Case No. 2018-1129

In the
Supreme Court of Ohio

STATE EX REL. MARK A. HARRIS, *et al.*,
Relators,

v.

MATT RUBINO, *et al.*,
Respondents.

Original Action in Mandamus

Expedited Election Matter Under S.Ct.Prac.R. 12.08

REPLY BRIEF OF RELATORS

Jordan Berns (0047404)
Majeed G. Makhlouf (0073853)
(Counsel of Record)
BERNS, OCKNER & GREENBERGER, LLC
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122
Phone: (216) 831-8838
Fax: (216) 464-4489
jberns@bernsockner.com
mmakhlouf@bernsockner.com

Thomas G. Lobe (0001346)
Law Director-City of Solon
The Rockefeller Building, Suite 1300
614 West Superior Avenue
Cleveland, Ohio 44113
Phone: (440) 725-5410
tomlobe@yahoo.com

Lon D. Stolarsky (0023711)
5333 Northfield Rd., Suite 250
Bedford Heights, Ohio 44146
Phone: 216-694-3987
Fax: 800-694-3028
lonstolarsky@yahoo.com

Donald J. McTigue (0022849)
J. Corey Colombo (0072398)
Derek S. Clinger (0092075)
Ben F.C. Wallace (0095911)
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
Phone: (614) 263-7000
Fax: (614) 263-7078
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com
bwallace@electionlawgroup.com

Counsel for Relators

Todd D. Cipollo (0069043)
TODD D. CIPOLLO CO., LPA
1300 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113
(216) 644-7450
(216) 664-6999 *fax*
tcipollo@cipollolaw.com

Counsel for Respondents Matt Rubino, Solon City Council, and City of Solon Ohio

Michael C. O'Malley (0059592)
Prosecuting Attorney of Cuyahoga County, Ohio
Brendan R. Doyle *(0078505)
Assistant Prosecuting Attorney
*Counsel of Record
The Justice Center, Courts Tower – 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Tel: (216) 443-7795 Fax: (216) 443-7602
bdoyle@prosecutor.cuyahogacounty.us

Counsel for Respondent Cuyahoga County Board of Elections

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

LAW AND ARGUMENT

As they readily acknowledge in their Merit Brief, the City Respondents have subjected the Proposed Ordinance to a more protracted procedure for its placement on the ballot than other initiative proposed zoning ordinances. The City Respondents also readily acknowledge that they are doing so because of the substance of the Proposed Ordinance, incorrectly describing it as proposing "spot zoning"[1] and calling the Proposed Ordinance "controversial."

The City Respondents claim that Respondent City Council is empowered to subject the Proposed Ordinance to this more protracted procedure under Articles IX and XIV of the City Charter, asserting that those provisions grant Respondent City Council the power to decide, "on a case by case basis," how long it may take before submitting an initiative proposed zoning ordinance for election. Simply stated, the City Respondents are wrong. They are ignoring the express terms of the City Charter and the clear legal duties imposed by both the City Charter and State law. Their delay tactics are interfering with the initiative petition powers reserved in Article II, Section 1f of the Ohio Constitution, and this Court's intervention is needed to mandate the performance of clear legal duties.

Relators and the City Respondents agree on one thing: "The Solon City Charter is clear and speaks for itself." (City Respondents' Merit Brief, p. 36.) The parties' merit briefs demonstrate that the City Respondents have failed, and continue to fail, to adhere to the plain and unambiguous language of the City Charter. Their disregard of the City Charter's language is even evident in their Merit Brief where one of the glaring omissions is any discussion of the actual language of the Charter. The City Respondents escape to their so-called "past practice,"

[1] Of course, by definition, the rezoning of an approximately 102-acre property cannot constitute spot zoning. See *Willot v. Village of Beachwood*, 175 Ohio St. 557, 559 (1964) (holding that an 80-acre parcel was a "large parcel of land," and its rezoning cannot constitute spot zoning).

but nowhere explain how this "practice" is derived from the language of the Charter. And if that were not enough, they seek to ignore the "past practice" and subject the Proposed Ordinance to a brand-new practice that is contrary to their "past practice" without any authority to do so existing either in the Charter or State law.

I. The City Respondents' disregard of the City Charter's plain and unambiguous language and selective compliance with State law decimates the integrity of the initiative petition powers reserved in Article II, Section 1f of the Ohio Constitution.

There is no dispute whatsoever that Relators have met all requirements under State law for placement of the Proposed Ordinance on the ballot by the Finance Director. Respondent City Council, however, has usurped Respondent Finance Director's duties and prevented the mandatory placement of the Proposed Ordinance on the November 6, 2018 ballot, contending that it has the sole power to place the Proposed Ordinance on the ballot according to a schedule that it sets at its whim based on how each Councilmember feels about the substance of the Proposed Ordinance. The City Respondents' position can be summarized as follows:

1. Article XIV of the City Charter requires that an initiative proposed zoning ordinance cannot be placed on the ballot unless and until Council passes an ordinance placing it on the ballot.

2. Council is not required to put that ordinance on first reading until the following "requirements" (or, as the City Respondents call them, "permitted" actions) are met:

    a. The petitions are held for ten days;
    b. The petitions are transmitted to the Board of Elections;
    c. The Board of Elections verifies the signatures on the petitions and notifies the City that the verification is complete; and
    d. The City retrieves the verification from the Board of Elections.

3. Council may consider the substance of the initiative proposed ordinance in determining the schedule for its consideration of its ordinance certifying the validity and sufficiency of the initiative petition to place the initiative proposed zoning ordinance on the ballot. (City Respondents' Merit Brief, p. 35 (justifying the City's

delay by claiming that the "Initiative Petition was in effect 'spot zoning' for the individual benefit of the owner and not all of Solon").)

4. Council has no duty to undertake any efforts to consider its ordinance placing an initiative proposed zoning ordinance on the ballot in time for placement at the upcoming election and can instead choose to subject it to three readings at meetings of its choice without regard to its impact on the timing of the placement of the initiative proposed zoning ordinance on the ballot.

5. Council must treat its ordinance placing an initiative proposed zoning ordinance on the ballot as a legislative act, not an administrative act, and can choose not to pass it as an emergency measure, thus subjecting the very ordinance placing the initiative proposed zoning ordinance on the ballot to a potential referendum. (City Respondents' Merit Brief, p. 27; City Charter, Article IV, Section 6; R.C. 731.30.) In fact, even in the absence of a referendum, that ordinance itself does not go into effect until 40 days after its final passage by Council. (City Charter, Article IV, Section 6.)

