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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUSAN BEIERSDORFER,)	
et al.,)	Case No. 4:19-cv-260
)	Youngstown, Ohio
Plaintiffs,)	Monday, August 26, 2019
)	1:09 p.m.
vs.)	
)	
FRANK LaROSE, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BENITA Y. PEARSON
UNITED STATES DISTRICT JUDGE

MOTION HEARING

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Proceedings recorded by mechanical stenography;
transcript produced by computer-aided transcription.

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8 Tish O'Dell, Paralegal for Terry J. Lodge, Esq.

9 Patrick J. Piccininni, Chief Ethics Officer and
10 Compliance Counsel for Ohio Secretary of State

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P R O C E E D I N G S

- - -

THE CLERK: The matter before the court is Case Number 4:19-cv-260, Beiersdorfer versus LaRose.

13:10:58

THE COURT: Thank you all for standing. Please feel free to retake your seats.

Counsel for plaintiffs, will you please introduce yourself and the person seated with you at counsel's table?

13:11:11

MR. LODGE: Yes. Thank you, Your Honor. I'm Terry Lodge. I'm counsel for all of the plaintiffs. And I might point out that many of the actual named plaintiffs are present today.

Along with me is Tish O'Dell, who is serving as my paralegal.

13:11:23

THE COURT: Welcome to you all.

On behalf of the defense, will you please introduce yourselves for the record and anyone accompanying you here to court today?

13:11:37

MS. STAFF: Good afternoon, Your Honor. Assistant Attorney General Renata Staff. I'm here today on behalf of Ohio Secretary of State Frank LaRose. And I have with me our client representative Patrick Piccininni. I'm also accompanied by co-counsel, Julie Pfeiffer.

THE COURT: Welcome to you all as well.

13:11:51

MS. STAFF: Thank you, Your Honor.

1 THE COURT: Lucas County?

2 MR. PITUCH: Yes, Judge. Kevin Pituch here on
3 behalf of Lucas County Board of Elections.

4 THE COURT: Welcome, sir.

13:12:02 5 MS. HACKETT: And Sharon Hackett on behalf of the
6 Mahoning County Board of Elections members.

7 THE COURT: Thank you all for appearing, and I am
8 prepared to hear your arguments. I'm sure you understand
9 from the order I issued, it's docketed as ECF Number 62,
13:12:19 10 that I've given each side an hour. And I'd like to know
11 what you've decided is the best way to make use of that
12 time.

13 I imagine that there might be some sharing among
14 the defense, but will you tell me?

13:12:34 15 MS. STAFF: Yes, Your Honor. At this point, we
16 are planning to allocate time with myself taking probably
17 the first 15 minutes or so on behalf of the Ohio Secretary
18 of State, and then the remaining defendants will be
19 splitting the rest of the time between them. We don't
13:12:48 20 anticipate taking longer than 45 minutes or so between the
21 three of us, depending on the court's questions.

22 THE COURT: Thank you. And am I to believe that
23 you've arranged your presentations to avoid any unnecessary
24 overlap?

13:13:05 25 MS. STAFF: Your Honor, I would propose taking the

1 First Amendment issues from the beginning, and then I would
2 be happy to address any additional questions regarding the
3 remainder of plaintiffs' complaint and the rest of the
4 counts in those complaints.

13:13:17 5 I believe several of the other defendants have
6 their own arguments they will be making.

7 THE COURT: Mr. Pituch?

8 MR. PITUCH: Yes, Judge. Because the motion
9 filed -- that I filed on behalf of the Lucas County Board of
13:13:34 10 Elections is virtually identical to that filed by the
11 Secretary of State, Ms. Staff will be handling not only her
12 argument, but probably mine as well depending on what she
13 says. It's the same motion.

14 THE COURT: Understood.

13:13:47 15 MS. HACKETT: And Mahoning County's motion to
16 dismiss was based on some additional factors, and so we'll
17 be addressing those shortly, though.

18 THE COURT: All right, then. Let me ask this.
19 And, Mr. Lodge, I don't intend to leave you out, but this
13:14:02 20 goes back to the defense table. You have the motions
21 pending, the motions to dismiss and the motions for a
22 judgment on the pleading. It's my expectation that you'll
23 go first. Is that your hope as well?

24 MS. STAFF: Yes, Your Honor.

13:14:14 25 THE COURT: And am I to expect only argument, or

1 will there also be some attempt to proffer or present
2 evidence?

3 MS. STAFF: My presentation is limited only to
4 argument, Your Honor.

13:14:24 5 THE COURT: All right, then. Same for each of
6 you?

7 MS. HACKETT: Yes, Your Honor.

8 MR. PITUCH: Yes, Judge. It's a 12(c) motion. I
9 think evidence would be actually improper.

13:14:33 10 THE COURT: Well, I said proffer or present,
11 meaning PowerPoint or anything of that sort.

12 MR. PITUCH: Oh, no.

13 THE COURT: But you don't have anything like that
14 in mind?

13:14:42 15 MR. PITUCH: No, Judge.

16 MS. HACKETT: No, Your Honor.

17 THE COURT: All right. Mr. Lodge, how would you
18 like to use your time? The one question I haven't put to
19 the defense is if each side would like to make some opening.
13:14:55 20 I'll tell you, I don't know that that would be a good use of
21 your time because I will subtract.

22 I've read what's been filed including the
23 supplemental filings. As you know, I've had an opportunity
24 with you in chambers to speak with you. So I think I'm well
13:15:09 25 prepared to hear what you'll share. But if you have a

1 burning desire to make some brief opening because it might
2 be a while before I hear from you more fully, I'll indulge
3 it.

4 MR. LODGE: Thank you for the invitation, Your
13:15:23 5 Honor, but I am confident that we can handle things in more
6 the customary fashion in motion arguments.

7 And I am -- I don't know if the court is going to
8 be very formalistic or if there's going to be sort of a
9 surrebuttal opportunity. If the court is entertaining that,
13:15:43 10 I would prefer to reserve about ten minutes of the hour for
11 that purpose.

12 THE COURT: Sure, but let me advise you, you're
13 your own timekeeper. Meaning what I'll do is count to 60
14 and once you've reached it, you're done. So if I were you,
13:16:00 15 I would stop at 50, right?

16 Is that part of Ms. O'Dell's responsibility?

17 MR. LODGE: Yes.

18 MS. O'DELL: I will go up and pull his coat.

19 THE COURT: Fair enough. And the court security
13:16:09 20 officer will not stop you.

21 MS. O'DELL: Thank you.

22 THE COURT: All right, then. With that,
23 Ms. Staff, if you're ready, I am prepared to hear you. Same
24 thing for the defense. Keep your time.

13:16:23 25 MS. STAFF: Thank you, Your Honor.

1 I am Assistant Attorney General Renata Staff, and
2 I am here today on behalf of Ohio Secretary of State Frank
3 LaRose. And, Your Honor, and may it please the court,
4 plaintiffs' complaint here lacks an essential component, any
13:16:40 5 claim for which this court may grant them relief.

6 Here, the very recent Schmitt versus LaRose
7 decision decides plaintiffs' First Amendment claims and
8 warrants dismissal of their complaint. Here --

9 THE COURT: You don't disagree, I believe that's
13:16:57 10 the case, with what plaintiff points out? Schmitt only went
11 so far. For instance, it denied as moot the as applied
12 challenges. And the complaint before me has both facial as
13 well as as applied challenges.

14 MS. STAFF: Yes, Your Honor is absolutely correct
13:17:16 15 that the complaint before you has both facial and as applied
16 challenges. And here, Your Honor, the plaintiffs tried to
17 avoid the result in Schmitt, which is the fact that these
18 laws are constitutional under the First Amendment, by making
19 several other arguments. They argue that their as applied
13:17:34 20 challenges should survive the facial dismissal.

21 But, Your Honor, plaintiffs' facial and as applied
22 challenges are exactly the same. They're based on the exact
23 same First Amendment theories, and they seek the exact same
24 relief. They are substantively --

13:17:55 25 THE COURT: Can I ask, then, would it be fair, if

1 I understand you, to say that my analysis and conclusion
2 regarding the as applied challenges in the complaint before
3 me would also be dispositive of the facial challenges before
4 me?

13:18:08

5 MS. STAFF: That's correct, Your Honor. And if I
6 may, there were similar arguments made to the ones
7 plaintiffs are trying to press here in the CITL versus
8 Ballot Board case before Judge Graham in the Southern
9 District of Ohio.

13:18:23

10 In there plaintiffs argued against a motion to
11 dismiss filed by the state saying that they had brought both
12 facial and as applied challenges to a statewide initiative
13 law.

13:18:36

14 And Judge Graham looked at the complaint and
15 looked at the state's motion to dismiss and found that the
16 plaintiffs had failed to meaningfully distinguish their as
17 applied challenge from the facial challenge in their
18 complaint.

13:18:51

19 And because the plaintiffs didn't distinguish any
20 part of their claim that should survive as an as applied
21 challenge, the court said he would not do so there.

13:19:07

22 And the result here, Your Honor, should be the
23 same. Plaintiffs did not at all distinguish their as
24 applied from their facial challenges. They seek wholesale
25 invalidation of these laws. They do not seek any specific

1 relief as applied to the particular plaintiffs. And their
2 as applied challenges fail for the same reason as their
3 facial challenges, and that's because these ballot
4 initiative laws survive and do not offend the First
13:19:24 5 Amendment.

6 And, Your Honor, here plaintiffs raise First
7 Amendment challenges in Counts 1 through 5. They -- as I
8 said, though, the recent decision in Schmitt versus LaRose
9 decides this case. Ohio's laws do not violate the First
13:19:44 10 Amendment.

11 And applying Anderson-Burdick balancing, the Sixth
12 Circuit held that Ohio's laws are supported by substantial
13 and legitimate interests. They further the state's interest
14 in preserving voter confidence and simplifying the ballot
13:19:59 15 and in avoiding voter confusion.

16 These laws are content neutral. They do not
17 discriminate based on content. They do not discriminate
18 based on subject matter. They do not discriminate based on
19 viewpoint. They are not prior restraints on speech. They
13:20:16 20 do not control expressive activity. They are reasonable
21 state regulations of ballot access laws. They do not offend
22 the First Amendment.

23 Schmitt resolves this case and requires dismissal
24 of these First Amendment claims.

13:20:30 25 And, in fact, Your Honor, on that content-based

1 point, plaintiffs actually conceded, like the Schmitt
2 plaintiffs did, that they don't claim they have an absolute
3 right to legislate about any particular topic of their
4 choosing. That was the same concession that the Schmitt
13:20:48 5 plaintiffs made, and the court relied on that as well as
6 their own analysis and found that these laws are content
7 neutral.

