

1 sir.

2 All right. So I assume there's no
3 more witnesses. Do you have some
4 exhibits that -- Actually, you know what,
5 they were admitted. There was only one
6 objection to K.

7 Is that right, Mr. Parker? I
8 thought all the other exhibits were
9 admitted.

10 MR. PARKER: Yes.

11 THE COURT: Let me just make sure I
12 have that.

13 So under Tab One, it looks like A
14 through M are admitted.

15 And then under Tab Two, it starts
16 over with A. That's Sherry Poland's
17 affidavit. A through -- let's see what
18 that is. Looks like a transcript.

19 Okay. Why don't I do this. I'll
20 make -- in the book it says A and B.
21 I'll just make it double A, double B. Is
22 that agreeable?

23 MR. FOX: Your Honor, there is a --
24 table of contents on the front is a
25 helpful guide. But if you just flip

1 right over -- there you go.

2 THE COURT: All right. So I dealt
3 with One.

4 Then number Two is -- right. All
5 right. Poland affidavit, A and B. Since
6 we already have an A, what I'll do is
7 make it double A and double B. Is
8 that --

9 MR. FOX: I think it would be more
10 helpful if it was maybe triple A and
11 triple B. Because I think we designated
12 that exhibit right there as double A.

13 THE COURT: I wrote that down as
14 1-1.

15 MR. FOX: Oh, this is 1-1? Well
16 then --

17 THE COURT: Well, let's do --
18 Number Two will be -- all right -- double
19 A and double B.

20 And then Tab Three starts with --
21 All right, 1, 2 and 3. Those are
22 admitted.

23 (Respondents' Exhibits AA and BB,
24 and Nos. 1, 2 and 3 were received into
25 evidence.)

1 And then we have 1-1 right there.

2 And with that, the defense rests.

3 And does anyone -- is there any
4 rebuttal, Mr. Parker? Any rebuttal
5 witnesses, sir?

6 MR. PARKER: (Shaking head.)

7 THE COURT: No. Okay. You want to
8 make a closing argument?

9 MR. PARKER: Yes.

10 THE COURT: All right. Go ahead,
11 sir. When you're ready.

12 MR. PARKER: I think I started when
13 Mr. Moeller was sitting in the chair, and
14 I was going to talk to you about what the
15 charter requires. Didn't write it. Only
16 trying to interpret it.

17 And the First District Court of
18 Appeals, on January 14th of 1981 made a
19 decision that --

20 May I approach, Your Honor?

21 THE COURT: Sure.

22 MR. PARKER: -- that I think is
23 instructive. It talks about the charter
24 provision.

25 First of all, the charter requires

1 the clerk to send it out; not a mailing
2 service. It's interesting to note that
3 the City -- one of the charter
4 amendments -- wanted to change the way
5 they provided notice to make it cheaper
6 and easier.

7 This case is pretty clear, that the
8 charter requires the clerk to send it.
9 For that reason, and that reason alone,
10 there should be no special election,
11 because the charter provision requiring
12 that notice to be sent by the clerk
13 didn't happen.

14 But let's go to even more so. What
15 was placed on the ballot for Issue 2,
16 it's being described as a typo, a
17 typographical error.

18 We didn't hear from the person who
19 typed in that material originally that
20 they missed keystrokes or that they wrote
21 down the wrong information.

22 Judge, this is -- there's no way,
23 under any reasonable reading of the
24 English language, that that could be
25 considered a typo. It just can't be.

1 And that's where the Board of Elections'
2 employees kind of went off the rails.

3 3505.14, the proofing period, is to
4 compare what was submitted by either the
5 candidate or the entity that's having the
6 issue or the question be posed to what
7 the printer prints up; not to compare
8 what was submitted to what was logical,
9 or appropriate, or reasonable. And
10 that's why they had to file before 60
11 days.

12 So if you were to let this happen,
13 then there would be no reason to have a
14 60-day rule. Because their amendment
15 places on the ballot something that was
16 enacted after the 60 days, which means it
17 can't be held.

18 But it's even deeper than that,
19 Judge. Because -- well, I alluded to it,
20 and I said it. You know, 28 years,
21 doesn't allow you to tell your tax clerk
22 to sign a document to represent it to the
23 Board of Elections as if it's something
24 that's true, when she really has no idea.
25 And the fact of the matter is they

1 made -- they made light of the fact that
2 the clerk, under the charter, is required
3 to be at the meetings.