In light of the above, it is no wonder that, while the City Respondents criticize Relators for "their failure to meet the deadline to make the November ballot," they offer no indication whatsoever of when that deadline supposedly occurred. (City Respondents' Merit Brief, p. 1.)

In essence, the City Respondents contend that if Respondent Council does not like the substance of an initiative proposed zoning ordinance, it can delay its placement on the ballot potentially in perpetuity in any number of ways. If, as the City Respondents contend, the placement of the initiative proposed zoning ordinance on the ballot is a legislative function carried out at the leisure of the seven members who happen to serve on Council when the initiative petition arrives, the following is permitted under the City's Charter and ordinances:

1. Council can refer its ordinance placing the initiative proposed ordinance to committee, and there is no time limit on how long an ordinance can remain in committee before being sent back to the Council. *See* City's Codified Ordinances, § 220.11 (Relators' Legal Appendix, Tab 6.)

2. Absent passage as an emergency measure that goes into immediate effect, Council's ordinance placing an initiative proposed ordinance on the ballot does not go into effect until 40 days after its passage by Council. Critically, since the Council treats it as a legislative measure and not an administrative measure, the very ordinance placing the initiative proposed zoning ordinance on the ballot may itself be subjected

> to a referendum if not passed as an emergency ordinance—not an unlikely possibility where an initiative proposed zoning ordinance faces opposition. (City Respondents' Merit Brief, p. 27; City Charter, § 6; R.C. 731.30.) Thus, contrary to the City Respondents' assertion that that "the real issue is whether the petition will be submitted for November 2018 or May 2019 election," a referendum of Council's certification ordinance may mean an initiative proposed zoning ordinance never gets on the ballot if Council's ordinance to place the Proposed Ordinance on the ballot is defeated at a referendum. And if Council's ordinance to place it on the ballot survives a referendum, only then do the City's voters get to vote on the initiative proposed zoning ordinance.

As such, the City Respondents' failure to identify the "deadline to make the November ballot" is unsurprising. It is an amorphous deadline that the City Council makes at its "prerogative in their separate independent opinion" depending on whether they like or dislike the substantive of the initiative proposed ordinance. (City Respondents' Merit Brief, p. 18.)

II. Article XIV of the City Charter is not applicable.

Article XIV of the City Charter is not applicable for two independent reasons. First, by its plain language it does not come into play until after the initiative proposed ordinance is passed, which can only occur through a vote of the electorate; and second, Article XIV violates Article II, Section 1f of the Ohio Constitution in two respects and therefore is unenforceable.

a. The plain and unambiguous language of Article XIV of the City Charter.

The City Respondents contend that the City "follows the Ohio Revised Code for all other initiative petitions **except** for matters involving land use and district changes." (City Respondents' Merit Brief, p. 13) (emphasis in original). The City Respondents rely on Article IX, Section (d), and Article XIV of the City Charter to justify their departure from State law. (Id., p. 14.) It is critical, therefore, to examine the language of Article IX, Section (d), and XIV of the City Charter because they provide for no such distinction whatsoever regarding the <u>manner of passage</u> of an initiative proposed zoning ordinance.

Article IX, Section (d) of the City Charter states:

> Ordinances and other measures may be proposed by initiative petition and **adopted by election, in the manner now or hereafter provided by the Constitution or the laws of Ohio**, **except** that ***ordinances or resolutions*** proposed by initiative petition to affect [*sic*] a zoning district change or zoning use change ***shall be governed*** by Article XIV of this Charter.

(Emphasis added). Article IX, Section (d), therefore, expressly provides that the "manner" for adoption by election of ordinances and other measures proposed by initiative petition shall be in accordance with the Ohio Constitution and State laws. The exception in Article IX, Section (d) only provides that the "ordinances" proposed by initiative petitions are governed by Article XIV, not that the "manner" of their placement on the ballot is governed by Article XIV.

Article XIV of the City Charter only buttresses this plain and unambiguous reading because it does not address the manner of placement of initiative proposed zoning ordinances on the ballot. Section 1 of Article XIV states:

> **Any ordinance**, resolution or other action, whether legislative or **proposed by initiative petition**, effecting a change in the zoning classification or district of any property within the City of Solon, Ohio, **shall not become effective *after the passage thereof*, until Council submits such ordinance**, resolution or other action **to the electorate at a regularly scheduled election, occurring more than 90 days after the passage of the ordinance**, resolution or other action and such ordinance, resolution or other action is approved by a majority of the electors voting thereon, in this Municipality and in each ward in which the change is applicable to property in the ward.

(Emphasis added). Section 2 of Article XIV is identical to Section 1, except that it applies to ordinances effecting a change in the uses permitted in a zoning-use classification or district.

The plain and unambiguous language of Article XIV, Sections 1 and 2, simply subjects a passed zoning ordinance—whether passed by City Council through the legislative process or by the voters through the initiative petition process—to an automatic referendum that includes a

ward veto, and, in the case of initiative proposed zoning ordinances, that referendum is a complete second election.

Article XIV, after all, existed in the Charter as a referendum provision on the powers of the City Council and had absolutely nothing to do with initiatives. It was amended in 1988 simply to add initiative proposed measures (the bold and underlined language below) to the list of items subjected to an automatic referendum:

> Any ordinance, resolution, or other action, whether legislative **or proposed by initiative petition**, effecting a change in the zoning classification or district of any property within the City of Solon, Ohio, shall not become effective after the passage thereof, until Council submits such ordinance, resolution or other action to the electorate at a regular scheduled election, occurring more than 60 days after the passage of the ordinance, resolution, or other action and such ordinance, resolution or other action is approved by a majority of the electors voting thereon, in this Municipality and in each ward in which the change is applicable to property in the ward.

(Berns Aff., ¶ 20 and Exhibit R thereto) (emphasis in original). Article XIV, therefore, always existed and continues to exist after the 1988 amendment as a referendum article on passed measures, without regard to how the measures were passed, and not an article governing the manner of placing initiative proposed measures on the ballot.

