Clerk or an authorized agent of the Clerk of Bridgeport. Relators' Evidence, Affidavit of Schmitt at ¶ 6. She answered "yes" when asked by Relator-Schmitt whether she was the Clerk and later stated that she was "a volunteer clerk." *See* Relators' Evidence, Affidavit of Schmitt at ¶ 6 and incorporated video at <https://youtu.be/ss6pyWqO6GQ>. As explained below, this same "volunteer" was present during Relator-Schmitt's subsequent unsuccessful attempts to deliver the petition supporting the Initiative.

The initial filing of the Initiative on April 28, 2021 with Respondent-Clerk of Bridgeport satisfied all requirements of Ohio law and thereby authorized the collection of signatures in support of the Initiative. *See* R.C. § 731.32. Relator-Schmitt, along with several other lawful circulators, thereafter collected 149 signatures from Village of Bridgeport voters, more than enough to satisfy Ohio's 10% of the last gubernatorial vote requirement. Complaint at ¶¶ 24, 25; Relators' Evidence, Affidavit of Schmitt at ¶¶ 13, 14. In the Village of Bridgeport, 10% of the last gubernatorial vote translates into 54 signatures. Complaint at ¶25; Relators' Evidence, Affidavit of Schmitt at ¶14.

Because the number of signatures collected by Relator-Schmitt and the other circulators exceeds 10% of the gubernatorial vote in Bridgeport during the last election, and because the petitions were otherwise in proper order, when delivered to Respondent-Clerk of Bridgeport's Office are presumed proper, valid and sufficient under Ohio law. "The petitions and signatures upon such petitions shall be prima facie presumed to be in all respects sufficient" under R.C. § 731.31.

Relator-Schmitt on three occasions on June 29, 2021, July 9, 2021 and July 12, 2021 attempted to deliver to Respondent, Clerk of the Village of Bridgeport the petition and 149 supporting signatures for the Initiative. Complaint at ¶ 15; Relators' Evidence, Affidavit of Schmitt at ¶ 15, 25, 27. The petition and supporting signatures must be filed by July 15, 2021, Complaint at ¶ 47; Relators' Evidence, Affidavit of Schmitt at ¶ 9, 10 & Attachment 4, and Respondent- Clerk of Bridgeport refused to accept them before this date. Complaint at ¶¶ 15, 16; Relators' Evidence, Affidavit of Schmitt at ¶¶ 17, 28. Respondent- Clerk of Bridgeport gave no reason for not accepting them other than that she would not do so until instructed to do so by the Village Solicitor and Relators would have to contact the Village Solicitor. Complaint at ¶ 31; Relators' Evidence, Affidavit of Schmitt at ¶ 20. A full video of Relator's attempt to deliver the petition to Respondent- Clerk of Bridgeport on June 29, 2021, can be seen on Youtube at https://youtu.be/u9dh4V_5_fc. See Relators' Evidence, Affidavit of Schmitt at ¶ 18.

Following Relator-Schmitt's unsuccessful attempt at delivery on June 29, 2021 he contacted his attorney, the undersigned attorney in this case. Complaint at ¶ 30; Relators' Evidence, Affidavit of Schmitt at ¶ 19. The undersigned attorney phoned the Respondent- Clerk of Bridgeport, and in a conversation with a person who identified herself as the Respondent-Mayor of Bridgeport but took the call for the Clerk's Office, was informed that Respondent-Clerk of Bridgeport would not accept delivery of the petition until told to do so by the Village Solicitor. Relators' Evidence, Affidavit of Schmitt at ¶ 20. The undersigned attorney telephoned the Village Solicitor three times on June 29, 2021 and June 30, 2021, left detailed messages with the receptionist who answered the phone, informed her that time was of the essence, requested that the Village Solicitor return his call, and asked to speak with any other available attorney in the Solicitor's Office. Relators' Evidence, Affidavit of Schmitt at ¶ 21. The receptionist informed

the undersigned attorney he could not speak to anyone else in the Solicitor's law firm and informed him that the Village Solicitor was given the messages but stated that he would not return the calls until July 6, 2021 or thereafter. The Village Solicitor did not return those calls on July 6, 2021 or at any time before the filing of this action. *See* Complaint at ¶ 33; Relators' Evidence, Affidavit of Schmitt at ¶ 22.

