IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *ex rel.* BARBARA A. LANGHENRY,	)	CASE NO. 2017-0753
Relator,	)	Original Action in Mandamus
v.	)	
PATRICIA J. BRITT	)	
Respondent.	)	

RELATOR BARBARA A. LANGHENRY'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

Pursuant to S.Ct. R. Prac. 4.01(B) and the Court's Order of July 5, 2017, Relator Barbara A. Langhenry, in her capacity as the Director of Law for the City of Cleveland ("City" or "Cleveland"), hereby submits the following Memorandum in Opposition to the Motion to Dismiss filed on June 30, 2017, by counsel for Respondent Patricia J. Britt, Clerk of Council ("Respondent" or "Clerk"). As set forth below, Respondent's Motion to Dismiss fails to demonstrate that the Clerk has been granted the authority under the City of Cleveland Charter (the "Charter") and Ohio law to reject a timely referendum petition based upon a *legal* determination about the constitutionality of the proposed referendum. Indeed, this Court has consistently held elections officials or municipal officers lack the authority to make legal determinations about the constitutionality of proposed initiative and referendum petitions. *See State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, ¶ 15-16; *State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶ 7; *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6, 716 N.E.2d 1114 (1999). Thus, this Court has held that the discretion of municipal officers "is limited to matters of form, not substance," and does not involve "judicial or quasi-judicial determinations." *See State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 30 (citations omitted); *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 231, 685 N.E.2d 754 (1997).

While the above-referenced case law is not based upon the language of the City of Cleveland's Charter, the undisputed fact remains that there is nothing in the language of Cleveland's Charter that suggests that the Clerk has been granted any greater legal authority in determining the validity and sufficiency of an initiative or referendum petition than granted to city auditors and village clerks under the Ohio Revised Code. Rather, as discussed below, the

language in Sections 51-62 of the Charter relating to the Clerk's responsibility to determine the sufficiency of a referendum or initiative petition is similar to the language in R.C. 731.28 and R.C. 713.29. Thus, this Court should conclude that the Charter does not grant the Clerk of Council with the authority to reject a referendum petition based upon a legal determination that the petition is unconstitutional.

In this regard, this Court need not – and should not – decide whether the proposed referendum is unconstitutional under the impairment of contract clause set forth in Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution. Rather, this Court can grant a writ of mandamus based solely upon the legal argument that the Clerk lacks the authority under the Charter to make her own legal determination about the constitutionality of the referendum petition. Indeed, this Court has long held that "[c]ourts should decide constitutional issues only when absolutely necessary." *State ex rel. DeBrosse*, 87 Ohio St.3d at 7. Thus, in the above-referenced cases, this Court has granted writs of mandamus without deciding the constitutionality of the proposed ballot measure. *State ex rel. Walker* at ¶ 15-18; *State ex rel. Ebersole* at ¶ 2; *State ex rel. DeBrosse*, 87 Ohio St.3d at 6-7.

Further, this Court should reject Respondent's meritless argument that Ordinance No. 305-17 is not subject to referendum under Section 64 of the Charter. (Motion to Dismiss, pp. 18-19). The fact that the second sentence of Section 64 of the Charter permits an emergency measure to go into immediate effect does not mean that the ordinance is not subject to referendum. Rather, the language of Section 64 merely provides that, if the ordinance is repealed, then it "shall be considered repealed *as regards any further action* thereunder; but the measure so repealed shall be deemed sufficient authority for payment in accordance with the ordinance, of any expense incurred previous to the referendum vote thereon." (*Id.*) (emphasis added). Thus,

the fact that the Ordinance No. 305-17 became effective on April 25, 2017, does not mean that it is not subject to referendum.

Finally, the Court should reject the other legal arguments raised in Respondent's Motion to Dismiss. Respondent concedes that Ordinance No. 305-17 amended Section 195.03 of the City's Codified Ordinances regarding exemptions from the City's admissions tax. (Motion to Dismiss, pp. 4, 22); (Verified Compl. Ex. 4). Given that Ordinance No. 305-17 *changes* existing law, it clearly constitutes a legislative act subject to referendum. *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.2d 678, ¶ 34. In addition, Ordinance No. 305-17 does not constitute a "subsequent measure" under R.C. 731.30, particularly given that this referendum petition is governed by the language of Charter (not R.C. 731.30), and Cleveland's Charter does not contain similar language. *State ex rel. Julnes v. S. Euclid City Council*, 130 Ohio St.3d 6, 2011-Ohio-4485, 955 N.E.2d 363, ¶ 42-43 (holding that the limitation on referendum set forth in R.C. 731.30 did not apply to municipal charter that provided that emergency measures are subject to referendum). Accordingly, the Court should reject all of Respondent's legal arguments and deny the Motion to Dismiss.