The City Respondents' position with respect to Article XIV of the City Charter is that it requires Council, upon filing of an initiative proposed zoning ordinance, to enact an ordinance certifying the sufficiency and validity of the Initiative Petition to submit the Proposed Ordinance to the voters in a referendum election. However, at no point in their brief do they explain how they arrived at this interpretation, nor do they ever cite any language in the Charter that supports this interpretation. Indeed, that is because no such language requiring this process exists in the Charter. The City Respondents have made it up, and in so doing they have violated a cardinal rule of statutory construction that one must not add or delete words not actually used in the

provision. See *Beau Brummel Ties, Inc. v. Lindley*, 56 Ohio St.2d 310, 311-12, 383 N.E.2d 907 (1978) (explaining that, in interpreting legal provisions, courts are "not to delete words used or to insert words not used").

The only way to arrive at the City Respondents' interpretation is by unlawfully adding and deleting words not actually used in the provision. Absent such improper alterations, the City Respondents are left with the unvarnished and plain language of Article XIV. As shown *infra*, there is no language in Article XIV of the City Charter governing how the ordinance proposed by initiative is to be submitted to the electors and this Court should not insert language that the citizens of the City never adopted. Article XIV only dictates that "after passage" of the initiative proposed ordinance (which can only be accomplished by the people in an election), it shall not become effective until Council submits it to the electors in a referendum election in which it must be approved by a majority of the voters citywide and in the relevant ward occurring more than 90 days "after passage."[2]

There is a second reason beyond plain language as to why Article XIV of the City Charter cannot govern the submission of the Proposed Ordinance to the electorate, namely, because it would require a second election after passage by the electors and provide that in the second election it must be approved by a majority of the electorate both citywide and in the affected ward. Both of these requirements would be in derogation of the right of initiative guaranteed to "the people" of the municipality as further demonstrated herein. Due to the

[2] The fact that the 1988 amendment resulted in an unconstitutional outcome—as the City Respondents readily concede that the two-vote requirement does not advance any legitimate governmental interest (City Respondents' Merit Brief, p. 20 (defining the two-vote requirement as "unreasonable" and "absurd")—means the amendment is invalid, not that the City Respondents get the right to interpret it in a manner that gives Respondent Council a carte blanche to do whatever it wishes with the people's State constitutionally reserved and protected initiative powers.

unconstitutionality of Article XIV, the only municipal official with responsibility to certify the Proposed Ordinance for placement on the ballot here is Respondent Finance Director.

Pursuant to the plain and unambiguous language of Article IX, Section (d), the City Charter mandates the City to place initiative proposed ordinances on the ballot in "the manner now or hereafter provided by the Constitution or the laws of Ohio." This manner is set forth in R.C. 731.28, which places the unequivocal duty on Respondent Finance Director to certify the validity and sufficiency of initiative proposed ordinances to Respondent Board without any delay. Respondent Council simply has no role in the placement of initiative proposed ordinances on the ballot without regard to whether they deal with zoning.

b. Article XIV of the City Charter, including the ward-veto provision, is unconstitutional as it applies to initiative proposed zoning ordinances.

As explained more fully in Relators' Merit Brief, Article XIV of the City Charter violates Relators' municipal initiative rights under Article II, Section 1 of the Ohio Constitution. (City Respondents' Merit Brief, p. 11.) This is because, in 1988, Sections 1 and 2 of Article XIV were amended to add the words "or proposed by initiative petition" so that, whether a zoning ordinance was passed by Respondent City Council or by the voters through the initiative process, a ward veto was to apply. (City Respondents' Merit Brief, p. 12.) However, by crudely inserting this phrase into Article XIV, the plain language thereafter can be read only as requiring initiative proposed zoning ordinances to be subjected to two elections, the second of which would require the proposed ordinance to receive a majority of votes citywide and in the relevant ward(s) in order to become effective. (City Respondents' Merit Brief, pp. 13-14.) Requiring such a second election unconstitutionally voids the outcome of the first election which resulted directly from the citizens' exercise of their constitutional right of initiative. (City Respondents' Merit Brief, p. 14-15.) This clearly voids the right reserved to the people of each municipality to enact

legislation by initiative. They are not required to enact it twice for the exercise of the right to be complete. *See* Ohio Constitution, Article II, Section 1f.

In addition, the right to propose and adopt laws belongs expressly to "the people of each municipality." "[T]he people" means all of the people. Article II, Section 1f does not grant the power to a minority of the people of a municipality to veto the decision of the majority. Clearly, Article XVI of the City Charter does just that in derogation of the Ohio Constitution. In response to these arguments, the City Respondents baldly assert that Article XIV is constitutional. (City Respondents' Merit Brief, p. 20.) However, the City Respondents engaged in no textual analysis of Article XIV, simply asserting that Article XIV does not require two elections. Instead, the City Respondents devote most of their argument to defending Article XIV's ward veto provision.

The City Respondents contend that interpreting Article XIV as requiring two elections is an absurd result, and that constructions resulting in absurd results must be avoided. (City Respondents' Brief, p. 20.) However, constructions that result in absurd results must be avoided only if they can be avoided by a different construction; the provision must be capable of being construed in more than one way without adding or deleting words not used in the provision; and in any case the rules of construction do not apply where the language of the law is not ambiguous—it is the Court's duty in such cases to apply the law as written. See *Sears v. Weimer*, 143 Ohio St. 312 (1944), ¶ 5 of the syllabus ("Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted"); *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, ¶ 26 ("The primary rule of statutory construction is to look to the language of the statute itself to determine the legislative intent. If a review of the statute conveys a meaning that is clear, unequivocal, and

definite, the court need look no further"); *State v. Evans*, 102 Ohio St.3d 240, 2004-Ohio-2659; ¶ 14 ("Rather, the unambiguous language of R.C. 2929.14 is dispositive. 'Absent ambiguity, a statute is to be construed without resort to a process of statutory construction'") (citing and quoting *State v. Lozano* (2001), 90 Ohio St. 3d 560, 563, 2001 Ohio 224, 740 N.E.2d 273; *Ohio Dental Hygienists Assn. v. Ohio State Dental Bd*. (1986), 21 Ohio St. 3d 21, 23, 21 Ohio B. 282, 487 N.E.2d 301. Accord *Specialty Restaurants Corp. v. Cuyahoga Cty. Bd. of Revision*, 96 Ohio St.3d 170, 2002-Ohio-4032; *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 106 Ohio St. 3d 70. Here, the plain language of Article XIV requires initiative proposed zoning ordinances to be subjected to two elections and in the second election gives power to a minority of the electors [people] to void the exercise of the right of initiative by the majority. There is no other way to interpret Article XIV without impermissibly adding or deleting words.