After the unsuccessful attempt to deliver the petition and signatures on June 29, 2021, and after the Solicitor had failed to return Relators' attorney's calls, Relators, through counsel, on June 30, 2021, delivered to the Village of Bridgeport's Solicitor a formal, "written request of [a] taxpayer of the municipal corporation" under R.C. § 733.59 demanding that he "make an[] application provided for in sections 733.56 to 733.58 of the Revised Code," on behalf of the Village to a court of competent jurisdiction, to force the Village of Bridgeport Clerk to perform her duties under Chapter 731 of the Revised Code. Complaint at ¶ 34 & Attachment 2; Relators' Evidence, Affidavit of Schmitt at ¶ 23 & Attachment 2. The Village Solicitor failed to file such an action, Complaint at ¶ 18; Answer of Respondents-Bridgeport at ¶ 21 (admitting), and did not otherwise inform Respondent- Clerk of Bridgeport before July 17, 2021 of her duty to accept the petition. Complaint at ¶ 35; Relators' Evidence, Affidavit of Schmitt at ¶ 24.

On July 9, 2021 and July 12, 2021 Relator-Schmitt again unsuccessfully attempted to hand-deliver to Respondent-Clerk of Bridgeport the petition and supporting signatures. Complaint at ¶¶ 36, 37, 38; Relators' Evidence, Affidavit of Schmitt at ¶¶ 25, 26, 27. The Office was not open on July 9, 2021 and on July 12, 2021, the Respondent-Clerk of Bridgeport once again expressly refused to accept the petition. Complaint at ¶ 39; Relators' Evidence, Affidavit of Schmitt at ¶ 28. As with the June 29, 2021 attempt, Relator- Schmitt recorded the July 12,

2021 attempt and it can be viewed on Youtube at <https://youtu.be/2buMLPyLIR8>. *See* Relators' Evidence, Affidavit of Schmitt at ¶ 29.

Two people were in the Office of Respondent-Clerk of Bridgeport when Relator-Schmitt appeared to deliver the petition on July 12, 2021. *See* Relators' Evidence, Affidavit of Schmitt at ¶ 29 (incorporating video). These were the same two people present on June 29, 2021, and one (who was not the Mayor) was present in the Clerk's Office on April 28, 2021 and who accepted Relator-Schmitt's initial filing of the Initiative on that date. *Relators' Evidence, Affidavit of Schmitt at ¶28.* That person identified herself as the Clerk and stated that she was a "volunteer" in the Office. Respondents have admitted in their Answer that this "volunteer" had the authority to act as the Clerk and had the authority to accept the certified copy of the Initiative when filed on April 28, 2021 by Relator-Schmitt. *See* Complaint at ¶ 21; Respondents' Answer at ¶ 21 (admitting).

This "volunteer" in the Clerk's Office, Respondents claim in their Affirmative Defenses, was Carole Lyle. The true Clerk, Respondents assert, is Mary Lyle, who apparently was absent from the Office at all of the events described in this case, including those on April 28, 2021, June 29, 2021, July 12, 2021, and July 17, 2021. Respondents do not indicate if the Lyles are related.

The "volunteer" present on July 12, 2021 and who refused to accept Relators' petition was the same "volunteer" who accepted Relator-Schmitt's initial filing of the Initiative on behalf of Respondent-Clerk of Bridgeport on April 28, 2021, *Relators' Evidence, Affidavit of Schmitt at ¶28,* as is confirmed by the recorded video. *See* Relators' Evidence, Affidavit of Schmitt at ¶¶ 28, 29. Rather than accept the petition as the Clerk on July 12, 2021, as she did with the Initiative on April 28, 2021 when she occupied the exact same Office with full authority to perform the functions of the Respondent-Clerk of Bridgeport, this time the "volunteer" refused it. *Relators'*

Evidence, Affidavit of Schmitt at ¶¶ 28. The Mayor who was also present informed Relator-Schmitt at this July 12, 2021 meeting that his petition would not be accepted. She told him this even though Relator-Schmitt informed her at this meeting on July 12, 2021 of the July 15, 2021 deadline and the need for immediate action. *See* Relators' Evidence, Affidavit of Schmitt at ¶¶ 28, 29.

Whatever reasons the Mayor and the "volunteer" had for refusing to accept the petition is known only to them. They did not inform Relator-Schmitt, his attorney, or anyone else of their rationale for refusing to accept delivery of Relators' petition other than to direct them to the Village Solicitor, who for his own reasons refused to respond or return their repeated phone calls. Virtually-identical versions of the Sensible Marihuana Ordinance proposed by Relator-Schmitt, meanwhile, have been presented to voters and passed by several municipalities in Ohio. *See Schmitt v. LaRose*, 933 F.3d 628, 636 (6th Cir. 2019) (reporting that the Sensible Marihuana Ordinance was voted on in Windham and Garrettsville, and passed in the former); Kyle Jaeger, *Four More Ohio Cities Will Vote On Marijuana Decriminalization This November*, Marijuana Moment, Aug. 13, 2020² (reporting that the Sensible Marihuana Ordinance was qualified by initiative in Adena, Glouster, Jacksonville, and Trimble, Ohio for the November 3, 2020 ballot).