8 These laws are also content neutral based on the
9 relative burdens here, Your Honor. You will likely probably
13:21:08 10 notice that the plaintiffs here attempt to distinguish
11 Schmitt based on the burden analysis. They argue that
12 somehow Schmitt didn't consider all of the burdens that they
13 may have been subjected to. But that's simply not the case
14 here.

13:21:26 15 Plaintiffs here claim that their only burdens come
16 from the content-based substantive pre-enactment review of
17 proposed ballot measures. Those are the exact same claims
18 that the Schmitt court considered and rejected in turn.
19 Again, these are not content-based laws, they are not prior
13:21:45 20 restraints on speech.

21 I would also, you know --

22 THE COURT: But let me just ask you to pause there
23 for a moment, because I don't disagree that plaintiff has
24 made an argument similar to the one you've just summarized,
13:22:00 25 and suggest that maybe the court's response should be a

1 bright-line rule, basically some clear prohibition against
2 pre-enactment review.

3 What's your direct response to that?

4 MS. STAFF: There's simply no legal basis for
13:22:17 5 that, Your Honor. These laws, the Sixth Circuit held, are
6 reasonable state regulations of ballot access.

7 THE COURT: I think Judge Bush considered them
8 gatekeeper laws, and I think another term used throughout
9 Schmitt was legislative authority rules, or something of
13:22:37 10 that sort, right?

11 MS. STAFF: Yes, Your Honor, that's correct. And
12 that's in -- these laws do facilitate these substantial and
13 legitimate state interests of ensuring that these issues
14 that don't meet threshold eligibility requirements for the
13:22:54 15 ballot do not appear on the ballot, and then later on, after
16 everyone has voted on them, have to go through a number of
17 legal challenges only to end up being invalidated.

18 So, yes, these --

19 THE COURT: Do you think there could be any
13:23:10 20 disturbance in the confidence voters have in the ballot if
21 there is this later review and later determination that
22 something was on the ballot that should not have been?

23 MS. STAFF: Of course, Your Honor. You know, it
24 would certainly create chaos for people if they do vote on
13:23:26 25 these issues, if they go to the polls, consider the issues

1 that are on the ballot and believe that the issues they have
2 voted on do meet threshold requirements to actually appear
3 on the ballots, only later to find out, after voting, after
4 taking the time to educate themselves, that they do not meet
13:23:45 5 these threshold requirements. There is certainly a huge
6 impact, I would think, on voter confidence in the items that
7 appear on the ballot.

8 And, of course, Your Honor, the Sixth Circuit
9 found that these laws do facilitate these substantial and
13:24:01 10 legitimate interests in ensuring voter confidence and
11 reducing voter confusion, also ensuring a simplified ballot,
12 a ballot that's not cluttered with issues that may
13 ultimately be found to not have met these threshold
14 requirements.

13:24:20 15 And, Your Honor, at one point in their briefing,
16 plaintiffs also suggest that at this stage in the
17 litigation, it's simply not appropriate to consider the
18 Anderson-Burdick balancing at the motion to dismiss stage.
19 And again, Your Honor, that's not the case.

13:24:38 20 The Sixth Circuit has affirmed dismissals of First
21 Amendment challenges to election laws where plaintiffs'
22 arguments fail as a matter of law. And the example there is
23 the CITL versus Ballot Board case, where the Sixth Circuit
24 affirmed a dismissal by Judge Graham in the Southern
13:24:57 25 District to a First Amendment challenge involving a

1 state-wide initiative law.

2 And in that particular holding, the Sixth Circuit
3 also cited to other cases where they have similarly affirmed
4 dismissals under the Anderson-Burdick analysis, including
13:25:12 5 the Lawrence versus Blackwell case and the Taxpayers United
6 for Assessment Cuts versus Austin case.

7 And, Your Honor, I would be also happy to speak
8 about the remaining counts aside from the First Amendment
9 issues that plaintiffs have --

13:25:28 10 THE COURT: Well, I strongly suggest you take this
11 opportunity, because as I read the motion to dismiss, it
12 addresses all, not just Counts 1 through 5.

13 MS. STAFF: That's absolutely correct, Your Honor.

14 THE COURT: So if you have anything more you'd
13:25:39 15 like to say about 6, 7 or 8, I'll certainly hear it.

16 MS. STAFF: Okay.

17 THE COURT: But don't feel that you need to go on
18 longer than necessary.

19 MS. STAFF: Okay. Thank you very much, Your
13:25:48 20 Honor.

21 Plaintiffs' Count 6 here raises a substantive due
22 process claim. This claim fails under the two methods for
23 raising such a claim. First, these laws do not violate any
24 particular constitutional guarantee. They do not violate
13:26:02 25 any fundamental constitutional right.

1 And from the outset, this is because there is no
2 recognized fundamental constitutional right to local
3 self-government. Plaintiffs acknowledge the lack of case
4 precedent for this particular position. And so this law
13:26:17 5 cannot -- these laws cannot be invalidated under that
6 particular method.

7 Under the second method for considering
8 substantive due process claims, plaintiffs simply failed to
9 state a claim. These laws do not shock the conscience.
13:26:32 10 That is an incredibly high threshold, as the court is well
11 aware.

12 And in here there are simply no allegations that
13 would lead to the conclusion that these laws are so
14 egregious, so outrageous that they would fairly be said to
13:26:45 15 shock the contemporary conscience. There's absolutely no
16 pleading to that effect. And in fact, Your Honor, the Sixth
17 Circuit held these laws to be constitutional.

18 With respect to plaintiffs' Count 7, they raise a
19 Ninth Amendment challenge to these ballot initiative laws.
13:27:00 20 And plaintiffs on that point also acknowledge the lack of
21 case authority supporting that particular claim. As courts
22 have recognized, there's no independent cause of action that
23 comes with the Ninth Amendment.

24 THE COURT: And doesn't Count 7 rise and fall with
13:27:14 25 Count 6?

1 MS. STAFF: Yes, Your Honor. Here there's just no
2 constitutional guarantee that speaks to the local
3 self-government right that plaintiffs are trying to press
4 here. That's absolutely right, Your Honor.

13:27:28

5 And with respect to their Count 8, this court
6 simply has no jurisdiction over plaintiffs' separation of
7 powers claim that arises exclusively under Ohio's
8 Constitution.

13:27:44

9 As the court is well aware, federal courts lack
10 jurisdiction over the state law claims against state
11 officials sued in their official capacities.

13:27:59

12 Your Honor, state courts are in the best place to
13 resolve these state law questions. And there is simply no
14 jurisdiction for the court to consider this particular
15 claim.

16 THE COURT: So I haven't overlooked some waiver
17 made by the State of Ohio?

18 MS. STAFF: I apologize, Your Honor?

19 THE COURT: There hasn't been a waiver?

13:28:07

20 MS. STAFF: No, absolutely not. There has been no
21 waiver on these particular issues. You have not overlooked
22 anything here.

13:28:24

23 Even taking plaintiffs' pleaded facts as true,
24 these claims in Counts 1 through 8 fail as a matter of law,
25 and it's the state's position, the Secretary of State's

1 position that this complaint should be dismissed under both
2 Rule 12(b)(6) and 12(b)(1).

3 And unless the court has any further questions, I
4 would cede the remainder of my time to the remaining
13:28:39 5 plaintiffs -- or defendants here.

6 THE COURT: Thank you. I'd appreciate that. I'm
7 sure they will as well. Thank you, Ms. Staff.

8 MS. STAFF: Thank you, Your Honor.

9 THE COURT: Mr. Pituch, if you're next.

13:28:50 10 MR. PITUCH: Good afternoon, Judge.

11 THE COURT: Good afternoon, sir.

12 MR. PITUCH: Briefly, I just want to touch on a
13 point that was raised in the supplemental brief filed by the
14 plaintiffs and point out that when a board of elections
13:29:07 15 looks at an election, there are a variety of ways they can
16 keep either candidates or issues off of the ballot. This
17 case only concerns not candidates, but certain issues. And
18 actually, there's one issue I think, Judge, that you no
19 longer really need be concerned about.

13:29:22 20 There are three things raised in the complaint.
21 One has to do with the board perhaps keeping a proposed
22 charter, a county charter off the ballot. Another one is a
23 proposed municipal initiative, where the city, through its
24 voters, enacts law. And the third thing is a municipal
13:29:40 25 charter amendment.

1 Prior to October of 2018, the board had the -- not
2 only the -- it actually had the obligation to keep all three
3 of those off the ballot if they were deemed to be
4 administrative rather than legislative. However, the
5 Supreme Court changed the law last October, and it -- in
6 terms of the charter amendments. It was a case actually I
7 had, Judge. And I'm pretty sure it's cited in the briefs.

8 But now there can no longer be a preelection
9 content review of a municipal charter amendment. That's
10 something the Ohio Supreme Court has said a board of
11 elections does not have the authority to engage in.

12 And actually, that's happened since that decision.
13 The Lake Erie Bill of Rights, which is one of the reasons we
14 are here today, was initially brought up to my board last
15 August. We kept it off of the ballot. It went to the
16 Supreme Court. The Supreme Court said if any -- a board no
17 longer has the authority to keep a charter amendment off of
18 the ballot. And if a municipal ordinance is then sent to
19 the board, it must go on the ballot.

20 And that's exactly what's happened this year.
21 Earlier this year there was a special election in Toledo.
22 The Lake Erie Bill of Rights went onto the ballot.

23 So I don't know that you necessarily have to
24 concern yourself in terms of preelection content review with
25 the charter amendment portion of the proceedings.

1 Everything else still stands in play. The Supreme Court has
2 said that a board of elections does have the authority to
3 keep a municipal initiative off of the ballot if it deems
4 fit to do so.

13:31:22

5 THE COURT: And it also still allows county
6 amendments?

13:31:31

7 MR. PITUCH: Yes. There is a proceeding right now
8 in the Ohio Supreme Court regarding a proposed county
9 charter amendment for Williams County. That will be
10 addressed by the Supreme Court later -- actually more likely
11 in September.

13:31:49

12 THE COURT: Is there a trend afoot? Do you
13 believe the ruling regarding the municipal charter
14 amendment, is that the start of a trend that maybe will
15 counsel the courts going forward?

13:32:03

16 MR. PITUCH: Well, here's what I think will
17 happen, Judge: The Supreme Court has said the board can
18 deny ballot access to a municipal initiative, but cannot to
19 a charter amendment.