The City Respondents cite the Eighth District Court of Appeals' decision in *Rispo Invest. Co. v. Seven Hills*, 90 Ohio App.3d 245, 259, 639 N.E.2d 3 (1993) for the proposition that the City's ward-veto provision is constitutional. But *Rispo* is a referendum case, not an initiative case, and therefore is distinguishable. In *Rispo*, the court determined that a municipality's ward veto provision was not *an unconstitutional delegation of legislative power by a city council. Id.* at 259. Further, in *Rispo*, the court was not faced with an initiative proposed zoning ordinance, and, therefore, the right to municipal initiative, as guaranteed by Article II, Section 1f of the Ohio Constitution, was not implicated in the decision. Here, Relators do <u>not</u> contend that the City's ward veto provision as applied in this matter is an unconstitutional delegation of power.

Rather, Relators contend that the City's ward veto provision violates their Article II, Section 1f rights. Thus, *Rispo* has no bearing on the instant action.[3]

In the end, there is no way to get around the constitutional defects in Article XIV of the City Charter. The absurd and unconstitutional effects of the plain language cannot be avoided, and its provisions cannot be enforced.

III. Respondent Finance Director breached his clear legal duty under Article IX, Section (d) of the City Charter and R.C. 731.28 to certify the validity and sufficiency of the Initiative Petition to Respondent Board for the Proposed Ordinance to be placed on the November 6, 2018 ballot.

While the City Respondents insist in their Merit Brief, like they did in their Answer, that they were not required to comply with the requirement of R.C. 731.28, there is no dispute that all requirements of State law were met in time for placement of the Proposed Ordinance on the November 6, 2018 ballot under State law in accordance with Article IX, Section (d) of the City Charter:

- Relators filed a certified copy of the Proposed Ordinance with the Respondent Finance Director on June 29, 2018, before circulation of the petition in accordance with R.C. 731.32. (City Respondents' Answer, ¶ 11; City Respondents' Merit Brief, p. 6.)
- Relators filed the signed Initiative Petition with Respondent Finance Director on July 12, 2018 in accordance with R.C. 731.28. (City Respondents' Answer, ¶ 12; City Respondents' Merit Brief, p. 6.)

[3] The City Respondents also contend that "Appellants [*sic*] assert that Article II, Section 1c of the Ohio Constitution prohibits a ward veto," but that "[t]his section governs the referendum power" and "is not applicable to municipal referenda." (City Respondents' Merit Brief, p. 34.) However, Relators never made this argument. As far as constitutional challenges, Relators have argued only that Article XIV violates Article II, Section 1f of the Ohio Constitution.

- The Initiative Petition was held for ten days until July 22, 2018, in accordance with R.C. 731.28. (City Respondents' Answer, ¶ 12; City Respondents' Merit Brief, p 6 and 24.)
- The Initiative Petition was submitted to Respondent Board on July 23, 2018, in accordance with R.C. 731.28. (City Respondents' Answer, ¶ 13; City Respondents' Merit Brief.)
- Respondent Board examined "all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition" and, on July 30,2018, certified that it contained 870 valid signatures, which is more than the number required by R.C. 731.28. (Berns Aff., ¶ 17 and Exhibit O thereto.)
- On July 31, 2018, Respondent City retrieved the July 30, 2018 Board certification from Respondent Board. (City Respondents' Answer, ¶ 14; City Respondents' Merit Brief, p. 7.)

Respondent Finance Director had nine days in which to certify the validity and sufficiency of the Initiative Petition to Respondent Board, but he simply failed to perform this mandatory act. Because Article IX, Section (d) specifies that ordinances "may be proposed by initiative petitions and adopted by election, in the manner now or hereafter provided by the Constitution or the laws of Ohio," the clear legal duty to place the Proposed Ordinance on the ballot lay with Respondent Finance Director under R.C. 731.28, and he simply failed to carry it out. A writ of mandamus ordering him to carry out that clear duty is warranted.

IV. If, somehow, Respondent City Council is the city authority that must act to place the Proposed Ordinance on the ballot, Respondent City Council breached its clear legal duty to place the Proposed Ordinance on the November 6, 2018 ballot.

As explained in Relators' Merit Brief and above, Article IX, Section (d) of the City Charter and State law impose on Respondent Finance Director the duty to certify the validity and sufficiency of initiative petitions to place initiative proposed ordinances, including zoning ordinances, on the ballot. If, somehow, the Court were to determine that Article XIV, Sections 1 and 2, are to be construed to establish a procedure whereby Respondent City Council, after compliance with all other requirements of R.C. 731.28 and R.C. 731.32 up to the point where the petitions reach the point of the validity and sufficiency certification under R.C. 731.28, was required to take action to place the Proposed Ordinance on the ballot, Respondent City Council was required to take that ministerial action in a timely manner so that the Proposed Ordinance could be placed on the ballot for the November 6, 2018 election.

a. Contrary to the City Respondents' derogation of the people's power as nothing more than a "second check," the power of initiative exists so that the people can enact laws that, for whatever reason, the legislative body has not enacted.

The City Respondents' Merit Brief reveals a fundamental misunderstanding of the initiative powers reserved to the people in Article II, Section 1f of the Ohio Constitution. Under the guise of its purported authority to subject an ordinance placing an initiative proposed zoning ordinance on the ballot to three readings, the City Respondents have the audacity to state:

> Council has the prerogative to review the zoning and land use ordinance and follow Charter mandated three (3) reading rule and take whatever action each independent Councilperson feels necessary and appropriate for each and every ordinance that comes before them. The voters act as the second check. Article XIV operates to place great deliberation of zoning and land use change ordinances and it does not reduce Council to a ministerial function that is obligated to rubber stamp "immediately" any zoning change ordinance that comes before Council.

(City Respondents' Merit Brief, pp. 19-20.) In other words, the City Respondents misread the City Charter, and well-established law, as allowing them to delay indefinitely a vote on an initiative proposed zoning ordinance that Respondent Council opposes or deems "controversial." This upends initiative powers. One reason that citizens resort to the initiative process is exactly because the legislative authority fails to act.