Baffled by Respondents refusals to accept delivery of the Initiative petition, and equally perplexed by the Village Solicitor's failure to return phone calls or respond to their demand letter, Relators had no choice but to file on July 16, 2021 this original action in this Court seeking a writ of mandamus directing Respondent, Clerk of the Village of Bridgeport, to perform her clear legal duties under R.C. § 731.28.

² <https://www.marijuanamoment.net/four-more-ohio-cities-will-vote-on-marijuana-decriminalization-this-november/>.

Jurisdiction is proper in this Court under Article IV, § 2(B)(1)(d) of the Ohio Constitution and Ohio Supreme Court Practice Rule 12.04. Ohio's general election, from which Relators' Initiative has now been excluded by Respondents' action, is scheduled for November 2, 2021. The deadline for submitting petitions and signatures in order to comply with R.C. § 731.28 is July 15, 2021, as made clear by the Ohio Attorney General in *Thompson v. DeWine*, 976 F.3d 610 (6th Cir. 2020). *See* Relators' Evidence, Affidavit of Schmitt at ¶¶ 9, 10 & Attachment 4. The certification deadline for local initiatives by boards of elections, meanwhile, is 4 PM on August 4, 2021. *Id.*; *see also* 2021 Ohio Election Calendar.³

Given these impending deadlines, the Court on July 19, 2021 ordered the following expedited briefing schedule:

Respondents shall file an answer to the complaint by 12:00 p.m. on Thursday, July 22, 2021; relators shall file a brief and evidence no later than Friday, July 23, 2021; respondents shall file a brief and evidence no later than Monday, July 26, 2021; and relators shall file a reply brief no later than Tuesday, July 27, 2021.

07/19/2021 Case Announcements #2, 2021-Ohio-2471.

Argument

I. Respondent-Clerk of the Village of Bridgeport Has A Clear Legal Duty to Accept Delivery of the Petitions and then Transmit Them to the Board of Elections Under R.C. § 731.28.

Ohio Revised Code § 731.32 states that "Whoever seeks to propose an ordinance or measure in a municipal corporation by initiative petition or files a referendum petition against any ordinance or measure shall, before circulating such petition, file a certified copy of the proposed ordinance or measure with the city auditor or the village clerk. Upon filing the proposed measure, here the Initiative, with the Clerk, section 731.28 of the Revised Code

³ https://www.ohiosos.gov/publications/2021-elections-calendar/?__cf_chl_jschl_tk__=pmd_3a7831f452f10033aefe4fd2d1219119a474622a-1626955607-0-gqNtZGzNAjjcnBszQji.

requires that circulators supporting the proposed measure collect signatures from local voters "of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation."

Village clerks, or alternatively auditors when they exist, are under a clear legal duty to fulfill the requirements of Chapter 731. *See State ex rel. Harris v. Rubino*, 155 Ohio St.3d 123, 127, 2018-Ohio-3609, 119 N.E.3d 1238, 1243 (2018) (ordering locality to perform its legal duty under § 731.28). Section 731.28 of the Revised Code states that "When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, transmit a certified copy of the text of the proposed ordinance or measure to the board of elections." (Emphasis added). *See also* R.C. § 731.34 ("After a petition has been filed with the city auditor or village clerk it shall be kept open for public inspection for ten days."). The duty to accept the petition, hold it for inspection for ten days, and then transmit it to the board of elections is clear and mandatory.

Section 731.28 of the Revised Code states that once the Clerk has performed this clear legal duty, "The board [of elections] shall examine all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition. The board shall return the petition to the auditor or clerk within ten days after receiving it, together with a statement attesting to the number of such electors who signed the petition."

Upon receipt of the verified signatures from the Board of Elections, § 731.28 then provides that "after the auditor or clerk certifies the sufficiency and validity of the initiative petition to the board of elections," the proposed measure (here the Initiative) shall then be "submit[ted] ...for the approval or rejection of the electors of the municipal corporation at the

next general election occurring subsequent to ninety days" after the Clerk's certification of sufficiency and validity.

The Ohio Supreme Court succinctly described this process in *State ex rel. Harris v. Rubino*, 155 Ohio St.3d 123, 127, 2018-Ohio-3609, 119 N.E.3d 1238, 1243 (2018):

The statute thus sets out the following procedure: (1) petitioners submit the municipal initiative petition to the city auditor [or clerk], (2) the auditor [or clerk] holds the petition for 10 days, (3) the auditor [or clerk] transmits the petition to the board of elections to determine the number of valid signatures, (4) the board certifies the number of valid signatures and returns the petition to the auditor, (5) the auditor [or clerk] certifies to the board the validity and sufficiency of the petition, and (6) the board submits the petition to the electors at the next election occurring 90 days after the auditor's certification.