4 So this isn't a situation -- this
5 is where the Board of Elections -- not
6 that Ms. Poland's a bad person, but she
7 was unwittingly duped into following this
8 process.

9 Now, if you think that's a
10 typographical error, Judge, I guess then
11 3505.14, the proofing period, allows
12 there to be changes to what was
13 submitted. But I don't think that
14 that -- I think that's a complete
15 misreading of that statute. It's
16 totally -- it makes new law. You know, I
17 talked earlier with Mr. Stevenson about
18 bad facts making bad law. Man, that
19 makes really bad law.

20 Analogous is when a candidate files
21 their petitions, and then they go back to
22 try to fix it later. You can't do that.
23 They're stuck with what they were with.

24 So the only thing they could have
25 done at that point was withdrew the

1 proposed charter amendment. But they
2 didn't. They engaged in this pattern of
3 conduct. And probably the most egregious
4 action was having Ms. Doyle sign Exhibit
5 K, knowing that she wasn't even at the
6 meeting, and claiming as though she could
7 certify it. I mean -- I think they call
8 that a legal sham, representing something
9 that's not supposed to be.

10 Mr. Fox would have you believe
11 that, well, it's not required to be
12 certified. If it's not required to be
13 certified, why was it? Because they were
14 trying to beat a deadline. And guess
15 what? It was a lie, Judge. Simple,
16 plain truth. Ms. Lowndes -- I can't say
17 her name right.

18 THE COURT: I know who you mean.

19 MR. PARKER: Lowndes. She can't --
20 a tax commissioner can't serve as an
21 acting clerk. There's no provision in
22 the law that authorizes her to serve as
23 an acting clerk. Just simply doesn't
24 happen.

25 Mr. Moeller mentioned some statute,

1 vaguely, that can do it. But then he
2 admits, none of the provisions that are
3 supposed to be followed was followed in
4 having her serve as the acting clerk.

5 But then he wants you to believe,
6 well, you know, with my office the clerk
7 sends the paperwork out. No. You heard
8 the clerk earlier. She didn't send it.
9 So we don't even get beyond that, 'cause
10 this case is clear in what's required to
11 be done.

12 Then you get to the amended
13 portion. Which there is no provision in
14 the law that allows them to amend any
15 proposed amendment; you just can't do it.
16 That portion about errors and
17 corrections, that's not what that means.

18 That means compare what they filed
19 to what was printed. And how do we know
20 that? Because the Secretary of State's
21 employee approved the first one. Because
22 they don't know the intricacies of the
23 city's charter about what provisions mean
24 what. It's not their job to check it.
25 Guess whose job that is, Judge? Whose

1 job is that? It's the person that files
2 it before March 3rd, 2017. And when they
3 file it, they're stuck with what they
4 filed.

5 I mean, honestly, I'm not sure that
6 I like that. As a lawyer who has to
7 amend pleadings because another very
8 intelligent lawyer -- and I'm not sure
9 which one it was -- a very intelligent
10 lawyer says you might have missed
11 something -- I'm trying to remember which
12 one it is.

13 THE COURT: I think it's Mr.
14 Stevenson.

15 MR. PARKER: Who was the really
16 intelligent -- because they said it, I
17 believed it. But we can do that. That's
18 part of what we're allowed to do.
19 They're simply, Judge -- they're simply
20 not allowed to do this.

21 And I don't feel great about it.
22 Heck. We even asked them to voluntarily
23 take it off the ballot. You know what
24 they said? Nope. No. No, we don't need
25 to. No.

1 Judge, we're going to be right back
2 in the same spot, in 1981, where the
3 results in the election are nullified.

4 So here's what we're going to ask
5 you to do. First of all, really, Judge,
6 I'm going to ask you to declare --
7 because of that mailing and because of
8 the plain language in the charter says,
9 no mailing, no election, just enjoin the
10 election, declare that the rules and
11 processes weren't followed, and just
12 cancel the election. Save a bunch of
13 people time running the polls and so
14 forth.