If, somehow, Council nonetheless is the authority that places initiative proposed zoning ordinances on the ballot, Council indeed is limited to reviewing matters of form, and, as its current law director has repeatedly acknowledged, is "duty-bound as of matter of law" to approve the ordinance placing the initiative proposed ordinance on the ballot. (City Respondents' Answer, ¶ 51; Berns Aff., ¶ 18 and Exhibit P thereto); see also *State ex rel. Langhenry v. Britt*, 151 Ohio St.3d 227, ¶ 15 (2017) ("As a general rule, when reviewing the sufficiency of a petition, municipal legislative officials have limited discretion to assess matters of form and no authority to review matters of substance such as the legality of the proposed measure.") If the City Respondents deem this to be a rubber stamp, that is exactly what the law mandates because anything else frustrates the initiative powers reserved to the people in the Ohio Constitution.

Indeed, the City Respondents refer the Court to two zoning ordinances enacted by Respondent Council after months of consideration before being subjected to the automatic referendum at the November 6, 2018 election, and suggest that the handling of those ordinances by Respondent Council somehow provides a roadmap for the handling of Respondent Council's handling of its ordinance placing the Proposed Ordinance on the ballot. (City Respondents' Merit Brief, p. 9.) This is precisely the problem. The City Respondents fail to acknowledge that the placement of any initiative proposed ordinance is an alternative to the Councilmanic process and cannot be thwarted by being subjected to the same process it is intended to avoid.

This Court has repeatedly stated that municipal officials may not engage in a substantive review before placing an initiated measure on the ballot. See *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, ¶30 (2005); *State ex rel. Walker v. Husted*, 144 Ohio St. 3d 361, ¶ 11 (2015); *State ex rel. Ebersole v. City of Powell*, 141 Ohio St. 3d 17, ¶¶ 6-7 (2014); *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St. 3d 481, ¶ 16, (2005). Yet this is exactly what the City Respondents assert they have the power to do and are doing in this case. However, given that they have no choice as a matter of law but to place the initiative proposed ordinance on the ballot, this review process serves only to delay submission to the electorate in an apparent attempt to gain an advantage for those who are opposed to it by forcing the measure on an off-year ballot with lower voter turnout.

The City Respondents need to understand that when it comes to the exercise of the initiative power under the Ohio Constitution, the people are the legislature.

b. If, somehow, Respondent Council is the authority that places initiative proposed zoning ordinances on the ballot and its "past practice" is used in determining the requirements for placement of initiative proposed zoning ordinances on the ballot, Respondent City Council's "past practice" has been consistent to take immediate action to place the initiative petition on the ballot.

The City Respondents seek to have this Court disregard the express language of the Charter in favor of the City's "past practice." (City Respondents' Merit Brief, p. 14.) The City Respondents' past practice, however, is quite clear and consistent. Respondent Council always took immediate action to place initiative proposed zoning ordinances on the ballot and consistently did so in a single meeting—sometimes a special meeting called specifically for the purpose of placing the initiative proposed zoning ordinance on the ballot— at which it waived any three-reading requirement and passed its ordinance as an emergency measure. (Berns Aff., ¶ 9 and Exhibit G thereto.) Thus, if somehow Respondent Council is the authority that places

initiative proposed zoning ordinances on the ballot, and if somehow Respondent Council's past practice is used in determining the requirements for placement of initiative proposed ordinances on the ballot, then that past practice does not support its treatment of the Proposed Ordinance.

By their own admission, Respondent Council treated the Proposed Ordinance differently because it deemed it "controversial." (City Respondents' Merit Brief, p. 25; *see also* City Respondents' Merit Brief, p. 35 (justifying the City's delay by claiming that the "Initiative Petition was in effect 'spot zoning' for the individual benefit of the owner and not all of Solon").) To be blunt, the City Respondents insist that, contrary to this Court's well-established law, they have the discretion to subject different initiative proposed zoning ordinances to different procedures based on the substance of those ordinances. *State ex rel. Langhenry v. Britt,* 151 Ohio St.3d 227, ¶ 15 (2017) ("As a general rule, when reviewing the sufficiency of a petition, municipal legislative officials have limited discretion to assess matters of form and no authority to review matters of substance such as the legality of the proposed measure.")

The City Respondents' argument and conduct in this case is simply inconsistent with their "past practice." Respondent City Council has not subjected a single zoning ordinance proposed by initiative petition to three readings in at least 25 years. (Berns Aff., ¶¶ 8-9, and Exhibits F and G thereto.)

Critically, the City Respondents selectively applied different provisions of State law, that they themselves simultaneously assert do not apply to them, to delay action on the Proposed Ordinance. They subjected the Proposed Ordinance to the ten-day holding period under R.C. 731.28 before submitting the signed Initiative Petition to Respondent Board for verification of the signatures and claim that "[p]ursuant to that same statute, the matter was out of the hands of

the City Respondents as the Board of Elections completed its review of the Petitions." (City Respondents' Merit Brief, p. 25.)

This, again, is contrary to the City Respondents' "past practice." On March 5, 2007, for instance, Respondent Council specifically introduced an ordinance to place an initiative proposed zoning ordinance on the ballot before receiving the verification from Respondent Board. The City's then Law Director David Matty instructed Respondent Council that it had two options: (1) schedule additional meetings to meet the deadline for submission of the initiative proposed zoning ordinance to Respondent Board on time or (2) pass an amended version of the certification ordinance to include language that it was subject to receipt of the verification of signatures from Respondent Board:

> Mr. Matty said the initiative petitions were submitted to the Finance Director with 2,300 signatures. Although Mr. Weber promptly delivered the petitions to the Cuyahoga County Board of Elections for verification of signatures, the Board was unable to verify the signatures before this meeting and indicated they will determine the number of acceptable signatures by 12:00 noon tomorrow. **Mr. Matty explained the Council has the option of [1] placing legislation on the first reading this evening and scheduling additional meetings this week to meet the March 9th deadline or [2] amending the legislation to be contingent upon the Board's verification of the appropriate number of valid signatures**.

(Berns Aff., ¶ 9, and Excerpts of Minutes of March 5, 2007 Council Meeting Minutes included in Exhibit G thereto) (emphasis added).)