In *Rubino*, which is very much like the present case, an initiative was filed with the city auditor on June 29, 2018 in order to allow circulation of petitions. *Id.* at 124, 119 N.E.3d at 1240. On July 12, 2018, supporting petitions with signatures were delivered to the auditor, which were duly accepted for filing. *Id.* The auditor held the petitions for ten days, as required by R.C. § 731.28, and then delivered them on July 23, 2018 to the board of elections. *Id.* On July 30, the board certified that the petition contained 870 valid signatures, more than the number necessary to qualify the petition for the ballot under R.C. § 731.28. *Id.* On July 31, 2018 the city retrieved the petition and certification from the board, but then refused to anything more. The city and its auditor refused certify the validity and sufficiency of the petition to the board of elections for inclusion on the November 2018 ballot by the certification deadline, which was then August 8 at 4 PM. *Id.* at 125, 119 N.E.3d at 1241.

The relators in that case sent a taxpayer demand under R.C. §§ 733.58 and .59 on July 20, 2018, claiming that the city had "a duty to certify the validity and sufficiency of the petition to the board by August 8." *Id.* The relators requested that the law director "seek a writ of mandamus compelling the city council to certify the petition to the board if the council did not do so at its

August 6 regular meeting." *Id.* "On July 30, the law director rejected this demand. The August 8 deadline passed with no action by the law director. On August 9, the [relators] filed this mandamus action." *Id.*

The city claimed that R.C. § 731.28 did not apply to it because its charter expressly contradicted the requirements in R.C. § 731.28. This Court disagreed. *Rubino*, 155 Ohio St. 3d at 131, 119 N.E.3d at 1245-46. Instead, it ruled that R.C. § 731.28 applied, and it further concluded that the city auditor had a clear legal duty to comply with it. It stated: "we hold that Rubino abused his discretion by failing to certify the sufficiency and validity of the petition to the board of elections by the August 8 deadline." *Rubino*, 155 Ohio St.3d at 131, 119 N.E.3d at 1246. Because the city and auditor had missed that deadline, the Court on September 7, 2018 "order[ed] Rubino to certify the sufficiency and validity of the initiative petition to the board for placement on the November 2018 ballot." *Id.*

Relators ask for essentially the same relief here. Just as in *Rubino*, the proximity of the election means that Relators have no adequate remedy at law. Just as in *Rubino*, the Respondent-Clerk of Bridgeport is responsible under R.C. § 731.28 for timely accepting delivery of the petition and timely transmitting it to the board of elections. She has refused to perform that clear legal duty. To be sure, in *Rubino* the failure was the last step of certification of sufficiency and validity, but that is no matter. Respondent-Clerk of Bridgeport has a clear legal duty to perform each step required of it under R.C. § 731.28. This includes the first three steps spelled out in *Rubino*, 155 Ohio St.3d at 127, 119 N.E.3d at 1243, that is, "(1) petitioners submit the municipal initiative petition to the city auditor [or clerk], (2) the auditor [or clerk] holds the petition for 10 days, [and] (3) the auditor [or clerk] transmits the petition to the board of elections to determine the number of valid signatures"

Here, Respondent-Clerk of Bridgeport has refused Relators' timely attempts to deliver the petition. That means that Respondent-Clerk of Bridgeport could not perform its additional duties under R.C. § 731.28 to hold the petition for 10 days and then transmit the petition to the Respondent, Belmont County Board of Elections. It means that the Belmont County Board of Elections, could not perform its admitted duty, *see* Complaint at ¶ 9; Separate Answer of Respondent, Belmont County Board of Elections at Complaint at ¶ 2 (admitting duty once petition delivered), to perform the required tasks described as steps (4) and (6) in *Rubino*, and the Respondent-Clerk of Bridgeport could not thereafter perform its duty under step (5) to certify the validity and sufficiency of the petition. It all goes back to the clerk's refusal to accept delivery of the petitions with supporting signatures on June 29, 2021, July 9, 2021 and July 12, 2021. Had she done so, the remaining duties could all have been timely performed. Now they cannot.

Because of Ohio's two ten-day requirements included in R.C. § 731.28, simply ordering the Respondent- Clerk of Bridgeport to accept Relators' petitions at this late date does not appear to be a workable remedy. The Clerk must hold the petition for 10 days, and then the Belmont County Board of Elections has 10 more days to verify the signatures. This would push the delivery back to the Clerk beyond the August 4, 2021 certification deadline and result in the Initiative's not appearing on the ballot.