13:32:17

20 If you look at the Lake Erie Bill of Rights, it's
21 not really an initiative -- it's a -- I mean, it's not
22 really a charter amendment. It doesn't have the -- it
23 doesn't deal with the form or structure of government. It
24 doesn't say how many councilmen the city has or what powers
25 the mayor has, it's really an initiative. It's really

1 something designed to regulate behavior.

2 But now what people will do is label their
3 initiatives charter amendments and they'll go on the ballot
4 and you'll have to be sued later. Just like the -- right
13:32:29 5 now, as we sit here today, the Lake Erie Bill of Rights is
6 being sued as being unenforceable and unconstitutional in
7 the Northern District of Ohio. Judge Zouhary has that case.
8 And he will make a determination later this year whether
9 that is so.

13:32:42 10 But that's what I think will happen. So
11 notwithstanding what the court does, I think smart
12 plaintiffs will craft their ballot measure as a charter
13 amendment, knowing that a board of elections -- like when
14 the -- when the city council in our case passed the
13:32:57 15 initiative -- passed the ordinance directing us to put the
16 Lake Erie Bill of Rights on the ballot, we did so.

17 Even though we all -- even though all the board
18 members there made statements to the effect that this thing
19 is unconstitutional, can't be enforced, but yet we must put
13:33:13 20 it on the ballot, and that's exactly what they did.

21 THE COURT: Thank you.

22 MR. PITUCH: That's really all I have.

23 THE COURT: All right, then.

24 MR. PITUCH: Ms. Staff pretty much said it all for
13:33:21 25 me other than that point, Judge.

1 THE COURT: Well, let me just ask this one
2 question. And it goes to your supplemental filing. And I
3 appreciate what all of you wrote to the court after the
4 Schmitt ruling was made public.

13:33:37 5 In yours, I appreciated that you use a style, you
6 enumerated certain points. And I appreciated that it makes
7 it easier to follow when there's a lot of reading to be
8 done.

9 But I am wondering about your statement towards
13:33:56 10 the end. You heard Ms. Staff, she briefly referenced Counts
11 6 through 8. And you did as well. You basically spent most
12 of your time on the First and the Fourteenth Amendments.

13 Would you like to say anything about Counts 6
14 through 8 of the complaint?

13:34:15 15 MR. PITUCH: No. The reason I submitted a
16 supplemental brief was to discuss what effect, if any,
17 Schmitt had on this case. I don't think Schmitt had any
18 effect on the Ninth Amendment aspect of this case, the
19 substantive due process aspect of this case, or the state
13:34:30 20 law portion. Schmitt was pretty much -- actually, they said
21 they were a First Amendment case and a Fourteenth Amendment
22 procedural due process case.

23 So that -- the only reason I mentioned that is
24 because that's -- the supplemental brief was to tell the
13:34:45 25 court, tell you why I thought Schmitt was important.

1 THE COURT: Thank you. And the only other
2 question I'll ask of you at this time, then, is -- and I
3 appreciate you pointing out that you hadn't relied on
4 Anderson-Burdick, but the Secretary had.

13:34:59 5 And I think what you were also saying is, "Judge,
6 we believe in hindsight Anderson-Burdick is the correct
7 analysis to be applied." Is that also --

8 MR. PITUCH: Yeah. My position only got one of
9 three votes, Judge.

13:35:11 10 THE COURT: Okay.

11 MR. PITUCH: And I don't know that that will
12 necessarily change if the petition for en banc review is
13 granted. I don't know if the petition will be granted, nor
14 do I know if Judge Bush's position will gain acceptance.

13:35:26 15 THE COURT: Understood. Thank you, sir.

16 Ms. Hackett, when you're ready.

17 MS. HACKETT: May it please the court. For the
18 record, I'm Sharon Hackett.

19 THE COURT: Ms. Hackett, forgive me. I don't know
13:35:46 20 why it keeps happening. I manage this, or as one of my
21 colleagues calls it, flying the bench. But today every time
22 I reach in this corner, I silence the room. Please, I did
23 hear who you are. I'll bet Mary did as well, so you can go
24 forward from there.

13:36:01 25 MS. HACKETT: Thank you, Your Honor. First of

1 all, I would like to perhaps reserve just a few minutes at
2 the end for rebuttal if need be.

3 And secondly, I wanted to make clear that we are
4 and did in our briefs rely on the Secretary of State's
13:36:17 5 arguments and the arguments of the Lucas County Board of
6 Elections with regard to the 12(b)(6) motion to dismiss.

7 And those are basically the arguments that Renata
8 and Kevin talked about today. So I don't want to repeat
9 myself or their arguments here, but I just wanted to let the
13:36:37 10 court know that we are relying on what their arguments are
11 in regards to those issues.

12 And also, we feel that we've, you know, dealt with
13 the bulk of our arguments adequately in our briefs and I
14 don't want to take up too much of the court's time. But I
13:36:57 15 did want to stress a couple of -- couple of matters.

16 The first of these has to do with the standing
17 issue. And that is particularly in regard to the Mahoning
18 County defendants. The court, as you know, has jurisdiction
19 over only live cases or controversies. And with regard to
13:37:24 20 the Mahoning County plaintiffs and their interactions with
21 the Mahoning County defendants, all of those interactions
22 had ended well before the time that this lawsuit was filed.

23 The last time that a petition was submitted to the
24 Mahoning County Board of Elections, it was certified to the
13:37:45 25 ballot and it went to the ballot and was voted on. There

1 had been -- have been no further petitions filed with the
2 Mahoning County Board of Elections.

3 And I think that there were a couple of cases
4 cited in our brief that I feel they're dispositive on that
13:38:02 5 standing issue. And those are the Lyons -- LA versus Lyons
6 case and Renne versus Geary, which are both U.S. Supreme
7 Court cases that talk about particularly the imminent threat
8 of imminent harm prong of the standing issue.

9 And both of those cases made it clear that a
13:38:30 10 plaintiff cannot rely on claims of past harm when they are
11 seeking declaratory and injunctive relief, in other words,
12 prospective relief only, in establishing that they are
13 subject to an imminent threat of injury.

14 And like I said, both of those were discussed in
13:38:55 15 more detail in our reply brief, and we rely on them again
16 here.

17 In the instant case, the plaintiffs, like the
18 plaintiffs in Lyons and Renne versus Geary, are not in any
19 immediate danger of suffering any imminent injury, simply
13:39:18 20 because all interactions between them and Mahoning County
21 Board of Elections are completed.

22 We don't know what their plans are with regards to
23 petitions in the future. We don't know what their plans are
24 with regard to making sure that they comply with the even
13:39:37 25 basic threshold requirements for petitions in Ohio.

1 And further, we have the Supreme Court -- Ohio
2 Supreme Court cases that were decided in October that Kevin
3 alluded to, which are Maxcy and Abernathy, I believe. And
4 those are also cited in our brief. And what they said was
13:39:59 5 that when a petition proposes a municipal charter amendment
6 as opposed to an initiative to propose legislation, when you
7 are dealing with a municipal charter amendment, board of
8 elections, once it receives direction from the municipality,
9 has really no obligation other than ministerial to put
13:40:29 10 those -- I shouldn't -- I'm sorry, that was the wrong word
11 to use.

12 THE COURT: But I understand the point you're
13 making.

14 MS. HACKETT: You understand what I'm saying.

13:40:35 15 And so all of the petitions that these Mahoning
16 County plaintiffs had submitted to the Mahoning County Board
17 of Elections in the past dealt with a municipal charter
18 amendment.

19 And so I suggest that given the now defined state
13:40:52 20 of the law in Ohio, due to those recent Ohio Supreme Court
21 decisions, that area has sort of been cleared up. And all
22 we have then right now is a -- is a -- excuse me.

23 THE COURT: That's quite all right.

24 MS. HACKETT: -- is a state where there are
13:41:08 25 basically no interactions between the Mahoning County

1 plaintiffs and the Mahoning County defendants.

2 So I don't know where that live case or
3 controversy comes from or can be even demonstrated by the
4 plaintiffs as against these defendants.

13:41:27

5 THE COURT: And you know what's been written on
6 behalf of the plaintiffs, and we'll hear in a minute what
7 Mr. Lodge has to say, but one of the cases, I think the
8 primary case relied on, is Babbitt versus United Farm
9 Workers. And that's a well settled 1979 Supreme Court case.

13:41:45

10 What have you to say about the employment, the way
11 plaintiffs are using it to support its position, that there
12 is an injury, even if it could be considered a prospective
13 one?

13:42:02

14 MS. HACKETT: Well, I think what distinguishes
15 Babbitt is that in that case, the court found, in essence,
16 the challenge provisions were sure that -- the court made
17 the statement that the challenge provisions were sure to
18 work the injuries alleged.

13:42:21

19 So, in essence, the court did find that the
20 plaintiffs were -- or could be subject to and were likely to
21 be subject to that imminent threat. They made that specific
22 finding in their decision.

13:42:42

23 So I think that distinguishes the case from the
24 current one before the court, where nothing is imminent
25 here. We can only speculate as to any future actions of the

1 defendant -- defendants -- I mean, I'm sorry, of the
2 plaintiffs, and we just really don't know what is going to
3 happen going forward.

13:42:59 4 THE COURT: And if your colleague at the defense
5 table is correct, it will likely show up in the form of a
6 municipal charter amendment, and it will be on the ballot.

7 MS. HACKETT: That's what I would suggest, Your
8 Honor, yes.

13:43:10 9 THE COURT: All right. Well, we'll hear what
10 Mr. Lodge has to say. And you've reserved, and by my count,
11 the defense still has time if you'd like to make some
12 rebuttal argument on that point.

13 MS. HACKETT: Okay.

14 THE COURT: But I'm not cutting you off. If
15 there's more, I'll certainly hear it.

16 MS. HACKETT: Okay. Actually, that was our
17 biggest and most important basis upon which we filed our
18 motion to dismiss. We did make other points in our motion.
19 But unless we felt -- unless the court has, you know,
13:43:41 20 specific questions for us on them, I would just refer the
21 court to our briefs.

22 THE COURT: Certainly. And if I do, I'll ask
23 before we separate, but so far I'm satisfied.

24 MS. HACKETT: Okay. Thank you, Your Honor.

13:43:53 25 THE COURT: Certainly.

1 Mr. Lodge.

2 MR. LODGE: Thank you, Your Honor. There's a lot
3 of issues here. I'm not quite sure where to start. But I
4 would like to acquaint the court with a little bit of the
13:44:12 5 history of Ohio's initiative scheme. It's about 106 years
6 old, and it was developed and finalized and put to a vote in
7 1912 after a very busy and controversial Constitution
8 convention.