Thus, Respondent Council's past practice demonstrates its recognition of the clear legal duty on the City's part to act promptly to place initiative proposed zoning ordinances on the ballot. In this case, however, the City Respondents insist that they had no duty to act promptly, but that it was instead incumbent on Relators to anticipate the procedural machinations to which the members of Respondent Council would, "in their separate independent opinion," subject the Proposed Ordinance. (City Respondents' Merit Brief, p. 19.) With an attitude like this, it is no

wonder that the City Respondents fail to indicate the "deadline" by which Relators were required to submit the Initiative Petition to the City. That "deadline," as the City Respondents freely admit, is determined by them "on a case-by-case basis" (Id., p. 20), thus Council always being able to thwart an initiative proposed zoning ordinance based on the whim of its individual members. That is no way to treat State constitutionally guaranteed rights where the people act as an alternative legislature to the City Council.

c. If, somehow, Respondent Council is the authority that places initiative proposed zoning ordinances on the ballot, Respondent Council breached its clear legal duty not to delay action on the Proposed Ordinance.

i. Respondent Council had the power to perform its clear legal duty to conduct the ministerial act of certifying the sufficiency and validity of the Initiative Petition to Respondent Board via motion, which is not subject to three readings, at its August 6, 2018 meeting, and City Respondents' argument that Respondent City Council could only act legislatively by ordinance demonstrates the City Respondents' continued disregard of the express language of the City Charter.

The City Respondents' argument that Council can only place the Proposed Ordinance on the ballot through a separate ordinance only shows its continued disregard of the express language of the City Charter. Not only do the City Respondents seek to have the Court disregard (and effectively delete) the express language of Article IX that the manner of placing initiative proposed ordinances on the ballot is in accordance with State law and the language of Article XIV regarding the two votes, but the City Respondents seek to have the Court insert additional language into Article XIV that does not exist. In effect, the City Respondents seek to insert the words "by ordinance" (or similar language) as follows:

> Any ordinance, resolution or other action, whether legislative or proposed by initiative petition, effecting a change in the zoning classification or district of any property within the City of Solon, Ohio, shall not become effective after the passage thereof, until Council**, by ordinance**, submits such ordinance, resolution or other action to the electorate at a regularly scheduled election, occurring more than 90 days

> after the passage of the ordinance, resolution or other action and such ordinance, resolution or other action is approved by a majority of the electors voting thereon, in this Municipality and in each ward in which the change is applicable to property in the ward.

If the drafters of Article XIV intended to include a mandate for Council to only act by ordinance, they would have included it in the language of Article XIV. They did not. It is not the place for the City Respondents or this Court to insert such language in the Charter.

But there unfortunately exists a clear pattern, and the City Respondents' outright disregard of the express language of the City Charter does not end there. If ignoring the express language of Article IX, Section (d), and Article XIV were not enough, Respondents falsely assert not only that Respondent Council must act to place initiative proposed zoning ordinances on the ballot, but that it can only do so by passing an ordinance legislatively. The City Respondents' argument that Respondent Council can only act legislatively and by ordinance defies the express language of the City Charter. Article IV, Section 1 of the City Charter expressly provides that Respondent Council is not limited to performing legislative acts:

> The legislative power of the City, **except** as limited by this Charter and **such additional powers** as may be expressly granted by this Charter, shall be vested in a Council of seven members.

Article IV, Section 3 grants those "additional powers":

> All the legislative **powers** of the City of Solon, **and** all ***such other powers*** **as may be granted by this Charter**, **together** with all such powers as are now or may hereafter be granted by the laws of Ohio to **boards of control, municipal tax commissions, boards of health or any other municipal commission, board or body now or hereafter created**, shall be vested in the Council except as otherwise provided in this Charter.

(Emphasis added). Do the City Respondents expect the Court to ignore the express language of Article IV, Section 3 about "such other powers" than legislative powers? Do they seek to argue that that the action of a municipal commission, board, or body is legislative? Respondent City

Council unequivocally performs non-legislative acts under the express, plain, and unequivocal language of the City Charter.

As this Court has repeatedly held, the act of certifying the validity and sufficiency of an initiative petition to place it on the ballot is a ministerial act. See, e.g., *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 233, 685 N.E.2d 754 (1997); *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 47. As such, if, as the City Respondents contend, Article XIV places the duty on Respondent Council to certify the validity and sufficiency of the Proposed Ordinance, then this is a ministerial act that Respondent Council performs under its "other powers" in Article IV, Section 3 of the City Charter. The idea that an act to place a measure on the ballot is itself a legislative act that can only be performed through an ordinance is simply mistaken.

As explained in Relators' Merit Brief, the City Council can act by motion to place the Proposed Ordinance on the ballot under Article IV, Section 4 of the Charter and R.C. 731.17(B). *See* City Charter, Article IV, Section 4 (permitting the City Council to pass ordinances and resolutions, and to take "any other action" at council meetings at which a quorum is present); R.C. 731.17(B) ("Action by the legislative authority, not required by law to be by ordinance or resolution may be taken by motion approved by at least a majority vote of the members present at the meeting when the action is taken.")

And while Article IV, Section 4 of the Charter authorizes Respondent Council to take "any other action" (such as the passage of motions), Article V only places the three-reading requirement on ordinances and resolutions. *See* City Charter, Article V, Section (c) ("The form and method of **enactment of its ordinances and adoption of its resolutions** except that each ordinance or resolution shall, before its passage, be read by title only on three separate days

unless the requirement for such reading be dispensed with by the concurrence of at least five Councilmen; provided, however, that any emergency measure may be passed after one reading and the legislative authority may require any reading to be in full by a majority vote of its members") (emphasis added).

ii. Respondent Council chose not to schedule three meetings to read its ordinance placing the Proposed Ordinance on the ballot and pass it.

Contrary to the City Respondents' repeated assertions, the issue is not simply a failure to waive a purported three-reading requirement on an ordinance. As explained, the three-reading requirement does not exist in the first place because the duty to place the Proposed Ordinance on the ballot lies with Respondent Finance Director. Furthermore, if the duty lies with Respondent Council, Council had every ability to place the Proposed Ordinance on the ballot through a motion, which is not subject to three readings.

Council simply chose to use an ordinance as the method through which to consider placing the Proposed Ordinance on the ballot. And even then, it had ample time to plan for and schedule three meetings at which to read its ordinance. It failed to do so.

The City Respondents had the signed Initiative Petition since July 12, 2018. It could have scheduled three meetings between July 12 and August 8 (the deadline for submission of initiatives to Respondent Board), or, for that matter, between August 2 (the absolute deadline by which Respondent Board had to verify the validity of signatures under R.C. 731.28, and August 8. It elected not to do so.

Respondents submit three affidavits in support of their Merit Brief, none of which mention any efforts undertaken by Respondent Council to schedule the meetings—not a single calendar showing lack of availability, not a single affidavit from any Councilmember showing unavailability, and not even a single email seeking to verify availability for a meeting. Any need

to waive three readings only arose because Council elected to use an ordinance, elected not to take any action to consider that ordinance until August 6, and elected not to schedule any other meetings to conduct three readings or even investigate Councilmembers' availability for such meetings.

Under the guise that, in considering an ordinance to place an initiative proposed zoning ordinance on the ballot, "the Council can decide how much deliberation and discussion should be given on a case by case basis," the City Respondents wrongly assert that they and only they can and will decide when an ordinance proposed by initiative petition will be submitted to the voters and advocate for a rule of law that absolves them of any duty to exercise any diligence in placing initiative proposed zoning ordinances on the ballot. (City Respondents' Merit Brief, p. 20.) The Court should not tolerate such dereliction of clear legal duties associated with citizens' exercise of State constitutional rights reserved to the people in the Ohio Constitution.

d. The City Respondents' attempt to blame Relators for failing to meet a fictitious deadline for submission of the signed Initiative Petitions is pure misdirection and subterfuge for their breach of their clear legal duty.

In light of the foregoing, it is no surprise the City Respondents have failed to state the deadline by which Relators were required to submit the signed Initiative Petitions so that Respondent City Council could take all action that the City Respondents claim it is required to take to place the Proposed Ordinance on the ballot for the November 6, 2018 general election—no such deadline can be determined based on the City Respondents' interpretation of Respondent City Council's powers.

V. Contrary to the City Respondents' argument, the constitutionality of the ward veto is properly before the Court in this action.

The Proposed Ordinance includes no language subjecting it to a ward veto. However, Respondent City Council's past practice is to subject initiative proposed zoning ordinances to a

single election that includes a ward veto. And consistent with that aspect of its past practice, the ordinance drafted by the City that is before Respondent City Council certifying the Proposed Ordinance to Respondent Board includes language subjecting the Proposed Ordinance to a ward veto:

> SECTION 3. That, upon an affirmative vote on the Initiated Ordinance, by the majority of the electors voting thereon, in the municipality **and in the ward in which the change is applicable**, in accordance with the Solon Charter Article XIV, Section 1 and 2, the City of Solon Zoning map shall be amended to create the Kerem Lake Mixed Use District applicable to the property described in Exhibit "A".

(Berns Aff., ¶ 12 and Exhibit J thereto) (Emphasis added). Whether the clear legal duty to place the Proposed Ordinance on the November 6, 2018 ballot lies with Respondent Finance Director or Respondent City Council, the writ must mandate that the Proposed Ordinance be placed on the ballot, not a corrupted version in which the City inserts a ward-veto requirement. Otherwise, Relators may be prevented from challenging the application of the ward veto in this election. See *Rzepka v. City of Solon*, 121 Ohio St. 3d 380, 384, 2009-Ohio-1353, ¶ 29, 904 N.E.2d 870, 874 (holding that petitioners could not challenge the outcome of the election based on the ward veto because the ordinance passed by Respondent City Council that was subjected to referendum itself contained the ward-veto language such that its passage in the ward was a condition to its effectiveness that could not be severed after vote from the rest of the ordinance).

This is the precisely the situation in which this Court has found it proper to consider constitutional questions within a mandamus action.

a. Relators properly pled a constitutional challenge to Article XIV of the City Charter.

The City Respondents contend that Relators did not properly plead their constitutional challenge to Article XIV of the City Charter. (City Respondents' Merit Brief, pp. 28-29.)

However, Relators have contended all along that Article XIV of the City Charter is unconstitutional with respect to initiative proposed zoning ordinances. In paragraph 27 of the Complaint, Relators alleged the following:

> Alternatively, if [Article XIV, Sections 1 and 2 of the Charter] did apply to the Proposed Ordinance, Article XIV, as written, would provide for two separate votes by the electorate on the initiative proposed zoning ordinance—first to pass the initiative proposed zoning ordinance by the electorate, and thereafter Council would then submit it again for yet a second vote by the electorate to make it effective. **That is absurd and would be an unconstitutional deprivation of the constitutional right reserved to the people by Article II, Section 1f of the Ohio Constitution.**

(Emphasis added).

Inherent in the argument that Article XIV of the City Charter is unconstitutional with respect to initiative proposed zoning ordinances is the argument that each of its components are unconstitutional. Indeed, the ward veto requirement is part and parcel of the two-election requirement. Under Article XIV, the mandated second election would require the Proposed Ordinance to receive a majority of votes citywide and in the relevant ward in order to become effective. (See Rel. Br. at 11-16 for further discussion). Invalidating the second election requirement—and, instead, subjecting initiative proposed zoning ordinances to State law provisions—would necessarily include invaliding the ward-veto provision. Thus, the City Respondents are wrong when they contend Relators did not plead this claim in their Complaint.

The City Respondents are also wrong that Relators never raised this issue "in any previous dealings." (City Respondents' Merit Brief, p. at 28.) In their July 20, 2018 taxpayer action letter to the City Law Director, Relators' counsel stated:

> Requiring an initiated ordinance to be submitted at two elections, as Article XIV of the Solon Charter plainly does, **would be unconstitutional as it would be in derogation of the power of**

> **initiative guaranteed by Article II, Section 1f of the Ohio Constitution**."

(Emphasis added). Thus, this issue was previously raised with the City Respondents prior to the commencement of this action.

b. Relators can challenge the constitutionality of Article XIV of the City Charter in the instant mandamus action.

The City Respondents wrongly contend that mandamus actions cannot be used to challenge the constitutionality of a city charter provision. (City Respondents' Merit Brief, p. 29.) This Court has squarely held that "the constitutionality of a city charter section may also be challenged by mandamus." *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166, 167, 545 N.E.2d 1256 (1989). And this is consistent with several other decisions by the Court allowing mandamus actions to be used to challenge the constitutionality of other forms of legislation. *See, e.g., State ex rel. Watson v. Hamilton Cty. Bd of Elections,* 88 Ohio St.3d 239, 242, 725 N.E.2d 255 (2000) (allowing consideration of the constitutionality of a State law provision in a mandamus action); *State ex rel. Purdy v. Clermont Cty. Bd of Elections*, 77 Ohio St.3d 338, 342, 673 N.E.2d 1351 (1997) (allowing consideration of the constitutionality of a State law provision in a mandamus action); and *State ex rel. Hinkle v. Franklin Cty. Bd of Elections*, 62 Ohio St.3d 145, 147, 580 N.E.2d 767 (1991) (holding a law unconstitutional and granting writ of mandamus to compel placement of local option questions on election ballot).

The City Respondents cite the Court's decision in *State ex rel. Hawthorne Valley Country Club, LLC v. Patton*, 119 Ohio St.3d 1482, 2008-Ohio-5273, for the proposition that the Court held that "mandamus is not a proper remedy for a challenge to the 'ward veto' Charter provision." (City Respondents' Merit Brief, p. 29.) The Court said no such thing as it was a merit decision without opinion. *Id.* ("MERIT DECISION WITHOUT OPINION"). In a related election contest brought by the same parties—*Rzepka v. City of Solon*, 121 Ohio St.3d 380,

2009-Ohio-1353, 904 N.E.2d 870—the Court explained that it dismissed the *Hawthorne Valley* case while the appeal in *Rzepka* was pending. *Rzepka*, ¶ 27, fn.1. The Court did not provide any additional rationale, and the Court certainly did not say that "mandamus is not a proper remedy for a challenge to the 'ward veto' Charter provision" as the City Respondents contend.[4]

Instead, the Court's standard for determining whether provisions can be challenged in mandamus actions is whether the complaint "seeks to prevent official action, making the relief injunctive in nature," and therefore not appropriate for a mandamus action, or if the complaint seeks "to compel [action], which this court has jurisdiction to do through a writ of mandamus." *State ex rel. Holwadel v. Hamilton Cty. Bd. of Elections*, 144 Ohio St.3d 579, 2015-Ohio-5306, 45 N.E.3d 994, ¶ 43. Additionally, the Court, in determining whether an adequate remedy exists at law in expedited election cases, takes into account whether there would be time to bring such an action instead of a mandamus action prior to the election. See *Watson,* 88 Ohio St.3d at 242 ("It is appropriate to consider the merits of Watson's constitutional claim in this mandamus action because an action for a declaratory judgment and prohibitory injunction would not be sufficiently speedy in this expedited election case*")*; *Purdy,* 77 Ohio St.3d at 342 ("given the fact that relators are seeking to have their petitions certified and names placed on the ballots for the upcoming November election, the alternative remedy would not be adequate").

Given the proximity of the November 6, 2018 general election, Relators would not have enough time to bring an action for declaratory judgment or prohibitory injunction prior to the election. Indeed, even in the highly unlikely event that a decision in such an action would be announced before Respondent Board's deadline for preparing ballots, the appellate process would certainly last well past the election. See *Purdy*, 77 Ohio St.3d at 341, citing *State ex rel.*

[4] The Court also did not say this in *Rzepka*.

Thurn v. Cuyahoga Cty. Bd. of Elections, 72 Ohio St. 3d 289, 291-292, 649 N.E.2d 1205, 1207-1208 (1995) ("'Given the proximity of the election, an injunction would arguably not constitute an adequate remedy because any appellate process would last well past the election.'") For these reasons, Relators lack an adequate remedy at law, and mandamus is the only available remedy.

VI. The Court should award Relators their reasonable costs and attorneys' fees.

The City Respondents seek to avoid liability for their actions by claiming that they acted in good faith and promoting a public good by insisting on compliance with the law. (City Respondents' Merit Brief, p. 35.) They are wrong. As detailed in Relators' Merit Brief and above, the City Respondents have failed to read their City Charter, much less adhere to it.

They have fashioned a procedure for the subjection of initiative proposed zoning ordinances to Respondent Board without regard to the plain and unambiguous language of their Charter. They have, by their own admission, failed to adhere to their past practice and claim instead that Respondent City Council "can decide how much deliberation and discussion should be given on a case by case basis" based on the substance of an initiative proposed zoning ordinance. (City Respondents' Merit Brief, p. 20.)

In asserting that Respondent City Council can only act by a legislative ordinance, the City Respondents ignore clear and unambiguous provisions of the City Charter that provides authority for action by motion.

Nothing in the City Respondents' conduct in this matter exhibits the good faith in which they claim to be acting. And interfering with the initiative power reserved to the people in the Ohio Constitution as the City Respondents have done does not further the public good. The City Respondents have engaged in just the sort of conduct that warrants an award of reasonable costs and attorneys' fees.

CONCLUSION

A. Relators respectfully request the Court to grant the following relief: (1) Issue an Order, Judgment and/or Writ of Mandamus ordering Respondent Finance Director to certify the sufficiency and validity of the Petition to Relator Board of Elections for placement on the November 6, 2018 election ballot; or, in the alternative, issue an Order, Judgment and/or Writ of Mandamus ordering Respondent City Council to submit the Proposed Ordinance to Relator Board of Elections for placement on the November 6, 2018 election ballot; and (2) issue an Order, Judgment and/or Writ of Mandamus ordering Respondent Board of Elections to place the Proposed Ordinance on the November 6, 2018 election ballot; or issue an Alternative Writ or other Order submitting the Proposed Ordinance to Relator Board of Elections for placement on the November 6, 2018 election ballot.

B. The Court should clarify that the Proposed Ordinance must be placed on the ballot as proposed without being encumbered by additional language by the City or on the ballot subjecting it to a ward veto.

C. Additionally, Relators request the Court to assess the costs of this action against Respondents; award Relators their attorneys' fees and expenses, pursuant to R.C. 733.61; and award such other relief as may be appropriate.

Respectfully submitted,

/s/ Majeed G. Makhlouf
Jordan Berns (0047404)
Majeed G. Makhlouf (0073853)
(Counsel of Record)
BERNS, OCKNER & GREENBERGER, LLC
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122
Phone: (216) 831-8838
Fax: (216) 464-4489

jberns@bernsockner.com
mmakhlouf@bernsockner.com

Donald J. McTigue (0022849)
J. Corey Colombo (0072398)
Derek S. Clinger (0092075)
Ben F.C. Wallace (0095911)
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, Ohio 43215
Phone: (614) 263-7000
Fax: (614) 263-7078
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
dclinger@electionlawgroup.com
bwallace@electionlawgroup.com

Counsel for Relators

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Relators' Evidence was sent via e-mail communication pursuant to S.Ct.Prac.R. 12.08(C) to the following on this the 27th day of August, 2018: Thomas G. Lobe, tomlobe@yahoo.com; Lon D. Stolarsky, lonstolarsky@yahoo.com; Todd D. Cipollo, tcipollo@cipollolaw.com; Brendan R. Doyle, bdoyle@prosecutor.cuyahogacounty.us

/s/ Majeed G. Makhlouf
Majeed G. Makhlouf (0073853)