The most logical remedy, given these time constraints, is to do what the Court in *Rubino*, 155 Ohio St.3d at 123, 119 N.E.3d at 1240, did on September 7, 2018, almost one month after the certification deadline in that case; that is grant the writ of mandamus and order Respondent-Clerk of Bridgeport "to certify the sufficiency and validity of the initiative petition to the board for placement on the November 2018 ballot," and then to also require Respondent-Belmont County Board of Elections to perform its clear duty and submit the Initiative to the electors of

the Village of Bridgeport on November 2, 2021. Including the Belmont County Board of Elections in the order ensures that Relators' Initiative will appear on the November 2, 2021 ballot, as it would have but for Respondent, Clerk of the Village of Bridgeport's actions. Without that relief, the Belmont County Board of Elections would otherwise remain bound by Ohio's existing deadlines.

Alternatively, the two ten day deadlines found in R.C. § 731.28 might be truncated by the Court in this case if time otherwise permits, so that the Initiative petition can be ordered accepted by the Respondent-Clerk of Bridgeport, delivered to the Board, verified by the Board, and then certified by the Clerk back to the Board as valid and sufficient by 4 PM on August 4, 2021. Regardless of the precise relief ordered, Relators respectfully request that it be fashioned so that their Initiative can be included on the November 2, 2021 ballot in the Village of Bridgeport.

II. Respondent-Clerk of Bridgeport Refused to Timely Accept Delivery of Relators' Petition in Violation of R.C. § 731.28.

Relator-Schmitt is an experienced circulator in Ohio, knows what Ohio law requires to properly place initiatives on local ballots, and has succeeded in placing the Sensible Marihuana Ordinance on local ballots in Ohio in the past. *See Thompson v. DeWine*, 976 F.3d 610 (6th Cir. 2020); *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019). He understands that petitions are to be submitted to municipal clerks or alternatively auditors (none exists in the Village of Bridgeport, Complaint at ¶ 40; Respondents' Answer at ¶ 40 (admitting)) and understands that he is to deliver his petitions to the relevant Clerk's Office.

Relator-Schmitt attempted to deliver the completed petition here on June 29, 2021, July 9, 2021 and July 12, 2021. Assuming the Bridgeport Clerk's Office was legitimately closed for business on July 9, 2021 (which Relators do not now contest), Relator-Schmitt still appeared at the Clerk's Office to deliver the completed petition during regular business hours, while the

Office was open and staffed, on two separate occasions on June 29, 2021 and July 12, 2021. On neither occasion would those staffing the Clerk's Office accept his petition.

These visits were preceded by Relator-Schmitt's first visit Respondent-Clerk of Bridgeport's Office on April 28, 2021. This visit was successful, resulting in the filing with the Respondent-Clerk of Bridgeport of a certified copy of the Initiative, which is required by R.S. § 731.32, a fact that Respondents admit. *See* Complaint at ¶ 18 ("On April 28, 2021 Relator, William Schmitt, timely and properly delivered to Respondent-Clerk of the Village of Bridgeport a certified copy of the Initiative as required by R.C. § 731.32."); Respondents' Answer at ¶ 18 (admitting).

Respondents thus admit that Relator-Schmitt found the Clerk's Office on April 28, 2021, the "volunteer" present in that Office accepted delivery of the Initiative on behalf of the Clerk, and that "volunteer" had authority to do so. This "volunteer" in the Respondent-Clerk of Bridgeport's Office on April 28, 2021 stated that she was the Clerk (responding to Relator-Schmitt's question of whether she was the Clerk with "yes"), and also stated that she was "a volunteer clerk." *See* Relators' Evidence, Affidavit of Schmitt at ¶ 6 and incorporated video at <https://youtu.be/ss6pyWqO6GQ>.

Because Respondents admit that the Initiative was properly filed on April 28, 2021 with this "volunteer" in the Clerk's Office, they admit that this "volunteer" who accepted the Initiative that day and wrote at the top of Relator-Schmitt's transmittal letter "Received 4-28-2021," *see* Relators' Evidence, Affidavit of Schmitt at ¶ 6 & Attachment 3, had authority to act as the Clerk when she, the "volunteer," was working in the Clerk's Office. This was as true on June 29, 2021 and July 12, 2021 when the "volunteer" was working in the Clerk's Office as it was on April 28, 2021.

On the second occasion at the Clerk's Office on June 29, 2021, Relator-Schmitt was met by the Mayor and once again the "volunteer." Because Relator-Schmitt had already correctly located the Office once and successfully delivered the Initiative, it is quite unlikely as Respondents now suggest in their Affirmative Defenses that Relator-Schmitt somehow this time was in the wrong Office. On June 29, 2021, as reflected in the video, Relator-Schmitt talked to the Mayor in the presence of the "volunteer" who was inside the Clerk's Office and the Mayor informed him that the petition would not be accepted. Complaint at ¶¶ 15, 16; Relators' Evidence, Affidavit of Schmitt at ¶¶ 17, 28.