STATEMENT OF FACTS

A. Summary of Relevant Charter Provisions.

This original action in mandamus has been filed in order to compel Respondent Patricia Britt in her capacity as the Clerk of Council (the "Clerk") for the City of Cleveland, Ohio (the "City" or "Cleveland") to determine the sufficiency of a petition for a referendum submitted under Sections 59 and 60 of the City of Cleveland Charter (the "Charter"). Relator Barbara A. Langhenry is the Director of Law for the City of Cleveland with all of the powers and duties provided by Chapter 15 of the Charter. (Compl. ¶ 3). As Director of Law, Langhenry has the

authority to file the instant original action for a writ of mandamus under both R.C. 733.58 and Section 89 of the Charter, which provides:

> **§ 89 Mandamus**
>
> In case any officer or commission fails to perform any duty required by law, the Director of Law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.

(Compl. Ex. 1, City of Cleveland Charter, § 89).

In this case, the Law Director filed this instant Complaint for Writ of Mandamus under Section 89 of the Charter in order to enforce the legal requirements of Sections 59, 60 and 64 of Charter with respect to referendum petitions. In particular, Sections 59 and 60 provide:

> **§ 59 The Referendum.**
>
> No ordinance passed by the Council, unless it be an emergency measure, shall go into effect until thirty (30) days after its final passage by the Council. If at any time within said thirty (30) days, a petition signed by electors equal in number to ten percent (10%) of the total vote cast at the last preceding regular Municipal election of the City be filed with the Clerk of the Council requesting that the ordinance, or any specified part thereof, be repealed or submitted to a vote of the electors, it shall not become operative until the steps indicated herein have been taken. The petition shall be prepared and filed in the manner and form prescribed in the foregoing sections of this Charter for an initiative petition for an ordinance.
>
> **§ 60 Petition for Referendum**
>
> When such a petition is filed with the Clerk of the Council he shall determine the sufficiency thereof in the manner provided in this Charter for an initiative petition for an ordinance. If the petition be found sufficient, or be rendered sufficient by amendment as provided in Sections 52, 53 and 54 hereof, the Clerk shall certify that fact to the Council, which shall proceed to reconsider the ordinance. If, upon such reconsideration, the ordinance be not entirely repealed the Council shall provide for submitting it to a vote of the electors of the City, and in so doing the Council shall be governed by the provisions of Sections 57 and 66 hereof respecting the time of submission and manner of voting on ordinances proposed to the Council by petition.

(Compl. Ex. 2, Charter, § 59-60).

Given that Section 60 provides that the Clerk "shall determine the sufficiency [of a referendum petition] in the manner provided in this Charter for an initiative petition," Sections 51, 54 and 57 of the Charter are directly relevant to this case because they further define the scope of the Clerk's duty to determine the sufficiency of a referendum petition under the Charter:

> **§ 51 Filing Petition.**
>
> All papers comprising a petition shall be assembled and filed with the Clerk of the Council as one instrument by no later than 4:00 p.m. on a regular business day of the office of the Clerk. Within ten (10) days from the filing of a petition the Clerk shall ascertain whether it is signed by the required number of qualified electors. Upon the completion of the Clerk's examination the Clerk shall endorse upon the petition a certificate of the result thereof.
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> * * *
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> **§ 54 Submitting Proposed Ordinances**
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> When the certificate of the Clerk shows the petition to be sufficient, he shall submit the proposed ordinance to the Council at its next regular meeting and the Council shall at once read and refer the same to an appropriate committee, which may be the committee of the whole. Provision shall be made for public hearings upon the proposed ordinance before the committee to which it is referred. Thereafter the committee shall report the proposed ordinance to the Council, with its recommendations thereon, not later than sixty days after the date on which the proposed ordinance was submitted to the Council by the Clerk.
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> * * *
>
> **§ 57 Ordinance Certification and Submission for Vote**
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> Upon receipt of the certificate and certified copy of the proposed ordinance, the Clerk shall certify the fact to the Council at its next regular meeting. If an election is to be held not more than six months nor less than sixty (60) days after the receipt of the Clerks certificate by the Council, the proposed ordinance shall then be submitted to a vote of the electors of the City. If no election is to be held within the time aforesaid, the Council may provide for submitting the proposed ordinance to the electors of the City at a special election to be held not sooner than sixty days after the receipt of the Clerk's certificate. If a supplemental petition, signed by five thousand (5,000) qualified electors, in addition to those who signed the original petition, be filed with the Clerk asking that the proposed ordinance be submitted to the voters at a time indicated in such petition, the Council shall provide for a special election at the time. The sufficiency of any such supplemental petition shall be determined, and it may be amended in the manner provided for original petitions for proposing ordinances to the Council. If no other

> provision be made as to the time of submitting a proposed ordinance to a vote of the electors of the City, it shall be submitted at the next election.

(Compl. Ex. 2, § 51, 54 and 57).