15 But, in addition to that, Judge, if
16 you know that probably since the Court of
17 Appeals made this decision in '81 and
18 after the results were counted and so
19 forth, I'm going to ask that you
20 impound -- order the impoundment until
21 all legal appeals are exhausted, to
22 impound the ballots. And if it's easier
23 for the Board to count them and --
24 canvass and count them, but to have them
25 not declare the results until the final

1 court process can be followed. Because I
2 have a feeling that if we were to
3 prevail, they'll appeal. And if they
4 were to prevail, I'm certain -- since my
5 client's already been down this road
6 once -- he's going to ask the Court of
7 Appeals to review it. But it would -- it
8 would have been much easier for them to
9 just withdraw it in the initial sense.
10 'Cause you heard him talk about, they
11 realize that -- you know, hey, we got a
12 little bit of a problem here, putting
13 them altogether in 17-02, so let's go
14 ahead and divide them up into 17-03 and
15 17-04. Well, and then they realized,
16 uh-oh, day 47 before the election, we're
17 missing some things. Really just doesn't
18 make any sense.

19 So at that point, pull it off the
20 ballot. But no, no. Instead, they want
21 to send the Board of Elections something
22 that's certified by a person who
23 doesn't -- I mean, they could have gone
24 to the bagger at Kroger and have them
25 certify it. I mean, you know, the bagger

1 at Kroger could probably just have
2 followed Mr. Moeller's direction as
3 anybody else.

4 And then I really -- honestly, I
5 said this about three times in different
6 places, Richard Nixon said it to David
7 Frost, it wasn't illegal because I did
8 it. And Mr. Moeller's trying to say,
9 well, because I was in charge, I'm
10 allowed to do it. You can't do that,
11 Judge.

12 They certified that to the Board of
13 Elections. Ms. Poland doesn't -- she
14 doesn't know who the Clerk of
15 Madeira/City Council is. She just
16 accepted it and this is what they said
17 has changed. But that's --

18 And least you can think that this
19 is much to do about nothing. Okay.
20 Least you think this is much to do about
21 nothing. (Indicating.)

22 A typo would be an O for an I.
23 Missed one -- missed one Roman numeral.
24 Thirty-nine keystrokes, Judge. That's
25 not a typo. That's a portion of it

1 missing because they're rushing to get
2 this on the ballot, because it's
3 evidently important to the city council
4 people to see if the city people want to
5 do it. But you can't rush it to the
6 ballot if you don't do it right.

7 Because one of the reasons for the
8 time period is so that people from the
9 community can gather up a committee to
10 respond. They didn't even give them
11 time.

12 And then, you know what's
13 interesting? Out of all the evidence we
14 heard, right, out of all of the evidence
15 we heard, from Mr. Moeller, did he tell
16 you when the mailer was mailed? He
17 didn't. And they've got the burden to
18 show that, that the mailer was sent
19 before 30 days before the election.

20 MR. STEVENSON: Your Honor, I'm
21 going to object at this point. That's
22 not a true reflection of the evidence.
23 Mr. Moeller stated it was mailed on March
24 31st.

25 MR. PARKER: No, that's not what we

1 said. He said it was taken to the
2 mailing company on March 31st.

3 THE COURT: It is closing
4 arguments, so I'll overrule it, Mr.
5 Stevenson.

6 Go ahead, sir.

7 MR. PARKER: But that -- that is a
8 great point Mr. Stevenson made. They
9 took it to the mailing company on March
10 the 31st. We got no evidence that it was
11 put in the mail before 30 days. Case
12 closed. Thank you, Judge.

13 THE COURT: All right. Thank you,
14 Mr. Parker. Thank you.

15 And who wants to -- Mr. Fox, or Mr.
16 Goodin, or Mr. Stevenson?

17 MR. STEVENSON: Your Honor, I
18 expect he's going to be a little bit
19 longer.

20 The bottom line on this is the
21 Constitution of the State of Ohio
22 requires two things when you try to amend
23 a city charter. They require that, in
24 this case, two-thirds of council vote for
25 it, and that the council set the date of

1 the special election, if it's not 60 days
2 ahead of the general election. That
3 happened here.

4 The Supreme Court in 1921, in State
5 ex rel. McCormick versus Fouts, 103 Ohio
6 St. 35 said in their syllabus:

7 In passing such an ordinance it's
8 not necessary that the council take and
9 record yea or nay votes of its members.
10 It's only necessary that it clearly
11 appears by the minutes of council that
12 the ordinance received two-thirds vote by
13 all its members.

14 That's what happened here. You've
15 heard a lot of testimony about the
16 three-reading rule. The three-reading
17 rule does not apply in this case. Even
18 though it's in their charter, it doesn't
19 apply in this case because this is not
20 enacting the law.

21 The bottom line is, is this is
22 calling for an election to enact the law.
23 And it's an entirely different matter.

24 The other thing that Mr. Parker
25 raised is 47 days before the election.

1 This matter was submitted to the Board of
2 Elections. Mr. Parker and his client had
3 knowledge that the defects they
4 complained about, with the exception of
5 the mailing, which does not appear in the
6 verified complaint by the way, those
7 defects --

8 THE COURT: You know what, I was
9 thinking it was in Mr. Moeller's
10 affidavit. I've read it somewhere before
11 the hearing. But anyway --

12 MR. STEVENSON: It's not in the
13 complaint. Okay. Not one paragraph
14 deals with the mailing.

15 Now, the bottom line is, is that
16 the Board of Elections has been voting,
17 conducting an election since March the
18 18th. This case wasn't even filed until
19 April. If they had filed it as an
20 expedited election case, the Supreme
21 Court would not even entertain it.
22 Because it's too late. The election is
23 underway, and has been underway since
24 March the 18th. And we're now, as they
25 said earlier, two business days away from

1 actually going to the polls and voting.

2 And the Supreme Court has held
3 time, and time, and time again, that you
4 must bring election matters with the
5 requisite diligence to get it decided
6 before the election starts. They didn't
7 do that here. There is no reason for you
8 to enjoin the election. There is no
9 reason for you to impound the ballots.

10 THE COURT: Okay. Thank you,
11 Mr. Stevenson.

12 All right. Mr. Fox.

13 MR. FOX: Your Honor, I created
14 this handy timeline with lots of lines in
15 order to hopefully demonstrate for the
16 court what transpired, and now that a
17 record has been built, I can talk through
18 this in closing to explain factually what
19 took place.

20 So, as you look, on March 2nd
21 Ordinance 17-03 and 04 were passed.
22 17-03 and 04 have been admitted into
23 evidence.

24 The minutes for the meeting that
25 took place on March 2nd have also been

1 admitted into the evidence.

2 On March 13th Mr. Parker sent a
3 letter to me, the law director. That
4 letter has also been admitted into
5 evidence.

6 From March 2nd until he filed
7 something with the Board of Elections on
8 April 4th there's a 32 day -- 32-day
9 delay between his knowledge of what took
10 place back here, as evidenced here, and
11 the actual submission to the Board of
12 Elections.

13 On April 7th in front of the Board
14 of Elections he presented his case. The
15 Board of Elections listened to him
16 present his case. The Board of Elections
17 unanimously rejected his arguments. Mr.
18 Oppenheimer was present at that hearing,
19 and he presented, the relator in this
20 case.

21 He said -- and this has been also
22 admitted into the record. Because it's
23 the transcript from that hearing. He
24 indicated that he actually brought his
25 absentee ballots with him in order to

1 cast a vote, or submit his absentee
2 ballot.

3 He also represented to the Board of
4 Elections that he has gone door to door
5 throughout the City of Madeira to
6 distribute absentee ballots.

7 So, bizarrely enough, the relator
8 is contesting something here before the
9 court that he has actively played a part
10 in causing it to no longer be ripe for
11 resolution.

12 So on April 11th relator files the
13 instant lawsuit. We have a hearing. And
14 there's a 16-day delay between the April
15 12 -- or April 11th hearing and today.
16 Today we are now two business days before
17 the May 2nd election.

18 Affidavit of Sherry Poland
19 indicates that the Board of Elections has
20 issued 51 absentee ballots, 19 of which
21 have already been returned.

22 That's the factual information that
23 is before this court. It was relator's
24 burden here today to prove to this court
25 by clear and convincing evidence that

1 they were entitled to injunctive relief.
2 And under Ohio law they have to satisfy
3 four factors, which I'm sure this court
4 is very well aware of.

5 One, they have to prove that there
6 was a substantial likelihood that they're
7 going to prevail. And I think it is
8 inarguable that they have not put forth
9 arguments before this court in any of
10 their papers that would demonstrate that
11 they're entitled to prevail in this case.

12 Two, they have to demonstrate that
13 they will suffer irreparable injury or
14 harm if the requested injunctive relief
15 is denied. Again, they have failed to
16 satisfy that burden. In fact, I haven't
17 heard those factors discussed at all by
18 opposing counsel.

19 His motion which was filed was a
20 skeleton, which effectively attempted to
21 reincorporate or restate all of the
22 allegations that were set forth in his
23 verified complaint.

24 So there's been no demonstration
25 that that factor has been met, let alone

1 any of the factors.

2 Three, no unjustifiable harm to
3 third parties will occur if injunctive
4 relief is granted. Again, in this case
5 that factor actually weighs in favor of
6 the City and the Board of Elections'
7 position. There are Madeira electors who
8 have already cast absentee ballots, who
9 have received absentee ballots that
10 already contain the proposed charter
11 amendment language on it.

12 So if this court were to intervene
13 at this midnight hour, step in two
14 business days before the election was
15 actually scheduled, the Madeira electors
16 would be deprived of our most sacred
17 civic virtue, which is the opportunity to
18 voice its opinion as it pertains to
19 legislation or the direction of its
20 community.

21 Four, they have to demonstrate by
22 clear and convincing evidence that the
23 injunctive relief requested would serve
24 the public interest.

25 Again, in this circumstance the

1 public interest would not be served.

2 Now, relator has represented to the
3 court that this case filed back in 1981
4 is the case that demonstrates that we're
5 just going to end up back in this
6 courtroom. But that case, if you read
7 the facts, they're vastly different than
8 the facts that are involved in this case.
9 In fact, that case turned on one central
10 fact, and that is, when the mailing took
11 place, rather than including in the
12 mailing the name and address of the
13 elector, it just said elector. So the
14 court looked at that and reviewed that
15 fact, and that fact was determinative.
16 So that case is not controlling.

17 As you look through the verified
18 allegations, I would encourage you to
19 consider the evidence that completely
20 contradicted it. If you look at some of
21 the allegations that are set forth in the
22 complaint, paragraph seven, that
23 three-reading requirement was not
24 dispensed with. Well, we've had
25 testimony, there are now exhibits with

1 the minutes that have been admitted into
2 evidence that demonstrate that that took
3 place.

4 You've heard a lot about
5 certification. Recall that, as we were
6 talking through certification, I went
7 through each of the provisions of the
8 Madeira charter that required
9 certification. And each of those
10 provisions impose affirmative obligations
11 on the clerk.

12 If they're going to levy an
13 additional tax, there's a certification
14 requirement associated with that. If
15 electors want to form an initiative
16 petition, there are certification
17 requirements relative to that fact. If
18 the electors want to engage in a
19 referendum, there is a certification
20 requirement to that effect.

21 That's the only circumstance that a
22 certification, an affirmative
23 certification, requirement would be
24 imposed upon the clerk, other than what
25 is actually contained in the section that

1 relates to amending the municipal
2 charter, which only requires
3 certification 30 days after the election
4 has taken place.

5 This court may be well aware of the
6 cannon of statutory construction known
7 as -- what is it -- ejusdem generis --
8 which is the expression of some things
9 and the exclusion of others has to be
10 interpreted by this court to mean that
11 those things were intentionally excluded.

12 So when the drafters of the charter
13 put together the charter, the express
14 provisions have to have controlling
15 effect. And if the charter is silent,
16 this court has to look at the silence of
17 the charter and determine that that was
18 intentional, that the drafters did not
19 desire to include affirmative obligations
20 relative to a clerk and the ordinance
21 that amends -- proposes to amend the
22 charter.

23 So, Your Honor, this case is
24 important to the City of Madeira. The
25 reason these demonstratives exists, and

1 we put together this case presentation,
2 is because it's very important. I don't
3 think the arguments on the other side
4 necessarily warrant this kind of
5 reaction, but we wanted to be as thorough
6 as possible to make it as clear as
7 possible to this court that they are not
8 entitled to step in and invade and insert
9 disruption into this political process.

10 Thank you, Your Honor.

11 THE COURT: Okay. Thank you.

12 Mr. Parker, anything further?

13 MR. PARKER: Mr. Stevenson's right,
14 the Ohio Constitution requires a couple
15 of things. But you don't just stop there
16 at the constitution, you got to go to the
17 charter. And the charter talks about the
18 charter amendments.

19 And Mr. Fox is -- respectfully --
20 trying to mislead the court. Paragraph D
21 under Article XIV, Section 5.

22 MR. FOX: I'm going to object to
23 that, Your Honor. He's mischaracterizing
24 an officer of the court.

25 MR. PARKER: The ordinance

1 providing for the submission of
2 question --

3 THE COURT: I'll sustain it. I'll
4 let him read the ordinance. Go ahead.

5 MR. PARKER: -- must require that
6 it be submitted to the electors --

7 I'm sorry. Section C.

8 The clerk shall forthwith transmit
9 the complete petition to each member of
10 the council. If the petition appears to
11 contain the minimum number of required
12 signatures, the council shall presume,
13 without further inquiry, that the
14 petition is procedurally valid and
15 sufficient and immediately refer the
16 matter to the Board of Elections to be
17 placed on the ballot at the appropriate
18 regular or special election.

19 So what it comes down to is, when
20 they filed their request to have the
21 charter amendments placed on the ballot
22 on March the 3rd, are they allowed to fix
23 those problems or not? And the answer is
24 that they're misreading 3505.14, and that
25 doesn't -- doesn't matter what -- who's

1 wrong in it, they're stuck with that
2 language that they submitted.

3 And but then rather than just face
4 the fact that they made a mistake and put
5 it on the ballot the next time, they go
6 through the gyrations of submitting
7 relators to the Board of Elections with
8 the person's signature on it, who can't
9 be the Clerk of Council, because there's
10 only one Clerk of Council, and that's
11 appointed by council, not by the city
12 manager. And the city manager says he
13 didn't appoint her, but she said he did.
14 And she wouldn't have signed if he didn't
15 tell her to. And why? so they could
16 beat the deadline for printing up of the
17 ballots and getting them out.

18 So, but let's talk about her for
19 just a second. This sacred process.
20 Right? It's a sacred process. Why do
21 they have to be certified at all? Why do
22 they have to put Ms. Lowndes' signature
23 on there? Why can't they just have gone
24 ahead and gave the Board of Elections the
25 copy that was unsigned? I mean, come on.

1 That says it all. Well, we didn't need
2 to certify it, but it was certified.
3 Because they needed to beat the deadline.
4 And you don't get to beat the deadline by
5 not being truthful, and not being
6 forthright, and not being completely
7 aboveboard. They know it's wrong and
8 they just can't admit it.

9 Mr. Moeller had no more right to
10 have Ms. Lowndes sign that document --
11 it's like I said, the gentleman, the
12 bagger at Kroger's. Why didn't Mr.
13 Moeller just sign it, if he were there?
14 Why don't we just dispense with the
15 charter provision that says the clerk has
16 to send it? Just say, you know, the city
17 manager gets to do it. Why? Because
18 that's what it says. We don't get to
19 change it.

20 And then they want to talk about,
21 well, hey, the Supreme Court says we
22 can't stop this. Well, what about the
23 1981 case? It was nullified.

24 So if you don't stop the election,
25 then you should require there to be an

1 impounding of the ballots, until the full
2 legal process has run its course.

3 Thank you, Judge.

4 THE COURT: All right. Thank you.

5 What I'll do is -- I know the
6 election's on Tuesday. I might need to
7 take a look at these exhibits. And I'll
8 get something out quickly, before
9 Tuesday, hopefully tomorrow at the
10 latest. Okay.

11 well, thank you, everybody. I just
12 want to go over the exhibits again and
13 take a look at the briefs. Thank you.

14 (Proceedings concluded)

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CERTIFICATE

I, Donna Franer, the undersigned, an Official Court Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the same time and place stated herein, I recorded in stenotype and thereafter transcribed the within 160 pages, and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 27th day of June, 2017.



DONNA FRANER, RPR
Official Court Reporter
Court of Common Pleas
Hamilton County, Ohio