On the third occasion when Relator-Schmitt physically appeared at the Clerk's Office on July 12, 2021, he was once again met by the Mayor. Also present was the "volunteer" who had accepted his Initiative on April 28, 2021 on behalf of the Clerk, *see* Relators' Evidence, Affidavit of Schmitt at ¶ 28, with full authority to do so (as admitted by Respondent), and who had provided him a receipt. This time, the same "volunteer" who had accepted Relator-Schmitt's Initiative on April 28, 2021, and who Respondents admit had authority to do so, refused to accept Relator-Schmitt's petition. The Mayor, moreover, informed Relator-Schmitt on July 12, 2021 in the presence of the "volunteer" that the petition would not be accepted without prior discussion with the Village Solicitor, who had repeatedly failed to return any of Relator-Schmitt's or his attorney's calls.

Relator-Schmitt stated to the Mayor and the person present in the Clerk's Office with her that the deadline for delivering the petition was July 15, 2021. *See* Relators' Evidence, Affidavit of Schmitt at ¶¶ 28, 29. Notwithstanding being expressly informed of this July 15, 2021 deadline, neither the Mayor nor the "volunteer" who had previously on April 28, 2021 accepted Relator-Schmitt's certified copy of the Initiative did anything before the end of the day on July 15, 2021

to notify Relator-Schmitt that they were now prepared to accept his petition, even though they were provided with his telephone number and e-mail address. They instead waited until after this case was filed and the deadline had passed on July 17, 2021 to phone Relator-Schmitt and inform him that the Clerk's Office would now accept the petition.

Respondents would have this Court believe that Relator-Schmitt did not know what he was doing. They suggest in their Affirmative Defenses that Relator-Schmitt must have gone to the wrong office, or perhaps he went to the right office staffed by the wrong people. If the latter of course, that is the fault of Respondents, since who is staffing the Clerk's Office falls beyond Relator-Schmitt's control. Citizens should be able to assume that the personnel staffing any governmental office during regular business hours when the office is open to the public have authority to do so. Especially when they identify themselves as the holder of that Office, as the "volunteer" did on April 28, 2021. It does not behoove any government to trick citizens by supplying fake staff in any office.

In regard to the suggestion that Relator-Schmitt perhaps went to the wrong office, maybe the Mayor's office Respondents suggest, this far-fetched argument not only ignores Relator-Schmitt's successful visit on April 28, 2021 to the Clerk's Office, but also ignores the "volunteer clerk's" presence in the Office Relator-Schmitt entered on July 12, 2021. If it was the Mayor's Office, why was the "volunteer clerk" there? The only logical conclusion is that Relator-Schmitt was in the Clerk's Office as he says.

The Mayor's presence and express refusal to allow the Clerk's Office to accept the petition on June 29, 2021 and July 12, 2021 only exacerbates matters. On both occasions the Mayor took command, exercised her authority as Mayor, and informed Relator-Schmitt that the Clerk's Office would not accept the petition without some sort of prior discussion with the

Village Solicitor. This made it virtually impossible for the "volunteer" to accept the petition even if she had wanted to. In order to do so she would have had to countermand the Mayor's orders. No staff member should be put to that choice.

Proof that the Mayor had assumed charge over acceptance or denial of the petition is found in both Relators' attorney's telephone conversation on June 29, 2021 with what he thought was the Clerk's Office, where the Mayor answered the phone and informed Relator's attorney that Office would not accept the petition without approval of the Solicitor, and the Mayor's July 17, 2021 telephone call to Relator-Schmitt informing him that the Clerk's Office would now accept the petition. This evidence leaves no doubt that the Mayor was taking charge of the Clerk's Office and deciding whether it would accept the petition. Even if the "volunteer" no longer had the authority Respondents admitted she had on April 28, 2021, the Mayor had assumed equal authority by June 29, 2021, July 12, 2021 and July 17, 2021.

Through her actions, the Mayor makes clear that she had either assumed the duties of the Clerk or was directing those duties. Her actions constitute actual and apparent authority to act as and for the Clerk. *See* Complaint at ¶ 4; Relators' Evidence, Affidavit of Schmitt at ¶¶ 31, 32. Because she had actually taken control of the Clerk's Office and was physically staffing it with the "volunteer," her statements and actions constitute those of the Clerk.