In this regard, the City of Cleveland's Charter differs from the Ohio Revised Code in how it treats a referendum petition filed from an emergency measure. Under R.C. 731.30, a referendum ordinarily does not lie from "emergency ordinances or measures necessary for the immediate preservation of the public peace, health, or safety in such municipal corporation." *Id*. The language of Section 64 of the Charter, however, is different. In particular, it provides:

> **§ 64 Referendum on Emergency Measures**
>
> Ordinances passed as emergency measures for the immediate preservation of the public peace, property, health, or safety and providing for the refinancing of bonds, notes or other securities of the City shall not be subject to referendum. Otherwise, emergency measures shall be subject to referendum in like manner as other ordinances, except that they shall go into effect at the time indicated in the ordinances. If, when submitted to a vote of the electors of the City, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder; but the measure so repealed shall be deemed sufficient authority for payment in accordance with the ordinance, of any expense incurred previous to the referendum vote thereon.

(Compl. Ex. 6, Charter § 64) (emphasis added). Thus, under Section 64 of the Charter, emergency measures are subject to referendum unless they are passed "for the immediate preservation of the public peace, property, health, or safety" or "for the refinancing of bonds, notes or other securities of the City." (*Id*.)

B. The City Council's Adoption Of Ordinance No. 305-17

The referendum petition at issue relates to the Cleveland City Council's adoption of Ordinance No. 305-17 on April 24, 2017. (Compl. ¶ 9). Among other things, Ordinance No. 305-17 amended Section 195.03 of the City of Cleveland Codified Ordinances relating to exemptions for the City's admission tax, and further authorized the Directors of Finance and Law to enter into Supplemental Agreement No. 1 to the 1992 Cooperative Agreement with Cuyahoga County

(the "County") relating to the issuance of a new series of bonds (the "Series 2017 Arena Bonds") by the County for the renovation and improvement of the Quicken Loans Arena (the "2017 Arena Project"). (*Id*. at ¶ 9, Ex. 4 and 5). Although Ordinance No. 305-17 was adopted by the Cleveland City Council (the "Council") as an emergency measure, it is subject to referendum under Section 64 of the Charter because the preamble of Ordinance No. 305-17 states that "this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department." (Compl. Ex. 4, Ordinance No. 305-17, pg. 1). Thus, the Ordinance No 305-17 is subject to referendum under Section 64 of the Charter because it was not passed "for the immediate preservation of the public peace, property, health, or safety" or "for the refinancing of bonds, notes or other securities of the City." (*Id*.)[1]

C. The Clerk's Rejection Of The Referendum Petition for Ordinance No. 305-17

On May 22, 2017, a petition for a referendum on Ordinance No. 305-17 was tendered to the Clerk. (Compl. ¶ 14). Upon receipt, the Clerk did not ascertain whether it was signed by the required number of qualified electors (i.e. whether the petition was signed by qualified electors equal to ten percent (10%) of the total vote cast at the last preceding regular Municipal election). (*Id*.) Rather, the Clerk, acting through her Deputy Clerk, rejected the referendum petition based upon the following grounds:

[1] The City of Cleveland's Charter is unique because Section 36 provides that an "emergency measure" may be adopted for one of two reasons: (1) "for the immediate preservation of the public peace, property, health or safety, ***or*** (2) "providing for usual daily operation of a Municipal department." (*See* Cleveland Charter § 36) (copy attached). Here, the preamble of Ordinance No. 305-17 provided that "the ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department." (Compl. Ex. 4, Ordinance No. 305-17, pg. 1). Thus, under Section 64 of the Charter, the emergency measure is subject to referendum because it was not passed "for the immediate preservation of the public peace, property, health or safety" or "for the refinancing of bonds, notes or other securities of the City." (*Id*.)

> A referendum seeking the repeal of Ordinance No. 305-17 would unconstitutionally impair an already existing and binding contract. Therefore, I do not accept the petition papers for such referendum.

(Compl. ¶ 14, Ex. 7).

Thereafter, on May 26, 2017, Subodh Chandra and Peter Pattakos, acting as attorneys for certain taxpayers, sent a letter to the Director of Law to demand that she exercise her authority under R.C. 733.58 and Section 89 of the Charter to apply for a writ of mandamus to compel the Clerk to certify the referendum petition. (Compl. ¶ 17, Ex. 8, pg. 4). Upon review of the Taxpayers' demand letter and the relevant portions of the Charter, the Director of Law then decided to retain outside counsel to file a Complaint for Writ of Mandamus on her behalf under Section 89 of the Charter. (Compl. ¶ 18-19).

ARGUMENT

I. RESPONDENT'S MOTION TO DISMISS FAILS TO SHOW THAT THE CLERK HAS THE AUTHORITY UNDER THE CHARTER TO REJECT A REFERENDUM PETITION BASED UPON A LEGAL DETERMINATION ABOUT WHETHER THE PROPOSED BALLOT MEASURE IS UNCONSTITUTIONAL.

Respondent's Motion to Dismiss is not based upon an argument that the Court lacks the jurisdiction to grant a writ of mandamus. Rather, it is essentially a Civ. R. 12(B)(6) motion to dismiss the complaint for failure to state a claim. In deciding a Civ.R. 12(B)(6) motion to dismiss, this Court must "presume that the complaint's factual allegations are true and make all reasonable inferences in the nonmoving party's favor." *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State of Ohio*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12. Then, before the Court may dismiss the complaint, "it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery." *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192, 532 N.E.2d 753 (1988), citing *O'Brien v. University Community Tenants Union*, 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus (1975).

Here, Respondent's Motion to Dismiss is based primarily upon the legal argument that the referendum "petition itself constitutes an unconstitutional impairment of a municipal contract and is void *ab initio*." (Motion to Dismiss, pg. 8). This argument, however, ignores the key, threshold legal issue presented by the Verified Complaint, *i.e.*, whether the Clerk has the authority under the City of Cleveland's Charter to reject a referendum petition by making a judicial or quasi-judicial determination about the constitutionality of the proposed referendum. (Verified Compl. ¶ 13-14). As previously discussed, this Court has consistently held election officials and municipal officers lack the authority to reject a referendum or initiative petition based upon a legal determination about the constitutionality of the proposed ballot measure. *See State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, ¶ 15-16 (citing cases); *State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶ 7; *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6, 716 N.E.2d 1114 (1999). Rather, this Court has held that the discretion of municipal officers generally "is limited to matters of form, not substance," and does not involve "judicial or quasi-judicial determinations." *See State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 30, quoting *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 55, 641 N.E.2d 1075 (1994); *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 231, 685 N.E.2d 754 (1997).

While the above-referenced case law is not based upon the language of the City of Cleveland Charter, the undisputed fact remains that there is nothing in the language of the City of Cleveland's Charter that suggests that the Clerk has been granted any greater legal authority than granted to city auditors and village clerks by the Ohio Revised Code. Section 60 of the Charter governs a "Petition for Referendum" and provides that "when such a petition is filed with the Clerk of Council he shall determine the sufficiency thereof in the manner provided by the Charter

for an initiative petition for an ordinance." (Verified Compl. Ex. 2, Charter § 60). In so doing, the language of Section 51 of the Charter is similar to the language set forth in R.C. 731.29 in that it merely provides that the Clerk shall determine the sufficiency of the petition by "ascertain[ing] whether it is signed by the required number of qualified electors." (*Id*. at § 51). Thus, there is nothing in the Charter that suggests that the Clerk has been granted the authority to reject a referendum petition based upon her own legal determinations about the constitutionality of the proposed referendum or initiative petition. *See State ex rel. Bartlett v. Collier*, 2d Dist. Clark No. 16-CA-0049, 2016-Ohio-7102, 72 N.E.2d 1, ¶ 23-30 (following Ohio Supreme Court precedent to conclude that the language of the City of New Carlisle's municipal charter was similar to R.C. 731.28, and thus did not grant the city clerk with the authority to make legal determinations concerning the legality or substance of an initiative petition).

In her Motion to Dismiss, the Clerk does not cite to any language in Sections 49-64 of the Charter that suggests that the Clerk has the authority to reject a referendum petition by making a legal determination that the proposed referendum is unconstitutional. While Respondent argues that the Clerk "took an oath of office to uphold the U.S. and Ohio Constitutions" (Motion to Dismiss, pg. 15), this oath does not mean that the Clerk has been granted the legal authority to make her own legal determinations about whether a referendum or initiative petition is unconstitutional. Otherwise, all municipal clerks would be granted the authority to reject initiative and referendum petitions on constitutional grounds because, as Respondent's Motion concedes, all municipal officers in the State of Ohio take an oath "to support the constitution of the United States and the constitution of this state." *See* R.C. 733.68(A). Accordingly, the Court should follow its well established case law and conclude that there is nothing in the City of

Cleveland's Charter that grants the Clerk with the authority to reject a referendum petition based upon the constitutionality of the proposed ballot measure.

In her Motion to Dismiss, Respondent seeks to distinguish *State ex rel. Walker v. Husted* and *State ex rel. Ebersole v. City of Powell* on the ground that they involved a determination about the "validity of the substance of the measure if approved by the voters," and did not involve the constitutionality of the "referendum petition, *itself*…" (Motion to Dismiss, pg. 17) (emphasis in original). This is a distinction without a difference. Although Respondent seeks to carve out a limited exception for referendum petitions that constitute "an unconstitutional impairment of contract," the fact remains that the Charter does not grant the Clerk with the authority to make legal determinations about whether "the referendum petition itself" constitutes an "unconstitutional impairment of contract." Indeed, as this Court explained in *State ex rel. Ebersole*, a determination of whether a referendum petition is unconstitutional is actually a *judicial* decision that ordinarily should be made by the courts, not city councils or clerks. *Id*., 2014-Ohio-4283, ¶ 6 (explaining that "it is not the role of the city council" to "assess the constitutionality of a proposal because that role is reserved for the courts"). Accordingly, the Court should reject Respondent's arguments and conclude that the Clerk lacks the authority under the Charter to determine in the first instance whether the referendum petition itself is unconstitutional. *Id*.

This Court's decision in *City of Middletown v. Ferguson*, 25 Ohio St.3d 71, 495 N.E.2d 380 (1986), does not compel a different conclusion. In *Middletown*, the courts did not decide the constitutional question until after "the voters approved the initiative ordinance." *Id.* at 73 (emphasis added). Although the Ninth District in *State ex rel. Perona v. Arceci*, 129 Ohio App.3d 15, 19, 716 N.E.2d 1181 (1998), affirmed the rejection of a referendum petition because it

"would unconstitutionally impair a binding contract," this 1998 ruling has never been adopted by this Court and conflicts with the Supreme Court precedent cited above, which recognizes that a municipal clerk lacks the authority to make a judicial or quasi-judicial determination about whether a referendum petition is unconstitutional. Accordingly, the Court should follow its existing precedent and conclude that the Clerk did not have the authority under the Charter to determine the constitutionality of the proposed referendum petition.

The other impairment of contract cases cited in Respondent's Motion to Dismiss – *City of London v. Proctor*, 10th Dist. Franklin No. 01AP-34, 2001 WL 548756 (May 24, 2001), and *Peppers v. Beier*, 75 Ohio App.3d 420, 599 N.E.2d 793 (3d Dist. 1991) – also are not controlling. As in the *City of Middletown* case, the courts in *City of London* and *Peppers* did not decide the constitutionality of an initiative ordinance until after it was approved by the voters. *City of London* at *2; *Peppers*, 75 Ohio App.3d at 423. Thus, in both *City of London* and *Peppers*, a municipal officer did not refuse to determine the validity or sufficiency of the initiative petitions on constitutional grounds. Rather, the initiative petitions were placed on the ballot, and were later challenged as unconstitutional after they were approved by the voters. *Id*.

This is a critical distinction because this Court need not – and should not – decide whether the referendum petition unconstitutionally impairs a binding contract in order to decide whether to issue a writ of mandamus. Rather, this Court can grant a writ of mandamus based solely upon the Relator's legal argument that the Clerk lacks the authority under the Charter to make her own legal determination about the constitutionality of the referendum petition. Indeed, this Court has long held that "[c]ourts should decide constitutional issues only when absolutely necessary." *State ex rel DeBrosse*, 87 Ohio St.3d at 7. Thus, at it has done in other cases, this Court should grant a writ of mandamus without deciding the constitutionality of the referendum

petition. *State ex rel. Walker*, 144 Ohio St.3d 361, 2015-Ohio-3749, 43 N.E.3d 419, at ¶ 15-18; *State ex rel. Ebersole*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, at ¶ 2; *State ex rel. DeBrosse*, 87 Ohio St.3d at 6-7. Accordingly, the Court should deny the Motion to Dismiss and proceed to issue either a preemptory writ or alternative writ to compel the Clerk to determine the sufficiency of the referendum petition.

II. THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT THAT ORDINANCE IS NOT SUBJECT TO REFERENDUM UNDER SECTION 64 OF THE CHARTER.

Respondent's second argument is based upon the language of Section 64 of the Charter, which Respondent suggests should be read as not applying to an emergency measure "authorizing the City to enter into a contract" with an immediate effective date. (Motion to Dismiss, pp. 18-19). This is a meritless argument that is not supported by the plain language of Section 64 of the Charter. Although Ohio law generally provides that emergency measures are not subject to referendum, the City of Cleveland's Charter is different because, except for the limited exceptions set forth in the first sentence, all other emergency measures <u>are</u> subject to referendum, *even if* they have an immediate effective date. In particular, Section 64 provides:

> **§ 64 Referendum on Emergency Measures**
>
> Ordinances passed as emergency measures for the immediate preservation of the public peace, property, health, or safety and providing for the refinancing of bonds, notes or other securities of the City shall not be subject to referendum. Otherwise, emergency measures shall be subject to referendum in like manner as other ordinances, except that they shall go into effect at the time indicated in the ordinances. If, when submitted to a vote of the electors of the City, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder; but the measure so repealed shall be deemed sufficient authority for payment in accordance with the ordinance, of any expense incurred previous to the referendum vote thereon.

(Compl. Ex. 6, Charter § 64).

Here, as previously discussed, it is undisputed that Ordinance No. 305-17 is subject to referendum because the preamble states that "this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department," and thus the ordinance was not passed "for the immediate preservation of the public peace, property, health, or safety" or for "providing for the refinancing of bonds, notes or other securities of the City." (Compl. Ex. 4, Ordinance No. 305-17, pg. 1). As a result, since Ordinance No. 305-17 does not fall within the scope of the first sentence of Section 64, the second sentence of Section 64 provides that the emergency measure "shall be subject to referendum in like manner as other ordinances . . ." (Compl. Ex. 6, Charter § 64) (emphasis added).

Respondent's argument, therefore, focuses on the second and third sentences of Section 64. While the second sentence of Section 64 provides that an emergency measure may "go into effect at the time indicated in the ordinances," this language does not mean that the emergency measure is not subject to referendum. Rather, it merely provides that an emergency measure may take effect before any vote of the electors, and does not otherwise create an exception to the mandatory referendum requirement that all emergency measures that do not fall within the scope of the first sentence "shall be subject to referendum." Indeed, the third sentence of Section 64 further clarifies that, if an emergency measure takes effect and is later repealed by the voters, it only "shall be considered repealed as regards any *further action* thereunder; but the measure so repealed shall be deemed sufficient authority for payment in accordance with the ordinance, of any expense incurred previous to the referendum vote thereon." *Id.* (emphasis added). Thus, the plain language of the second and third sentences of Section 64 clearly contemplates that an emergency measure "shall" be subject to referendum, *even if* it has an earlier effective date.

Accordingly, this Court should reject the Respondent's interpretation of Section 64 and conclude that Ordinance No. 305-17 is subject to referendum under the plain language of the Charter.

III. THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT THAT ORDINANCE NO. 305-17 IS NOT A LEGISLATIVE ACT.

In her Motion to Dismiss, Respondent also advances the argument that Ordinance No. 305-17 is not subject to referendum because it is allegedly not a legislative act. (Motion to Dismiss, pp. 18-23). In making this argument, however, Respondent *concedes* that Ordinance No. 305-17 *amends* Section 195.03 of the City of Cleveland Codified Ordinances relating to exemptions from the City's admissions tax. (*Id*. at pg. 22). Given that Ordinance No. 305-17 *changes* existing law, therefore, it clearly constitutes a legislative act under Ohio law. *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.2d 678, ¶ 34 (explaining that when "a legislature *changes* its zoning code," such an "amendment is a legislative act subject to referendum") (emphasis added); *State ex rel. Hazel v. Cuyahoga Cty. Bd. Of Elections,* 80 Ohio St.3d 165, 169, 1997-Ohio-129, 685 N.E.2d 224 (1997) (holding that proposed ordinance *to amend the City of Parma's building code* was a legislative act) (emphasis added); *State ex rel. Zonders v. Delaware Cty. Bd. Of Elections,* 69 Ohio St.3d 5, 11, 630 N.E.2d 313 (1994) (holding that "a zoning *amendment,* like the enactment of the original zoning ordinance, is a legislative act which is subject to a referendum") (emphasis added).

Ordinance No. 305-17 also constitutes a legislative act because it authorizes the City to enter into a new agreement to provide a new source of funding for a new public improvement project that was not authorized by already existing law. While Supplemental Agreement No. 1 was drafted as an amendment to the 1992 Cooperative Agreement, a review of the subject matter of Supplemental Agreement No. 1 confirms that it relates to a *new*, public improvement project (the 2017 Arena Project) that will be funded by a *different* series of bonds issued by the County

(the Series 2017 Arena Bonds). (Compl. Ex. 5, Supplemental Agreement No. 1). The original 1992 Cooperative Agreement related to the original construction of the Gateway Project in 1992. The recent Supplemental Agreement No. 1, in contrast, relates to the proposed renovation and improvement of Quicken Loans Arena in 2017. (*Id*.) In so doing, Cuyahoga County has issued a new series of bonds (Series 2017 Arena Bonds), and Ordinance No. 305-17 amends the City's existing codified ordinances (Section 195.03) relating to the exemptions from the City's admissions tax in order to use a certain portion of the admissions tax to fund payment of the service charges on the Series 2017 Arena Bonds. (*Id*.) None of these actions would have been permissible or authorized under already-existing ordinances. Thus, it was necessary for the Cleveland City Council to *change* the existing law.

The cases cited in Respondent's Motion to Dismiss on this issue are clearly distinguishable and not controlling. In *State ex rel. Upper Arlington v. Franklin Cty. Bd. Of Elections,* 119 Ohio St.3d 478, 482, 2008-Ohio-5093, 895 N.E.2d 177 (2008), this Court held that a City of Upper Arlington ordinance was not a legislative action only because it merely executed and administered previous ordinances. *Upper Arlington,* 119 Ohio St.3d at ¶22. In fact, this Court found that the adoption of Ordinance No. 126-2007 was unnecessary because other existing ordinances already gave the city manager authority to enter into the contracts at issue. *Id*. Here, by contrast, there is no already-existing ordinance that authorizes the City's Law Director or Finance Director to enter into Supplemental Agreement No. 1, or to use the City's admission tax to pay the service charges on the new Series 2017 Arena Bonds. Thus, it was necessary for the Cleveland City Council to *amend* the existing law in order to authorize such actions.

Similarly, this Court's opinion in *State ex rel. Oberlin Citizens for Responsible Development v. Talarico,* 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529 (2005), is

distinguishable. In that case, the Court found that a 2005 ordinance passed by the Oberlin City Council was an administrative act because it "merely execute[d] and administer[ed] laws already in existence instead of enacting new laws." *Id.* at ¶ 24. Although the 2005 ordinance authorized Oberlin to enter into a development agreement with Wal-Mart for the construction of public improvements, this Court found that the Oberlin already had an existing codified ordinance that "requires that a developer enter into a construction agreement with the City in order to assure the construction and installation of all public improvements in the proposed development to the satisfaction of the City, and in accordance with the site plan." *Id*. Thus, the Court concluded that the 2005 ordinance did not *create* new law and did not *amend* existing law. *Id.* at ¶ 24, 27. In so doing, this Court recognized that an *amendment* of an existing ordinance would constitute a legislative act. *Id.* at ¶ 27 (citing *State ex rel. Zonders*, 9 Ohio St.3d at 11, and *State ex rel. Hazel*, 80 Ohio St.3d 165).

Finally, the Ninth District's opinion in *State ex rel. Helms v. City of Green,* 9th Dist. Summit No. 23534, 2007-Ohio-2889, is distinguishable. In that case, the Ninth District found that certain resolutions passed by the City of Green were administrative acts because they were passed as part of "the administration of an already existing ordinance which required the City's sewer systems be owned and operated by the County after contracts were awarded pursuant to a proper bidding procedure." *Id.* at ¶ 16. Thus, the Ninth District held that the resolutions merely "administer[ed]…an already-existing ordinance," and did not constitute the "enactment of a new law or ordinance." *Id.*

All three cases, therefore, are clearly distinguishable. Unlike the ordinances and resolutions that were the subject of the *Upper Arlington, Oberlin Citizens*, and *Helms* cases, the 2017 ordinance passed by the Cleveland City Council was <u>not</u> administering an already existing

ordinance, but was *amending* existing law and authorizing a source of funding for a *new* series of bonds to pay for a *new* public improvement project. Thus, under the applicable case law, it clearly is a legislative act that is subject to referendum as a matter of law. *State ex rel. Ebersole*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, at ¶ 34; *State ex rel. Zonders*, 69 Ohio St.3d at 11; *State ex rel. Hazel*, 80 Ohio St.3d at 169.

IV. THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT THAT ORDINANCE NO. 305-17 IS NOT SUBJECT TO REFERENDUM UNDER OHO REVISED CODE 731.30.

Respondent's Motion to Dismiss also argues that Ordinance 305-17 is not subject to referendum because R.C. 731.30 provides for the following statutory exception to the right to obtain a referendum of a municipal ordinance:

> Whenever the legislative authority of a municipal corporation is required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, sections 731.28 to 731.41, inclusive, of the Revised Code shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto.

This is a meritless argument because it is based entirely upon the statutory exception set forth in R.C. 731.30, which does not apply to the referendum provisions in City of Cleveland's Charter. As this Court explained in *State ex rel. Julnes*, 130 Ohio St.3d 6, 2011-Ohio-4485, 955 N.E.2d 363, the general provisions in R.C. 731.30 "do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures." *Id.* at ¶ 42 (citing R.C. 731.41). Thus, in *State ex rel. Julnes*, this Court held that R.C. 731.30 did not apply to an emergency ordinance adopted by the South Euclid City Council because South Euclid adopted its own charter that, with a few specified exceptions, provided that "all other ordinances and resolutions, including, but not limited to, emergency ordinances and resolutions shall be subject to referendum." *Id.* at ¶ 42-44.

Here, it is undisputed that the City of Cleveland also adopted municipal charter provisions for referendums that are different from the language of Section 731.30 of the Ohio Revised Code. Under Cleveland's Charter, there is no language similar to the language in R.C. 731.30 that limits the right to referendum only to the "first ordinance or other measure" necessary to pay for a public improvement and/or excluding "subsequent ordinances and other measures relating thereto." (Compl. Ex. 2 and 6). Thus, the Court should conclude that the limitation set forth in R.C. 731.30 does not apply to referendum petitions filed under the City of Cleveland's Charter.

Indeed, even if R.C. 731.30 applied to referendum petitions of municipal ordinances filed under the City of Cleveland's Charter, the fact remains that Ordinance No. 305-17 would not fall within the scope of this statutory exception. Here, Ordinance No. 305-17 is the first ordinance that was adopted by the Cleveland City Council to provide for funding to pay the service charges for the Series 2017 Arena Bonds for the 2017 Arena Project. Respondent's Motion to Dismiss in fact fails to identify any other ordinance or measure passed by the Cleveland City Council that amends the City's codified ordinances or authorizes this source of funding for the 2017 Arena Project. While page 25 of Respondent's Motion to Dismiss argues "Cuyahoga County passed its legislation first on March 28, 2017," this is a *county* resolution, not a city ordinance. It therefore cannot be considered the first ordinance adopted by the Cleveland City Council to amend Section 195.03 of the Codified Ordinances or to provide funding for the 2017 Arena Project.

In this regard, this Court's opinion in *State ex rel. Szymanowski v. Grahl,* 145 Ohio St.3d 215, 2015-Ohio-3699, 48 N.E.3d 511 (2015), actually supports the Relator's position. In *Szymanowsi,* the City of Fremont passed an ordinance in 2008 that authorized the Mayor to enter into an agreement for removal of the Ballville Dam "by December 31, 2012." *Id.* at ¶ 17-19. The City of Fremont failed, however, to remove the dam by the end of 2012. *Id.* at ¶ 20. Although

the Fremont City Council passed subsequent measures before the December 31, 2012 deadline, none of them actually extended that deadline. *Id.* at ¶ 19. Thus, because the initial authorization had expired, the City was "required" to pass a new ordinance in 2014 to re-authorize the removal of the dam. *Id.* at ¶ 22.

Although the 2008 ordinance was the first ordinance relating to the removal of the dam, this Court held that the 2014 ordinance was nevertheless subject to referendum because the 2008 authorization had expired, and thus it was "necessary" for the Fremont City Council to provide "new authorization" for the removal the dam. In so doing, the Court stated that "[t]he city cannot defeat the application of a referendum by retroactively tying a new authorization to remove the dam to a project whose authorization had expired." Id. at ¶ 21. Thus, the Court granted a writ of mandamus compelling the Fremont City Auditor to submit the referendum petitions to the Board of Elections. *Id.* at ¶ 24.

Although Respondent seeks to distinguish *Szymanowski* on the ground that the original 1992 Cooperative Agreement has not expired, this argument misses the point. As previously discussed, the 1992 Cooperative Agreement related to the construction of the original Gateway Project; it did not authorize funding for the 2017 Arena Project. Rather, the authorization and funding for the 2017 Arena Project is the subject of the Supplemental Agreement No. 1 and the 2017 amendments to Section 195.03 of the Cleveland Codified Ordinances, which was first authorized by Ordinance No. 305-17. (*See* Compl. Exs. 4 and 5). Otherwise, there would have been no need to enter into Supplemental Agreement No. 1 or to amend the City of Cleveland Codified Ordinances in order to fund the service charges for the Series 2017 Arena Bonds. Accordingly, even if R.C. 731.30 were to apply to a referendum of a municipal ordinance under

the City of Cleveland's Charter, the fact remains that Respondent has failed to demonstrate that Ordinance No. 305-17 is exempt from referendum under the applicable legal standards.

V. THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT THAT THE FILING OF AN INITIATIVE PETITION PROVIDES AN ADEQUATE REMEDY.

Finally, this Court should reject the argument on page 26 of Respondent's Motion to Dismiss that the Charter's initiative process provides an adequate remedy at law. (Motion to Dismiss, pg. 26). This is a meritless argument that is not supported by any case law. While Section 58 of the Charter permits the filing of an initiative petition for repealing any existing ordinance, this remedy does not mean that the Clerk does not have a mandatory legal duty to determine the sufficiency of a petition for referendum that was timely submitted under Sections 59 and 60 of the Charter. Both remedies – referendum and initiative – are equally available under the City of Cleveland Charter, and one does not trump the other. Thus, the Court should reject Respondent's final argument as a matter of law.

Indeed, in arguing that an initiative petition provides an adequate remedy, Respondent misconstrues the applicable legal standard. The question of whether there is an adequate remedy at law relates to whether there is an alternative *judicial* remedy to the issuance of a *writ of mandamus*, not a legal alternative to the referendum. On this issue, the case law is clear that there is no adequate remedy at law where, as here, the complaint for writ of mandamus involves an election-related matter where the timing of a ruling may affect upcoming ballot deadlines. *See State ex rel. Finkbeiner v. Lucas Cnty. Bd. of Elections*, 122 Ohio St.3d 462, 2009-Ohio-3657, 912 N.E.2d 573, ¶ 18-21; *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 42-43. Accordingly, this Court should conclude that mandamus is the proper remedy to compel the Clerk to determine the sufficiency of the referendum petition because there is no adequate remedy at law.

CONCLUSION

For these reasons, Relator Barbara A. Langhenry, in her capacity as Law Director for the City of Cleveland, respectfully requests that the Court deny Respondent's Motion to Dismiss and issue a preemptory or alternative writ to compel the Clerk to determine the sufficiency of the referendum petition under Sections 59 and 60 of the City Cleveland Charter.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on this 7th day of July, 2017, the foregoing *Relator Barbara A. Langhenry's Memorandum in Opposition to Respondent's Motion to Dismiss* was electronically filed. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

A copy also has been served, pursuant to Civ. R. 5(B)(2)(f), by electronic mail upon all counsel of record at the following e-mail addresses:

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Print

Cleveland, OH Code of Ordinances

§ 36 Emergency Measures

All ordinances and resolutions shall be in effect from and after thirty (30) days from the date of their passage by the Council except as otherwise provided in this Charter. The Council may by a two-thirds vote of the members elected to the Council, pass emergency measures to take effect at the time indicated in the emergency measure. An emergency measure is an ordinance or resolution for the immediate preservation of the public peace, property, health, or safety, or providing for the usual daily operation of a Municipal department, in which the emergency is set forth and defined in a preamble. Ordinances appropriating money may be passed as emergency measures, but no measure making a grant, renewal or extension of a franchise or other special privilege, or regulating the rate to be charged for its services by any public utility, shall ever be so passed.

(Effective November 4, 2008)