9 The initiative right actually stemmed from a
13:44:42 10 movement that began in the Victorian Era in the 1880s and
11 '90s nationally. And it gathered steam with what we now
12 historically review and refer to as the Robber Baron
13 Movement. Post Civil War -- actually beginning especially
14 in the Civil War, corporations began to acquire considerable
13:45:06 15 power and insularity that didn't previously exist. After
16 the Civil War, Ohio, for instance, the General Assembly
17 granted essentially immunity to incorporators.

18 During this era, incidentally, the state
19 legislature was very involved in granting charters for
13:45:25 20 corporations. And the original notion was essentially to
21 create a formalized partnership type of arrangement and to
22 identify a group of people who would stand liable if things
23 went wrong. This would be true if a private concern is
24 operating a turnpike or -- I'm talking a turnpike circa
13:45:51 25 1800s, or some other type of -- a ferrying operation,

1 something like that.

2 After the Civil War, many states, including Ohio,
3 granted immunity to the incorporators, in effect,
4 protection, corporate veil, if you will, which was a
13:46:07 5 remarkable development at the time and considered to be a
6 major lurch forward in history.

7 So the Robber Baron Era occurs in the 1880s and
8 '90s. The railroads become increasingly powerful.
9 Electricity becomes a valued commodity for the development
13:46:29 10 of trolley, i.e., traction systems and street lighting
11 around the turn of the 18th, 19th century, and that is when
12 investor-owned utilities start making their move as
13 corporations.

14 In Ohio in particular, there is an interesting,
13:46:45 15 long-standing, few decades of controversy over whether or
16 not there would be IOUs, as they are known, versus public
17 traction systems, in Toledo and in Cleveland in particular.

18 The Reform Era, also known and which has come to
19 be known as the Progressive Era, commenced in the 1890s into
13:47:07 20 the 1910s. It saw, among other things, the beginning of
21 regulatory agencies in order to try to curb some of the
22 excessive greed, corruption and appetites of corporations,
23 which also were heavily influential in state legislative
24 affairs, not just in Ohio, but many states.

13:47:30 25 By the time of the 1912 constitutional convention,

1 there were many movements afoot that drove it to be
2 convened. There was a move for women's suffrage. There was
3 the Grange Movement, which was possibly the largest
4 historical national populist leftist type of movement in the
13:47:52 5 history of the country down to the present, very rural based
6 and Midwestern based, and had significant influence in Ohio.

7 There was also the Initiative, Referendum Movement
8 which stemmed from other efforts. Labor unions were
9 beginning to acquire a certain amount of power, such that
13:48:09 10 they were fighting back against the bosses. There was
11 corruption in legislatures. There was corruption especially
12 in the granting and non-enforcement of corporate charters.

13 So by 1912 --

14 THE COURT: Sir, let me just say this: I love
13:48:26 15 history so you will hold my interest, but I'm not sure that
16 you'll help your client.

17 MR. LODGE: Well --

18 THE COURT: So we're only in 1912, and you have
19 about 56 minutes to go. Just, you know, use --

13:48:41 20 MR. LODGE: I've got a lot of time then, Your
21 Honor.

22 THE COURT: Let me ask this.

23 MR. LODGE: Okay.

24 THE COURT: And I'll use this as a framework for
13:48:49 25 listening to -- because I do think I understand the point

1 you're making, the deep history of these sorts of
2 initiatives and the results of them having been put on the
3 ballot and eventually being approved. But I'll let you
4 speak for yourself.

13:49:06 5 Something that drew my attention in your
6 supplemental filing, which I appreciate receiving as well,
7 and I wonder if you meant for me to read it as a concession.
8 I will confess to you that I did.

9 When you distinguished Schmitt and informed the
13:49:23 10 court, it was obvious, but it was certainly fair of you to
11 point it out, that the Schmitt court only addressed the
12 facial challenges, and you explicitly state that you do not
13 believe your clients, that is, that Schmitt can be invoked
14 against plaintiffs' as applied challenges.

13:49:48 15 And I'm interested in what you'll say when you get
16 to that point and whether or not you believe
17 Anderson-Burdick would be the correct analysis for the as
18 applied if you believe that they must be treated separately.

19 MR. LODGE: Pardon me, Your Honor.

13:50:04 20 THE COURT: No worries.

21 MR. LODGE: Actually, you've offered me a good way
22 to turn the corner from the history lesson.

23 THE COURT: Sure.

24 MR. LODGE: There was a considerable municipal
13:50:14 25 rights -- what actually at the time was called Municipal

1 Socialism Movement that had considerable sway at the
2 constitutional convention. The same convention produced the
3 home rule amendments to the Ohio Constitution. It's a lot
4 of -- and very intriguing byplay, which I will not take the
13:50:35 5 court's time up with.

6 But the Article I, Section 2, as well as the
7 explicit initiative and referendum rights, had considerable
8 steam and momentum coming out of the 1912 convention and
9 were enacted as amendments to the Constitution.

13:50:57 10 The point -- one major point is this: That every
11 time the issue of whether or not an election official,
12 whether it be the secretary of state or board of elections,
13 may inquire into the substance of a proposal, a local
14 initiative proposal, 25 times, the Ohio Supreme Court, at
13:51:21 15 least 25 times, in dating back to 1918, down to 2019, has
16 affirmed the precept that it's hands off, and with the
17 reasons that you have to keep hands off as an election
18 official are several.

19 One is, we're talking about determinations of
13:51:41 20 illegality or constitutionality, which before something is
21 enacted is mere speculation.

22 Secondly, that guess as to constitutionality or
23 legality if passed is a loaded question and is not facially
24 neutrally applied, because it depends on who's making the
13:52:06 25 determination.

1 There is a separation of powers issue, because
2 BOEs and the secretary of state are, of course, in the
3 Executive Branch.

4 And the courts exist to determine after something
13:52:22 5 is ripe because it has been enacted into law to determine
6 whether it should be allowed to stand or whether there are
7 parts of it that can be severed to allow whatever is left to
8 stand.

9 So the philosophy, the policy articulated by the
13:52:40 10 state Supreme Court repeatedly, for a hundred years, is
11 hands off. The courts exist to do this when there is
12 leisure, not in the heat of a mandamus or prohibition kind
13 of action during the election season.

14 THE COURT: Let me ask if you can help me to
13:53:01 15 understand why it is, then -- and this is again referring
16 back to Schmitt and Judge Bush's concurrence. When he
17 describes the gatekeeper rules that we're talking about, he
18 refers to them as election mechanics.

19 Why isn't it sufficient, when there isn't that
13:53:21 20 human error that he also writes about that can lead to some
21 sort of discriminatory application, barring of something,
22 why isn't it sufficient that the mechanics, that as you
23 heard Ms. Staff say are designed to keep the ballots from
24 being uncluttered, to avoid the loss of confidence, and
13:53:40 25 always having to go back later, why isn't this gatekeeper

1 function correctly applied as it is now as long as there is
2 the opportunity to do precisely what your clients are doing
3 now, to bring the matter -- first of all, you can mandamus
4 the court. There is that provision. But then also to
5 litigate further if you think necessary.

13:54:01 6 MR. LODGE: All right. And I will come back to
7 Schmitt.

8 I'd like to point out that election mechanics have
9 been subjected to mission creep especially in the last 10 to
10 20 years.

11 THE COURT: You mean erosion?

12 MR. LODGE: Yes.

13 THE COURT: Okay.

14 MR. LODGE: Because election mechanics is fine if
15 it is some wording on the petition. The initiative petition
16 has to be in red. You have to have the warnings about
17 felonies. If you -- you know, if you're a circulator and
18 you defraud the public or the state in your petitioning
19 activity, that sort of thing.

13:54:40 20 Whether the paper size is correct. Whether
21 there's a -- whether there's a committee of sponsors
22 enumerated by name and address. All of those are the real
23 mechanics. They are ministerial responsibilities that
24 historically have fallen correctly to election officials.
13:54:58 25 Of course you want that.

1 The mission creep, the erosion, is that at first
2 through secretary of state folkways most recently epitomized
3 by some of the determinations made by former Secretary of
4 State Husted, that what has happened is his initial
13:55:20 5 interpretations of what scope of review, whether or not a
6 petition qualifies as something that can be enacted, has
7 been a very long-running attempt to create 88 constitutional
8 preelection courts out of boards of election, which are in
9 no position to be that, no position to serve in that role.

13:55:48 10 Again, why do we have to engraft a new preelection
11 veto censorship type of system onto a system that has worked
12 well with court retrospective review for a century?

13 The impetus out of the constitutional convention
14 was that, by golly, there is going to be local rights, and
13:56:10 15 yes, cities and local governments are going to have the
16 right to legislate.

17 And the principle has been repeated in some of
18 those two dozen decisions by the Ohio Supreme Court that
19 even if illegal, and this was a Mahoning County case in
13:56:30 20 2015, even if the proposal is enacted and is illegal upon
21 enactment, it cannot be vetoed from the ballot by a board of
22 elections or a secretary of state, even if illegal.

23 THE COURT: So am I to understand you to say that
24 any ballot initiative that a voter, with the correct number
13:56:56 25 of signatures, presents must go on, and your position,

1 should go on the ballot --

2 MR. LODGE: Yes.

3 THE COURT: -- and to be dealt with later?

4 MR. LODGE: Yes. And it's because in the Ohio

13:57:10 5 Constitution now is enshrined to the concept that the people
6 are also legislators when they do this.

7 Let's think about the Ohio General Assembly and

8 what the Ohio General Assembly does. The Ohio General

9 Assembly repeatedly passes abortion statutes or statutory

13:57:33 10 regulations that its sponsors admit probably will not stand
11 muster against Roe v. Wade, but they do it anyway.

12 And they do it to send a message. There are

13 political reasons. I'm not going to go deeply into that,

14 other than to point out that nobody, certainly not a court,

13:57:52 15 certainly not the governor, certainly not the public, is

16 allowed to say, "No, you can't consider passage of that law.

17 You can't even talk about it. You can't vote on it. It

18 would be illegal if passed."

19 The people deserve and have, under the Ohio

13:58:07 20 Constitution -- Constitution framework, that right right
21 now.

22 But let's talk about House Bill 463. The Ohio

23 Legislative -- if I can find it. Give me a moment, please.

24 I may have -- ah, all right.

13:58:25 25 The Ohio Legislative Service Commission, which as

1 the court I'm sure understands, is the drafting entity for
2 the General Assembly, always -- well, often is asked to
3 produce an analysis of a major complicated bill.

4 House Bill 463 is the December 2016 lame duck
13:58:48 5 session grab bag, Christmas tree they call it, Christmas
6 tree legislation. It started out as a foreclosure
7 clarification bill and turns into quite a dicey thing that
8 addresses two or three dozen different topics, including
9 gutting initiative rights under Ohio law.

13:59:09 10 The Ohio Legislative Service Commission, in an
11 analysis that's available online, expressly warned that "The
12 bill's," quote, "The bill's provision concerning local
13 initiative petitions might be vulnerable to a challenge
14 under the Ohio Constitution on two grounds: 1) that the
13:59:28 15 bill infringes on the people's right of initiative; and 2)
16 that the bill violates the separation of powers doctrine."

17 So, and it goes on. There's a considerable
18 analysis here, analysis presented. "A reviewing court,"
19 also I'm quoting, "might rule that the bill violates a
13:59:48 20 separation of powers doctrine of the Ohio Constitution by
21 giving the secretary of state or board of elections the
22 authority to decide the constitutionality of a proposed
23 statute."

24 There are -- there's other analysis.

14:00:02 25 But the point is, before they voted on it, before

1 it came out of whatever committees, if it even passed
2 through committee, it was a lame duck bill, before that
3 happened, the General Assembly was told, "You're going to
4 waste a lot of time and money of other people, of citizens
14:00:20 5 who want initiatives on the ballot by passing this." And
6 they did it anyway, because they could. Because --

7 THE COURT: So how much longer do you think that
8 kind of mission creep or activity could happen before the
9 general voter just loses interest and stops showing up? And
14:00:39 10 so that there are these myriad laws that result as a result
11 of appropriate number of signatures and matters on the
12 ballot and the few folks who still care showing up?

13 I mean, isn't that also a risk? Isn't that an
14 interest that the state legitimately has? I use the state
14:01:00 15 generally as the defense.

16 MR. LODGE: The state does not have an interest in
17 encroaching on First Amendment association rights of people.
18 The initiative process involves several different types of
19 First Amendment protected activity. Petitioning, of course.

14:01:20 20 A petition, even if it doesn't go onto the ballot
21 or they don't get enough signatures, a petition encourages
22 public dialogue and debate. Once it's put on the ballot, a
23 campaign can ensue that -- at a higher level, a more visible
24 way, that a topic or an issue is discussed within a
14:01:41 25 community.

1 And then there's, of course, the constitutional
2 act of voting, which is, in its own way, an exercise of
3 associational types of free speech.

4 So there are considerable rights implicated by the
14:01:59 5 First Amendment in protecting the initiative in Ohio.

6 THE COURT: Well, the associational rights are not
7 diminished. If anything, the better argument, as I see it,
8 might be that it's delayed, because there isn't the placing
9 of the matter on the ballot to start with for it to be voted
14:02:17 10 upon, but rather, conversation or litigation results.

11 So it's not as if it could never be put on the
12 ballot, it's just a matter of not being put on the ballot
13 without some non-content-based evaluation.

14 MR. LODGE: The problem is is that the
14:02:38 15 content-based evaluation has already produced quirk-ish
16 results. In the -- boy, I'm trying to remember. I believe
17 it was in 2017, the Youngstown citizens attempted to put a
18 bill of rights on the ballot. It was vetoed by the board of
19 elections.

14:02:58 20 While it was being litigated in mandamus at the
21 Supreme Court -- that's the Flak v. Betras decision. While
22 it's being litigated, a very similar rights -- community
23 rights proposal, charter amendment, was proposed in the City
24 of Bowling Green. The Board of Elections in Wood County,
14:03:17 25 four to nothing, put it on the ballot.

1 So you have the too many constitutional
2 quasi-courts delivering completely opposite interpretations
3 of the same law. The Wood County Board of Elections people,
4 one or two of them actually said in comments that they
14:03:37 5 didn't believe that it was -- that House Bill 463 was
6 lawful, that those provisions could be enforced.

7 And so you have the possibility of anomalous
8 results that work differently in different communities
9 according to the politics of the community. And that ain't
14:03:58 10 justice. That is not -- that is not the free speech that is
11 contemplated by having the initiative power laid in the
12 citizenry.

13 To answer your question, work back to Schmitt,
14 Your Honor, it is our position -- the Schmitt case is
14:04:16 15 actually quite narrow. The decision there says that the --
16 the trial court decision, pardon me, was that the statute
17 that says that there is no appeal, the decision of the
18 secretary of state shall be final, was determined to be
19 unconstitutional, and then, of course, reversed.

14:04:39 20 But we believe that the as applied principle is
21 quite alive and well and keeps our claims before the court,
22 because of the fact that the lawsuit that we have written
23 and produced for you is an enumeration of the ad hoc, as I
24 said, mission creep types of excuses that are rendered time
14:05:07 25 and again to keep initiatives off the ballot.

1 There's careful wording that says, "The board of
2 elections or the secretary of state shall review the
3 proposal to make sure it's within the scope of what a local
4 government can legislate," and that's code for decide
14:05:28 5 whether or not it's legal in your opinion, guys.

6 And there is concerted activity between the
7 secretary of state and the boards of election, the members
8 of which are appointed by and serve at the whim of the
9 secretary of state.

14:05:46 10 So each of the 88 boards of election, while there
11 is certainly some autonomy in how they vote, you can be
12 assured that in these controversies, they are coached and
13 certainly guided by the secretary of state's office.

14 So we're talking about the Executive Branch
14:06:06 15 irrigating power to itself that is reserved for the courts
16 to sort out after the people have stood in the role of local
17 legislator.

18 I'd also like to point out that Schmitt, the Sixth
19 Circuit Schmitt, simply reverses things. It applies a
14:06:30 20 medium grade standard of review. But we're talking about --
21 and the Schmitt decision did not at all address the hundred
22 year history, the two dozen or so Supreme Court cases that
23 say content review is completely off limits.

24 Our lawsuit seeks for this court to make the
14:06:52 25 determination that a rule, not one that is laden with

1 asterisks or footnotes, lame excuses and ad hoc
2 decision-making, that there's one rule that says you don't,
3 as election officials, you are not allowed to look at the
4 substance of a -- of a proposal.

14:07:14 5 One of the justices, Justice Fischer on the Ohio
6 Supreme Court, refers to this as a -- in a somewhat humorous
7 way, as a substantive procedural issue, where the BOEs or
8 the SoS are allowed to make a substantive determination
9 under the guise of merely following a supposed process.

14:07:40 10 That's mission creep. Because they're allowed to analyze
11 the substance and decide if it would be in the scope of a
12 local legislature or local city council's power -- or a
13 local county council's power to pass.

14 So the problem is, is that as long as the Ohio
14:08:01 15 Supreme Court, which has reduced itself to paying lip
16 service to this time-honored principle, but then saying --
17 but finding excuses that keep things off the ballot.

18 As long as that is allowed to continue, it will --
19 it will produce the results of turning people off, of making
14:08:19 20 people feel at the local level that they do not have power.

21 The constitutional convention in 1912 was in
22 circumstances that are -- that at least reverberate down to
23 2019, where we have corporate control and commodification of
24 many, many things in our society, privatization of
14:08:43 25 governmental functions for mere profit, where we have an

1 Ohio General Assembly that some would say is the best
2 legislature money can buy, as certainly exemplified in the
3 recent battle over utility bailouts. So we have a situation
4 here --

14:09:03 5 THE COURT: Let me ask you a question that --

6 MR. LODGE: Yes.

7 THE COURT: -- regards the way in which I've been
8 thinking about these, and might, dependent upon your answer,
9 continue to think about these. It stems from something you
14:09:17 10 wrote but said also.

11 Schmitt was narrow in the way you describe. I
12 think none of us will agree, because it found -- pardon me,
13 Sixth Circuit Schmitt, it found the as applied challenges to
14 the First Amendment moot.

14:09:35 15 MR. LODGE: Moot, right.

16 THE COURT: Are you conceding, then, that the
17 facial challenges, that being Counts 1, 3 and 5, are binding
18 on your clients' position?

19 MR. LODGE: I'm not certain I understand the way
14:09:50 20 you've worded the question.

21 We believe -- we don't subscribe -- given the
22 narrowness of the facial challenge that the Sixth Circuit
23 addressed, we don't believe Schmitt has any serious effect
24 of moment on this lawsuit.

14:10:12 25 THE COURT: Rather, the challenge is as applied or

1 moot or facial?

2 MR. LODGE: Correct. Correct. And we also -- I
3 also disagree --

14:10:22

4 THE COURT: And tell me why it is you believe
5 that.

6 MR. LODGE: Well, the facial -- the statutes
7 themselves certainly suggest that there's a problem --

8 THE COURT: Uh-huh.

14:10:33

9 MR. LODGE: -- because of the fact that, as I say,
10 there's an invitation to election officials to sort of make
11 whatever they wish of scope of review types of wording.

14:10:57

12 What we have delineated in the complaint are
13 multiple examples of where substance is called procedure,
14 substance is called simply a review, particularly in the
15 county charter proposal arena.

14:11:20

16 And that's okay, because the statute says that we
17 have to do that now, without going a little bit beneath the
18 surface and realizing that as that statute is applied, it
19 contains few to no standards. The standard is whatever,
20 frankly, a county prosecutor thinks might be illegal if
21 passed.

14:11:36

22 Incidentally, I'm offended by the word "cluttering
23 the ballot." The ballot needs to be a lot more cluttered.
24 People need to have a lot more opportunities to exercise a
25 direct vote and say.

1 THE COURT: Let me just go back to my question,
2 because my chief ambition here today is to make sure that I
3 understand you and your position. And I think I put this
4 question to Ms. Staff, and I am going to try to ask it in a
5 similar way.

14:11:54

6 Because what I wanted to understand is if she
7 believed my analysis of the as applied challenges would be
8 dispositive of the facial challenges, because Schmitt didn't
9 address the as applied challenges.

14:12:13

10 So I think it's without doubt that my job here,
11 without that guidance, certainly includes an analysis of the
12 as applied challenge. So the question -- challenges.

13 The question I have for you is the analysis of the
14 as applied challenges --

14:12:33

15 MR. LODGE: Yes.

16 THE COURT: -- are they -- is it dispositive of
17 the facial challenges as well?

18 MR. LODGE: No. And I will tell you this. After
19 reviewing the complaint, which I was involved in the
20 drafting of just about ten months, nine months ago, I guess,
21 in retrospect, I think that the wording of the statutes that
22 are under challenge is evidentiary and that essentially this
23 is a case that involves as applied claims.

14:12:45

24 And I therefore don't believe that the facial --
25 that it is appropriate to deem the facial challenge stuff to

14:13:15

1 be conceded. But I would possibly have restructured the
2 complaint so that all of the claims were reflected as
3 applied and cited the gateway problem, if you will, with the
4 statutes.

14:13:39 5 THE COURT: And I'm sure you probably don't intend
6 for me to mean that you are dismissing the facial
7 challenges.

8 MR. LODGE: No, no, not at all.

9 THE COURT: No misunderstanding.

14:13:48 10 MR. LODGE: I'm recognizing the court's inherent
11 power to construe the pleadings to do substantial justice.

12 THE COURT: Just making sure you're on your toes.

13 You're probably working your way up to this, but I
14 am interested, it wasn't just bookkeeping when I asked about
14:14:05 15 Counts 6 and 7, which I also think about in a similar way,
16 and then also 8. And I know you'll get to them, but just a
17 reminder to please do.

18 MR. LODGE: Well, let's talk about them now.

19 The court is certainly -- I think the court is,
14:14:25 20 from a technical standpoint, allowed under the doctrine of
21 supplemental jurisdiction to decide whether there's a
22 violation of separation of powers under Ohio law.

23 The court certainly is familiar with the very
24 analogous federal separation powers types of claims. And we
14:14:46 25 believe that there's nothing especially subtle about what

1 has happened with House Bill 463 amendments to the statutes
2 that are under challenge.

3 Number -- oh, boy, pardon me.

4 THE COURT: What I thought you might have been
14:15:06 5 about to address is the local community self-governance
6 that's Count 6. What, if you have any law that supports the
7 belief that -- or can tell me whether a court has recognized
8 local community or self-governance as a fundamental right
9 under the United States Constitution or the Ohio.

14:15:37 10 MR. LODGE: We'll stand on our written arguments
11 as far as that's concerned. I am not aware of any precedent
12 since the time of authoring the memo.

13 THE COURT: And before the memo was authored,
14 certainly Justice Sotomayor's concurring decision in John
14:15:58 15 Doe versus Reed. And it's simply the one wherein she says,
16 "Instead it is up to the people of each state to decide
17 whether and how to permit legislation through mechanisms of
18 direct democracy, such as the initiative power and
19 referendum power."

14:16:17 20 Meaning -- and that was against the notion that
21 the right to local community self-government is governed by
22 state law. And she writes, "It's not a fundamental right
23 under the United States Constitution."

24 Does that ring a bell?

14:16:33 25 MR. LODGE: Yes. Thank you. I'd also point out,

1 Your Honor, that Article I, Section 2 of the Ohio
2 Constitution, which is sort of the inherent -- reserves to
3 the people the inherent power to change a government which
4 no longer serves their interest, is something that in one
14:16:48 5 form or another is found in all 50 state Constitutions, and
6 it has fallen into disuse.

7 And the Ohio Supreme Court, when asked to make
8 pronouncements about it in some of the cases I've been
9 associated with, continues to basically make rulings on
14:17:09 10 sub-Constitutional grounds or whatever. It never gets to
11 the issue.

12 The problem is, is that it either means something
13 or it doesn't. And if it doesn't, I am not sure what that
14 says about our democracy.

14:17:23 15 THE COURT: One of the things I appreciated about
16 the complaint, and I'll certainly defer to you about how it
17 could be improved, but I appreciated the many instances of
18 attempts to, successful or otherwise, eventually to place
19 matters on the ballot.

14:17:42 20 But what I don't believe is revealed there, nor in
21 the papers filed since, is an episode, that rare episode
22 that would shock the conscience. And that's something else
23 that I've been looking for in the evaluation of Count 6
24 primarily, but also Count 7.

14:18:08 25 MR. LODGE: I think that I would ask the court to

1 review closely the circumstances enumerated in the complaint
2 as to what I continue to call the erosion. I think that
3 House Bill 463 hidden, never assigned to a committee, hidden
4 in a lame duck session bill that covered about 31 or 32
14:18:31 5 other unrelated topics, which possibly runs afoul for all of
6 that, of Ohio's single subject rule, I think that it shocks
7 the conscience because it attempts to codify a statutory
8 enactment that overrules pertinent constitutional
9 interpretations going back for a hundred years. I think
14:18:52 10 that that shocks the conscience incredibly.

11 I think that what -- what we are watching -- maybe
12 I should explain a couple of other things, in fact.

13 In 2015, the State of Ohio voters I believe were
14 misled into changing the Constitution so that a statewide
14:19:16 15 initiative hereafter, all statewide initiatives have to go
16 through a board of five people chaired by the secretary of
17 state for analysis of whether they are -- in the proposal,
18 the initiative that's being proposed, creates a monopoly
19 practice.

14:19:34 20 This was an issue that was passed -- that was,
21 pardon me, on the ballot at the same time as an issue to
22 legalize marijuana sales, but confining the production to
23 ten selected vending corporations.

24 There was some outrage about that from a market
14:19:55 25 perspective. And the legislature quickly added to the

1 ballot a proposal that creates no longer a court system, but
2 a board of five people who may only be challenged indirectly
3 via mandamus as to whether they require a two-step vote to
4 take place.

14:20:21 5 There's actually wording now -- it passed, the
6 measure passed, and there's wording required to be shown,
7 basically as I understand the mechanics, the voter is first,
8 on the voting machine, shown the screen that basically says,
9 "Shall such-and-such a proposal dislodge the current lawful
14:20:38 10 activity of such-and-such," and if the answer is yes, then
11 you go to a second screen to vote yes or no on the actual
12 proposal. So that was 2015.

13 More recently, in 2019, in the budget bill, the
14 other Christmas tree enactment of the Ohio General Assembly,
14:20:58 15 which starts out as about an 800-page budget of all state
16 governmental activity, and always balloons into something in
17 excess of 2- to sometimes nearly 3,000 pages, and it's a
18 grab bag of all kinds of unrelated things, there is a -- the
19 pending court challenge that Lucas County counsel referred
14:21:18 20 to pending in federal court in Toledo over the rights of
21 nature, the Lake Erie Bill of Rights, rights of nature
22 provision.

23 The General Assembly sneaked through, without
24 committee reference, without any publicity of any great
14:21:34 25 moment, sneaked through a provision that makes it unlawful

1 to raise -- for anyone to basically raise in court the issue
2 of stewardship of a natural resource.

3 So what you see is not just an attempt to irrigate
4 court-like quasi-judicial power to an Executive Branch
14:21:59 5 agency, but there is a continuing legislative undercutting
6 of what are appropriate topics to be raised via initiative;
7 and indeed, at the state level so far, whether an initiative
8 can even be voted on.

9 I'd like to point out also, Your Honor, that the
14:22:19 10 Saferin decision, which is the one that somewhat momentarily
11 changed how local charter initiative amendments get to the
12 ballot, didn't address several other important things.

13 It addresses, of course, the matter of requiring a
14 supermajority of a city council to put something on the
14:22:41 15 ballot, and it reduces the board of elections' role to what
16 is called ministerial.

17 But it didn't address ordinances that are
18 initiated at the local level. It did not address charter --
19 county charter proposals that are a hybrid constitutional
14:22:59 20 and statutory creature. And it also did not address what
21 happens when a local member of a city council says, "You
22 know, that thing would -- that would be illegal if it was
23 enacted, so I'm not going to vote to put it on the ballot."

24 In other words, what happens when city councils
14:23:23 25 who are supposedly acting legislatively, although I would

1 contend it's a mere administrative matter to vote something
2 onto the ballot if the number of petition signatures has
3 been produced, those issues still remain open.

4 And that gets me into the matter of the continued
14:23:43 5 standing of the Mahoning County plaintiffs who have tried
6 eight different times, going back at least as many years,
7 possibly a few more, and have in their most recent attempt
8 to pass a community bill of rights, yes, the Saferin
9 decision came out -- or pardon me, the Flak decision came
14:24:11 10 out and the citizens removed a local enforcement clause from
11 their proposal, and the board of elections says, "Okay, it
12 can go onto the ballot."

13 These battles, especially in the Mahoning group,
14 but certainly by no means not just the Mahoning group, these
14:24:29 15 battles are at a terrible price, a terrible price in
16 attorney fees, but more importantly, a terrible price in the
17 loss of access to public debate to campaign.

18 The legislation wins its way through the Supreme
19 Court mandamus process, and in a couple of instances, the
14:24:50 20 Supreme Court has ruled Pyrrhically for the citizens, for
21 instance in the Bowling Green case, allowing something onto
22 the ballot. But there was a -- as I recall, something on
23 the order of fewer than 16 days to campaign. So things were
24 in limbo.

14:25:09 25 The Supreme Court rules, yay, the citizens win,

1 and they have few resources anyway and little access to
2 garnering public debate and didn't have any throughout the
3 election season until two and a half weeks before the
4 election itself.

14:25:27 5 So the problem is, the measure -- the principle
6 measures that have been pushed by the Mahoning citizenry
7 still have not been enacted into law. It is highly likely
8 that there will be additional future campaigns, and that
9 these unresolved matters, and who knows what other kinds of
14:25:48 10 excuses will be raised by election officials to deter things
11 and divert them from going onto the ballot.

12 So we believe that the complaint actually is
13 perhaps, if I may say so, more like a RICO allegation than
14 simply a damages complaint. The plaintiffs seek no monetary
14:26:09 15 damages. They are looking for prospective injunctive
16 relief.

17 And the evidence is -- emanates from election
18 travails in seven different counties that have citizens who
19 are bona fide plaintiffs who have circulated petitions or
14:26:28 20 been in the steering committees of the citizen sponsoring
21 groups. So --

22 THE COURT: But even if -- if you don't mind me
23 interjecting now, because I sensed you may have been
24 wrapping up the standing argument to move on, and before you
14:26:41 25 do, I'd like to hear from you on this.

1 I noted that you used "it's highly likely" that
2 your clients would seek something more from Mahoning County
3 that isn't before the county now, is how I interpreted that
4 statement.

14:26:57 5 But that's just not what the law requires. The
6 law requires present adverse consideration, not just
7 speculation prospectively of what might happen once that
8 matter does mature and is presented to Mahoning County.

9 That's what I see. And you might recall that I
14:27:19 10 shared that concern before today.

11 MR. LODGE: Correct.

12 THE COURT: So I'm keenly interested in how --
13 what legal distinction you can make. "Highly likely" just
14 isn't a term of art associated with standing, at least not
14:27:34 15 in a successful way.

16 MR. LODGE: No, but I think a term that is
17 associated with it is where -- boy, and I'm at a little bit
18 of a loss to remember the precise wording, but it is where
19 something recurs but escapes review, repetition occurs, but
14:27:53 20 each time -- and this is very common in First Amendment
21 types of cases anyway, that the citizens, for instance, have
22 attempted repeatedly to put something on the ballot, and
23 they are unable to get a merits direct appeal type of review
24 because of a variety of factors, not the least of which is
14:28:15 25 that they usually have to litigate in a mandamus action in a

1 very charged, lightning round of briefing type of mandamus
2 action before the Ohio Supreme Court.

3 So I think that the court may legitimately
4 consider the history of the citizens' activity in Mahoning
14:28:37 5 County, in Youngstown, and conclude from it that the very
6 plaintiffs -- the plaintiffs are some of the very people who
7 have been at the core from the beginning, at eight different
8 tries at getting something on the ballot and/or having a
9 vote taken on it, which has happened a few times.

14:28:57 10 I believe that the court may consider highly
11 likely to be serious evidence of intention, and evidence, as
12 I say, of a history of misdeeds by election officials that
13 contrive circumstances to keep public votes from taking
14 place.

14:29:19 15 THE COURT: You heard Mr. Pituch speak about the
16 one change in the law that he sees may be advantageous to
17 your clients, and that's the Supreme Court's ruling that
18 municipal charter amendments shall be placed on the ballot.
19 So that's certainly an improved circumstance, one that
14:29:41 20 perhaps wasn't in existence.

21 And I know we're talking about Mahoning County
22 versus, say, the City of Youngstown. But there could be
23 some culling and maybe something done just on behalf of
24 Youngstown.

14:29:55 25 So it seems that if there was some chilling

1 effect, that measure warms it up a bit. Do you see it
2 differently?

3 MR. LODGE: Well, as I suggested earlier, the
4 Maxcy case says with a supermajority, a local council is
14:30:16 5 required, apparently, to put a measure on the -- a
6 Constitution -- pardon me, start over -- a municipal charter
7 amendment on the ballot.

8 THE COURT: Well, I understand you.

9 MR. LODGE: And the question has not yet been
14:30:29 10 answered and is probably out there someplace, what happens
11 when a majority -- the supermajority vote is not attainable
12 because one or more of the members of the city council say,
13 "You know, I'm not a lawyer, but that isn't going to be
14 legal if it's passed, so I'm not going to inconvenience and
14:30:47 15 burden the public with the expense of an election."

16 Then what happens? Then you have, again, a
17 circumstance where city council, acting as effectively as an
18 election official, has intervened to keep something off the
19 ballot because of considerations of content.

14:31:04 20 So I -- Maxcy did not cure everything. It makes
21 it more possible, yes. But again, it depends, for now, on
22 the good faith, the bona fides of the members of council who
23 were asked to vote in what I still think is a merely
24 administrative ministerial type of role to put something on
14:31:30 25 the ballot.

1 THE COURT: You wrote about Babbitt. You heard
2 the question I framed about it. And the one concern I still
3 have and would like to hear from you is whether you can
4 offer something to encourage me to believe that your clients
14:31:48 5 would be subject to some imminent threat of harm.

6 I mean, there is this notion of, well, there is
7 the exertion in the past, the repetitive exertion, the
8 weariness, the costs of the exertion. But, again, sort of
9 lunging towards, but I'm not even at the present adverse,
14:32:07 10 but I'm talking about some imminent threat of some harm
11 resulting.

12 MR. LODGE: The harm to the state constitutional
13 right to initiative is a -- is imminently being attacked, as
14 I've illustrated. It's being attacked --

14:32:24 15 THE COURT: Well, and I -- let's say for the
16 moment --

17 MR. LODGE: Okay.

18 THE COURT: -- without -- that -- even if that's
19 the case, what we're really talking about, though, is the
14:32:36 20 ask for declaratory judgment and injunctive relief.

21 MR. LODGE: Okay.

22 THE COURT: And I'm not even sure, quite frankly,
23 Mr. Lodge, how I'd write that order. "Mahoning County,
24 going forward, you can't..." I mean, it's even that basic
14:32:56 25 when I just try to look at it in a very elementary level.

1 Do you see the point I make?

2 MR. LODGE: No, and I'm sorry.

3 THE COURT: Well, I don't see the harm or what I
4 could instruct. It's one thing to tell the county, "You
14:33:09 5 shall not do this, and going forward it would be illegal as
6 well." I'm not sure what it is you would tell me to tell
7 the county based on what's before me as the harm, the case,
8 the controversy regarding Mahoning County.

9 MR. LODGE: The order would probably --

14:33:29 10 THE COURT: And if I hear another word, I will
11 clear the room. You've been wonderful. I'm pleased that
12 your civic interest has brought you here. But you've chosen
13 well. He's doing all right without the murmuring. And I
14 think that was more in support of you than me, so...

14:33:44 15 No, please, you go ahead. You still have 11 whole
16 minutes.

17 MR. LODGE: Thank you.

18 The harm is -- boy --

19 THE COURT: But let me ask you, and think of it in
14:34:05 20 the way that I've suggested. It's elementary, but I think
21 at times we have to get down to nuts and bolts.

22 The order as to Mahoning County, if you were to
23 draft it, would look like what?

24 MR. LODGE: It would look like, "Henceforth, the
14:34:24 25 board of elections is constrained to review initiative

1 petitions," and you would have to break it out by category,
2 if it was a county charter, city charter amendments, city
3 ordinances.

4 But it would state -- it would refer to some
14:34:40 5 statutory basis for the very ministerial -- the true
6 gatekeeper kinds of functions that the board of elections is
7 confined to.

8 And that it would essentially have to say that
9 inquiry into -- you would have to find that there is a
14:35:06 10 conflation of the terms, scope of review -- or scope of
11 authority, pardon me, and that the court would have to find
12 and declare that that is effectively coded language for an
13 invitation for local election officials to actually make a
14 judgment call as to whether something would be lawful or
14:35:29 15 constitutional or not if passed. That effectively, the
16 measure cannot be assessed, reviewed, analyzed for anything
17 but strict form types of requirements.

18 And I understand that there are occasionally
19 things that look like substantive but are actually
14:35:53 20 procedural ministerial reviews. And let me give an example.

21 If a library district or a school district wants
22 to -- wants a new or increased levy, the proposal as it
23 appears on the ballot is actually supposed to state numbers,
24 you know, what the amount of the millage is and all that, to
14:36:15 25 generate a certain dollar, minimum dollar amount of revenue.

1 And I have seen a couple of cases where boards of
2 elections caught a dumb mathematical mistake, and basically
3 deterred something from being put on the ballot because it
4 was erroneous and they sent it back to the local government
14:36:36 5 saying, "You've got to fix this."

6 That is a form type of matter. It's not a
7 substance matter, not really.

8 So there are some points that at first glance
9 might appear to give considerably more substantive power to
14:36:54 10 a board of elections than actually occurs.

11 They're supposed -- the board exists to decide if
12 there's enough voters and they're registered and the form's
13 right and the circulator is signed correctly and all of
14 that, as well as very minimal scrutiny of the content.

14:37:15 15 The conflation has happened, actually, where the
16 statute says, "The petition shall be scrutinized by the
17 board of elections." That's actually pretty particularized
18 statutory wording. The petition contains an initiative
19 proposal. You're supposed to look at the four corners of
14:37:39 20 the document for its propriety under state law, not the
21 proposal contained within the document.

22 THE COURT: In your example, when the math is off,
23 would the board, under your rubric, be able to correct the
24 math or send it back?

14:37:57 25 MR. LODGE: Send it back probably would --

1 THE COURT: So there would be some interpretation?

2 There would be times when even under your system, review
3 would be -- review and modification would be appropriate?

4 MR. LODGE: Sure. I expect the -- certainly

14:38:15

5 there's nothing to keep a board of elections from reading

6 the initiative. But the question is whether or not they are

7 allowed to make a determination in the manner of censorship.

8 And in a math screw-up such as I cite, they're not censoring

9 the speech, they're saying -- there's legal requirements

14:38:38

10 that the proposal has to say the following to the voters,

11 and there are -- I believe in the tax code, there are -- or

12 possibly in the education code, in the library code, but in

13 any event, there are explicit requirements as to how revenue

14 measures are to be put to the public. And they're simply

14:38:56

15 administering a statute.

16 We keep getting, incidentally, without talking

17 about it, back to the administration versus legislation kind

18 of thing, and that has become one of the excuses, where

19 boards of election are basically saying a measure is

14:39:16

20 legislating even though -- or they're saying it's

21 administrative and not new legislation. That's another one

22 of the ways that initiatives have been, in my reckoning, at

23 least, sometimes gamed.

24 But I think that the court could draft a very

14:39:34

25 meaningful type of injunctive order.

1 THE COURT: Thank you, sir, for indulging me on
2 that topic.

3 You are whittling away your time, and you still
4 have some, not much.

14:39:50 5 MR. LODGE: Unless the court has any other
6 questions, I'm --

7 THE COURT: Willing to save what you have left?

8 MR. LODGE: I'm willing to, yeah.

9 THE COURT: All right, then. I don't at this
14:39:57 10 time, but I appreciate the attention you've given me.

11 MR. LODGE: Thank you.

12 THE COURT: And I'll circle back to the defense
13 table and give you an opportunity to speak again.

14 Ms. Staff.

14:40:10 15 MS. STAFF: Your Honor, if I may, I have a few
16 brief remarks. As Your Honor is well aware, federal courts
17 are courts of limited jurisdiction. Unlike state trial
18 courts, federal courts do not have general jurisdiction to
19 review questions of federal and state law, but only the
14:40:31 20 authority to decide laws and questions that are before them
21 under statutory and constitutional limits.

22 This case simply no longer presents a federal
23 question for this court to consider. Schmitt has resolved
24 any federal claims these plaintiffs had.

14:40:49 25 And I did want to briefly address their as applied

1 issue just once again briefly. This case presents a stark
2 contrast to the Schmitt facts, where the Schmitt plaintiffs
3 had particular as applied claims in their complaint. They
4 were seeking ballot placement for the November 2018 general
14:41:10 5 election.

6 Here there are no specific as applied claims with
7 respect to any of these plaintiffs. They seek the same
8 relief, general declarations, general injunctive relief
9 under their both as applied and facial challenges, and both
14:41:27 10 fall for the same reason, because these laws are
11 constitutional.

12 With no federal claims left, the only court that
13 has the final say over the meaning of the constitutionality
14 of these laws is the Ohio Supreme Court. And the Ohio
14:41:44 15 Secretary of State's position is that this complaint should
16 be dismissed in total under Rule 12(b)(1) and 12(b)(6).

17 Unless the court has any further questions, I
18 would be happy to entertain those. Otherwise, I will cede
19 the remainder of my time to the other defendants here.

14:42:00 20 THE COURT: Thank you, Ms. Staff. No questions
21 for you.

22 MS. STAFF: Thank you, Your Honor.

23 MR. PITUCH: Good afternoon again, Judge.

24 THE COURT: Certainly. Same to you, sir.

14:42:14 25 MR. PITUCH: Several points. I brought before the

1 court a motion for a judgment on the pleadings. With that
2 motion, I am required to accept all the factual allegations
3 of the complaint as true. And I'm willing to do that; I
4 don't have a problem with that.

14:42:28 5 The history lecture you got from Mr. Lodge,
6 interesting as it was, I don't think is contained in his
7 complaint and I don't have to accept any of that as true for
8 today's proceedings. My guess is that if I spent some time
9 and gave the court my version of the history of the last
14:42:44 10 100, 150 years, it would be slightly different than his.

11 The second point, he talked about how the Ohio
12 Supreme Court has a hands-off position on preelection
13 content review of ballot initiatives. That's not an
14 accurate assessment of the law. I can cite just in the few
14:43:01 15 minutes I had there thinking about it, I could come up with
16 three cases where they did just that.

17 2018, the Bolzenius case, and that's cited in our
18 brief, where the Supreme Court allowed the Franklin County
19 Board of Elections to keep a municipal initiative off the
14:43:15 20 ballot, the equivalent of the Lake Erie Bill of Rights.

21 2016, State ex rel. Sensible Norwood versus the
22 Hamilton County Board of Elections, that's cited in the
23 briefs. In that case, they found that the Hamilton County
24 Board did not violate Ohio law when it kept off the ballot
14:43:35 25 an initiative that would decriminalize marijuana. It would

1 in essence repeal Ohio felony drug law. They found out that
2 that was not a problem. In fact, it should have been kept
3 off the ballot.

4 The third case that comes to mind quickly is from
14:43:47 5 1967, State ex rel. Rhodes versus the Board of Elections.
6 It's also cited in my motion for judgment on the pleadings.
7 In that case the Supreme Court held it was proper to keep an
8 initiative off the ballot which would order the government
9 to terminate the war in Vietnam. They found out that was
14:44:06 10 not a proper subject for an initiative and it could be kept
11 off the ballot.

12 There was a statement Mr. Lodge made about 88
13 county board of elections and the varying decisions they
14 might make. Well, there's a resolution for that. Any one
14:44:19 15 of those 88 decisions can be addressed by the Ohio Supreme
16 Court via a writ of mandamus, as the Schmitt court recently
17 affirmed.

18 In that case, you won't have 88 different
19 decisions, you'll have one decision going to the Supreme
14:44:31 20 Court and they'll make it once and for all.

21 One other thing. This power to keep an initiative
22 off the ballot. I've been doing the board of elections work
23 now for nine and a half years. It's a power that's rarely
24 used. I've used it twice. And just in the last year. And
14:44:47 25 both initiatives contained the same blatantly

1 unconstitutional and unenforceable language, both the Lake
2 Erie Bill of Rights, and there was another one, the downtown
3 jail amendment. And I recommended to the board that they
4 keep those off the ballot and they did.

14:45:01 5 But that's the only two times in the nine years
6 that I've had to deal with anything like this. My default
7 position as a county prosecutor is if it's a close call, put
8 it on the ballot. I've done that with candidates when there
9 have been protests and also with initiatives. So while this
14:45:16 10 is something for the court to address, this is a power that
11 is rarely, rarely used.

12 Other than that, thank you, Judge.

13 THE COURT: Thank you, sir.

14 MS. HACKETT: Your Honor, just one or two things.
14:45:39 15 When you asked Mr. Lodge about what harm he suggests is
16 imminent, he said that it is the harm to the state
17 constitutional right to initiative.

18 And I suggest that under the U.S. Supreme Court
19 cases that I cited in our brief, that is simply not enough.
14:46:03 20 I would ask the court to, when you're reviewing the
21 arguments and our briefs, to look at the Hollingsworth
22 versus Perry case, and it's cited in our brief.

23 And in that case, the court said that you have to
24 have a concrete and particularized imminent injury. And
14:46:22 25 they said that the doctrine of standing serves to prevent

1 the judicial process from being used to usurp the powers of
2 the political branches.

3 So it's keeping the courts in their proper place
4 in our system, and also making sure that what comes out of
14:46:40 5 courts aren't merely advisory opinions. And that's the
6 reason for the constitutional requirement of standing.

7 Also, the Renne versus Geary case, I talked about
8 it earlier, but I really didn't go into the facts. In that
9 case, the plaintiffs had challenged a provision in the
14:47:08 10 California Constitution that provided that no political
11 party or party central committee could endorse or support a
12 candidate for a non-partisan office.

13 And the plaintiffs in that case were the
14 Republican Party and the Democratic Party who wanted to
14:47:26 15 include party endorsements in voter pamphlets. And the
16 court in that case found that there was no standing. Even
17 though they had party endorsements removed from voter
18 pamphlets in the past, clearly the actions had happened in
19 the past, but going forward, there was nothing showing any
14:47:51 20 threat of imminent injury, and the court found that the fact
21 that the defendants had deleted party endorsements in the
22 past were not enough to establish or demonstrate a live
23 controversy.

24 So I suggest that those U.S. Supreme Court cases
14:48:10 25 are really important here and really dispose of the standing

1 issue.

2 And then also -- I guess that's -- I guess that's
3 all I have.

4 THE COURT: All right, then.

14:48:21 5 MS. HACKETT: Thank you, Your Honor.

6 THE COURT: Thank you, Ms. Hackett.

7 Mr. Lodge, you'll get the final word.

8 MR. LODGE: The Sensible Norwood case is sort of
9 an interesting one, because Justice Fischer of the Ohio
14:48:37 10 Supreme Court has criticized it, I believe twice since --
11 well, in the last couple of years.

12 In it, there was a package of decriminalization
13 for marijuana possession and usage. And effectively, the
14 entire thing was thrown out because there were -- this isn't
14:48:56 15 the exact wording, but there were provisions that
16 essentially said that the police of Norwood shall not do
17 this or that.

18 So the determination was, that's an administrative
19 order, that's not legislative; therefore, it's an improper
14:49:09 20 initiative.

21 I might point out that an almost identical bundle
22 of marijuana-related changes were enacted in Toledo via
23 initiative, and instead of having the Ohio Supreme Court
24 intervening before the election and vetoing, which
14:49:30 25 incidentally violates their own principle about not

1 inquiring into the substance until something's had a chance
2 to be enacted or not on the ballot, but a common pleas judge
3 in Toledo, basically after the AG filed a declaratory
4 judgment action to try to strike the entire measure, that
14:49:49 5 judge very diligently and properly, exercising the severance
6 clause, kept some of the stuff in the Toledo municipal code
7 and jettisoned other parts of it. It was a textbook example
8 of post hoc determination by the court system at leisure.

9 And that brings up the problem with the mandamus
14:50:12 10 mechanism. Justice Fischer and, in fact, the majority in
11 the Walker v. Husted, the 2015 case, points out that the
12 problem with this lightning round of briefing and mandamus
13 activity before the Ohio Supreme Court doesn't allow leisure
14 time for serious understanding and possibly collegial debate
14:50:38 15 among the Ohio Supreme Court justices.

16 I might point out that we have three days to file
17 the merit brief, three days to file the respondent's
18 response, and three days to file a reply. That's the tone
19 and tenor of the lightning round briefing under the rules of
14:50:56 20 the Ohio Supreme Court in election cases.

21 So the problem is, the standard for mandamus is
22 different from the standard in a direct appeal. The
23 standard for mandamus, as Justice Fischer and other judges
24 of the Ohio Supreme Court have pointed out, actually means
14:51:13 25 that the secretary of state might not have abused his or her

1 discretion, but that the court might believe that the
2 approval or the ruling made by the secretary of state is
3 unconstitutional, but the Supreme Court would not be able to
4 overturn the determination of the secretary of state because
14:51:35 5 of the standard involved in mandamus.

6 So these matters are time sensitive. The public
7 interest in something may easily dissipate if there is
8 consequential delay. I have prosecuted an election case up
9 through the rungs instead of availing myself on behalf of
14:51:57 10 the clients of the speeded-up mechanism of the Ohio Supreme
11 Court. And, yes, we got a decision, and yes, we won, and it
12 was fully -- I'm believing it was about 20 months after the
13 initial complaint.

14 So the problem is that a direct appeal is not an
14:52:14 15 adequate remedy, and frankly, mandamus may not be altogether
16 an adequate remedy to secure the enforcement consistently.

17 One last thing, Your Honor, is that I just want to
18 remind the court of the example. When the court's
19 deliberating about the standing of the Mahoning County
14:52:34 20 plaintiffs, I don't believe that you can consider their
21 standing apart from the other plaintiffs and the allegations
22 in the lawsuit.

23 At the same time, as the Mahoning plaintiffs were
24 pursuing something before the Ohio Supreme Court in the Flak
14:52:50 25 case and losing, the Wood County Board of Elections, as I

1 indicated, was taking up virtually the identical issue and
2 ruling the other way.

3 That's fine among courts, but it is impermissible
4 preelection censorship of something that isn't even a ripe,
14:53:10 5 enacted law, and it's being done by people who, with all due
6 respect to boards of election, may not be in any particular
7 way qualified to make those kinds of decisions, even with
8 the advice of esteemed counsel like Mr. Pituch.

9 Thank you.

14:53:26 10 THE COURT: Thank you, sir.

11 Thank you all. I have heard you fully. The
12 matter is heard and submitted. You will receive my ruling
13 soon. I won't keep you waiting long. I appreciate the
14 effort, the obvious effort that all of you put into not only
14:53:40 15 your writings, but your oral presentations today. And I bid
16 you all safe travels. This matter is adjourned.

17 THE CLERK: All rise.

18 (Proceedings concluded at 2:53 p.m.)

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20 C E R T I F I C A T E

21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.

23 /s/ Mary L. Uphold August 3, 2020
24 Mary L. Uphold, RDR, CRR Date

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