Further, even if she did not have actual authority, she had apparent authority. This Court in *Master Consolidated Corp. v. BancOhio National Bank*, 61 Ohio St.3d 570, 576, 575 N.E.2d 817, 822 (1991), described apparent authority as having two conditions: "(1) [t]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did

believe that the agent possessed the necessary authority." Here, Relator-Schmitt was acting in good faith, and had both reason to believe and actual belief that both the "volunteer" and the Mayor had the necessary authority to act while inside the Clerk's Office. The second prong is easily satisfied.

As for the first prong, the Village's Clerk, whomever that is, "knowingly permitted" both the Mayor and the "volunteer" "act as having such authority." They were staffing the Clerk's Office. The "volunteer" had previously accepted Relators' Initiative on April 28, 2021. Respondents admit that this "volunteer" had authority to act as and for the Clerk on April 28, 2021. The "volunteer" was once again present in the Clerk's Office on July 12, 2021. Because Respondents have admitted that she had authority on April 29, 2021 to act as the Clerk, she must have had the same authority to act as the Clerk on July 12, 2021, too. If not actual, it is at least apparent.

The Mayor, meanwhile, represented that she had authority to refuse delivery of the petition on both June 29, 2021 and July 12, 2021. The Mayor represented that she had authority to accept the delivery of the petition on July 17, 2021. She held herself out as having that authority. She was allowed by the Clerk, whomever that is, to staff the Clerk's Office. There is no claim that the Clerk ever instructed the Mayor not to help staff the Clerk's Office. The Mayor's authority was apparent.

The evidence is clear that the Respondent- Clerk of Bridgeport expressly refused to timely accept Relators' petition on June 29, 2021 and July 12, 2021. The evidence is clear that the Respondent-Clerk of Bridgeport knew of the July 15, 2021 deadline and despite having Relator-Schmitt's phone number and e-mail address did not contact him until July 17, 2021, two days after the deadline had passed, to inform him that it would accept the petition. The Clerk

breached its clear duty under R.C. § 731.28 to timely accept delivery of Relators' petition. Mandamus is proper.

III. Respondent-Clerk of Bridgeport's Belated Offer to Accept the Petition Does Not Cure the Respondent-Clerk of Bridgeport's Breach of its Duty.

Two days after the July 15, 2021 deadline passed, the Mayor on July 17, 2021 telephoned Relator-Schmitt and told him that the Respondent-Clerk of Bridgeport was now prepared to accept the petition. Acting on advice of his attorney, Relator-Schmitt did not once again attempt to deliver the petition at this late date.

The reason is simple. Under Ohio law, including R.C. § 731.28 and R.C. § 731.34 ("After a petition has been filed with the city auditor or village clerk it shall be kept open for public inspection for ten days."), upon delivery of the petition to a clerk the clerk must then hold the petition for inspection for ten days. Only after this ten days must the clerk under R.C. § 731.28 transmit the petition to the board of elections. The board of elections then under R.C. § 731.28 ("The board shall return the petition to the auditor or clerk within ten days after receiving it, together with a statement attesting to the number of such electors who signed the petition."), has up to ten days to verify the signatures. Whether the board takes all ten days is beyond the control of the petition's proponents.

Assuming that Relator-Schmitt had turned in his petition on July 17, 2021 as the Mayor insisted, the Clerk would have had to hold it for ten days until July 27, 2021. After this ten days the Clerk then on July 27, 2021 (at the earliest) would have had to transmit the petition to the board. If the board then took the ten days provided it under R.C. § 731.28 to verify the signatures, it would not then return the petition to the Clerk until August 6, 2021, which is two days after the August 4, 2021 certification date for the November 2, 2021 election.

Because delivery on July 17, 2021 risked not having the petition being timely certified for the November 2, 2021 election, Relator-Schmitt could not accept it. Accepting delivery on July 17, 2021 does not satisfy the Clerk's clear duty under R.C. § 731.28 and *Rubino* to act timely. It was therefore not acceptable.

IV. Relators Should Be Awarded Their Costs and Attorney's Fees.

Section 733.58 of the Revised Code provides that "[i]n case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the village solicitor or city director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty." Section 733.59 of the Revised Code then states that "[i]f the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation." It further states that "[n]o such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding."

Section 733.61 of the Revised Code states that "[i]f the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney."

On July 16, 2021, Relators moved the Court to establish the security needed for this action, and requested that as in *Rubino*, 155 Ohio St.3d at 132, 119 N.E.3d at 1247, the security

be waived beyond the amount of the filing fee (\$100) and security (\$100) already paid by Relators when they electronically filed this action.

After waiving the need for additional security, the Court in *Rubino*, 155 Ohio St.3d at 132, 119 N.E.3d at 1247, also concluded that "an award of costs and reasonable attorney fees is appropriate under R.C. 733.61." As explained above, the present case is much like that presented in *Rubino*. Indeed, it is even more clear. In *Rubino*, at least, the auditor and city had an argument (unsuccessful as it was) as to why they would not comply with R.C. § 731.28. Still, the Court ordered costs and attorney's fees. Here, Respondent-Clerk of Bridgeport, refused to perform a clear legal duty without any meaningful explanation. Only after this case was filed and the July 15, 2021 deadline had passed did the Respondent-Clerk of Bridgeport offer to accept the petitions. Costs and attorney's fees against Respondents, Clerk of the Village of Bridgeport, Mayor of the Village of Bridgeport, and the Village of Bridgeport, are fully warranted under R.C. § 733.61.

CONCLUSION

Relators respectfully move the Court to **GRANT** a writ of Mandamus directing Respondents to certify the Initiative for the November 2, 2021 general election in the Village of Bridgeport.

Respectfully submitted,

/s Mark R. Brown

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief and a copy of Relator's Evidence was served via email on July 23, 2021 upon Mark Landes, Attorney for Village Respondents at mlandes@isaacwiles.com, and David Liberati, Attorney for Respondent-Belmont County Board of Elections at david_liberati -belmont.oh.us.

/s/ Mark R. Brown
Mark R. Brown

ADDENDUM

R.C. § 731.28:

Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation by the general assembly may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation.

When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, transmit a certified copy of the text of the proposed ordinance or measure to the board of elections. The auditor or clerk shall transmit the petition to the board together with the certified copy of the proposed ordinance or other measure. The board shall examine all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition. The board shall return the petition to the auditor or clerk within ten days after receiving it, together with a statement attesting to the number of such electors who signed the petition.

The board shall submit such proposed ordinance or measure for the approval or rejection of the electors of the municipal corporation at the next general election occurring subsequent to ninety days after the auditor or clerk certifies the sufficiency and validity of the initiative petition to the board of elections. No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the measure in such municipal corporation shall be subject to the veto of the mayor.

As used in this section, "certified copy" means a copy containing a written statement attesting it is a true and exact reproduction of the original proposed ordinance or other measure.

R.C. § 731.31:

Any initiative or referendum petition may be presented in separate parts, but each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure, and each part of any referendum petition shall contain the number and a full and correct copy of the title of the ordinance or other measure sought to be referred. Each signer of any such petition must be an elector of the municipal corporation in which the election, upon the ordinance or measure proposed by such initiative petition, or the ordinance or measure referred to by such referendum petition, is to be held. Petitions shall be governed in all other respects by the rules set forth in section 3501.38 of the Revised Code. In determining the validity of any such petition, all signatures which are found to be irregular shall be rejected, but no petition shall be declared invalid in its entirety when one or more signatures are found to be

invalid except when the number of valid signatures is found to be less than the total number required by this section.

The petitions and signatures upon such petitions shall be prima facie presumed to be in all respects sufficient. No ordinance or other measure submitted to the electors of any municipal corporation, and receiving an affirmative majority of the votes cast thereon, shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the ordinance or measure was procured, nor shall the rejection, by a majority of the votes cast thereon, of any ordinance or other measure submitted to the electors of such municipal corporation, be held invalid for such insufficiency.

Ordinances proposed by initiative petition and referendums receiving an affirmative majority of the votes cast thereon, shall become effective on the fifth day after the day on which the board of elections certifies the official vote on such question.

R.C. § 731.32:

Whoever seeks to propose an ordinance or measure in a municipal corporation by initiative petition or files a referendum petition against any ordinance or measure shall, before circulating such petition, file a certified copy of the proposed ordinance or measure with the city auditor or the village clerk.

As used in this section, "certified copy" means a copy containing a written statement attesting that it is a true and exact reproduction of the original proposed ordinance or measure or of the original ordinance or measure.

R.C. § 731.34:

The petitioners may designate in any initiative or referendum petition a committee of not less than three of their number, who shall be regarded as filing the petition. After a petition has been filed with the city auditor or village clerk it shall be kept open for public inspection for ten days. If, after a petition proposing an ordinance or other measure has been filed with such auditor or clerk, the proposed ordinance or other measure, or a substitute for the proposed ordinance or measure approved by such committee, is passed by the legislative authority of the municipal corporation, the majority of the committee shall notify the board of elections in writing and such proposed ordinance or measure shall not be submitted to a vote of the electors.

If, after a verified referendum petition has been filed against any ordinance or measure, the legislative authority of the municipal corporation repeals such ordinance or measure, or it is held to be invalid, the board of elections shall not submit such ordinance or measure to a vote of the electors.

R.C. § 733.58:

In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the village solicitor or city director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty.

R.C. § 733.59:

If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

R.C. § 733.61:

If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney.