IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. JOSHUA ABERNATHY,	:	Case No. 2018-1824
Relator,	:	Original Action in Prohibition
vs.	:	
LUCAS COUNTY BOARD OF ELECTIONS,	:	Expedited Election Case under S.Ct.Prac.R. 12.08
Respondent.	:	

MERIT BRIEF OF AMICI CURIAE, OHIO FARM BUREAU FEDERATION, OHIO CORN & WHEAT GROWERS ASSOCIATION, OHIO PORK COUNCIL, OHIO SOYBEAN ASSOCIATION, AND OHIO DAIRY PRODUCERS ASSOCIATION, IN SUPPORT OF RELATOR

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INTRODUCTION

This case presents the Court with yet another initiative petition seeking to place on the ballot an ill-considered bill of rights in the form of a proposed city charter amendment in support of one aspect of the environment; here, the Lake Erie Bill of Rights ("LEBOR"). Like those that came before it, the LEBOR is unconstitutional on its face and exceeds a municipality's legislative powers by a wide margin. But this Court need not delve into those issues or explore the divisive constitutional questions that have begun to crop up around statutes requiring boards of elections to review substantive aspects of initiative petitions. *See, e.g.*, *State ex rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035 (Fischer, J., dissenting, joined by O'Connor, C.J., and DeGenaro, J.). Rather, the Court should avoid constitutional review here for two reasons.

First, the Lucas County Board of Elections ignored the statutes' commands and conducted no substantive review of the LEBOR's provisions.

Second, the Court should dispose of this case on the basis of res judicata. The LEBOR and its supporting petitioners have already been before the Court. And the Court refused to grant a writ of mandamus placing the LEBOR on the ballot. That was a final judgment; the LEBOR was dead. Yet Toledo City Council and the Board still attempted to revive it and ordered that it appear on the ballot.

Thus, ruling that res judicata bars any further action on the LEBOR carries the benefits of being simple and correct—and the Court should grant Relator, Joshua Abernathy's, request for a writ of prohibition. Applying res judicata carries another benefit: it complies with the constitutional-avoidance doctrine, which says that a Court should not address constitutional issues when a case can be resolved on other grounds. *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225, 551 N.E.2d 989 (1990). Should the Court determine that this case and the LEBOR require a more in-depth review, amici

curiae offer a path to harmonize the complementary constitutional provisions of Article II, Section 1f and Article XVIII, Section 9 of the Ohio Constitution.

It has become something of a fad in this state to circulate petitions proposing to establish bills of rights for the laudable goal of protecting various water sources and other aspects of the environment. *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229; *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 153 Ohio St.3d 581, 2018-Ohio-1602, 109 N.E.3d 1184; and *State ex rel. Bolzenius v. Preisse*, Slip Opinion No. 2018-Ohio-3708. Unfortunately, even well-intentioned petitioners who champion these initiative petitions have given short shrift to issues of facial unconstitutionality or the economy-hampering effects of litigating unenforceable provisions.

The intervening respondents, Bryan Twitchell, Julian Mack, and Sean Nestor (collectively, "Petitioners"), are members of the Committee of Petitioners that sponsored the Lake Erie Bill of Rights, a proposed amendment to the City of Toledo's charter. The LEBOR thumbs its nose at notions of constitutionality or compliance with state and federal laws. Among other things, the proposed amendment: (1) attempts to create legal rights in Lake Erie—that is, legal rights that the water itself can exercise through any citizen of Toledo; (2) creates a felony offense; (3) expands the jurisdiction of the Lucas County Court of Common Pleas; (4) hamstrings the administration of existing laws and regulations by invalidating any "permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law * * *," Section 2(b); and, (5) spreads the effects of all of these provisions across state lines (and arguably the international boundary with Canada).

The LEBOR creates a quagmire that is unconstitutional as a matter of law and fatally defective. Of paramount significance to this analysis, the LEBOR seeks to enact a measure that exceeds in several respects what any municipality has the authority to enact. Whether proposed via citizen-led initiative petition or the Toledo City Counsel, the result is the same: an unconstitutional provision that should not appear on the ballot.

If for no other reason, the LEBOR should not be permitted to proceed to the ballot because of its overt attempt to impose regulations beyond the jurisdictional boundaries of the city of Toledo.

Plainly, Petitioners intend that the effects of this charter amendment carry weight across state lines. We know that Petitioners intend out-of-state effects because the LEBOR's language purports to affect not only Lake Erie itself, but also the "Lake Erie watershed." Section 1(a). The charter amendment combines the lake itself and its watershed into the "Lake Erie Ecosystem," which it further defines to include all soil in the watershed. *Id.*

A watershed involves much more than just water. It includes all of the land that water drains across on its way to a body of water. Lake Erie's watershed includes parts of Ohio, Indiana, Michigan, Pennsylvania, New York, and Ontario, Canada. https://coastal.ohiodnr.gov/portals/coastal/pdfs/atlas/CH3_watershed.pdf (accessed December 30, 2018), at 34. Even if we consider only the Maumee River watershed (the Maumee River empties into Maumee Bay near Toledo), it is "the largest drainage basin in the Great Lakes." *Id.* at 42. It exceeds 6,500 square miles in Michigan, Indiana, and Ohio. *Id.* The reference to jurisdiction over the watershed's soil would thus bestow on Toledo (or any of its individual citizens as private attorneys general) the power to drag into the Lucas County Court of Common Pleas any business entity that allegedly infringes on the ecosystem's "right to exist, flourish, and

naturally evolve," Section 1(a), or the people of Toledo's "right to a clean and healthy environment," Section 1(b).

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Farm Bureau Federation ("Farm Bureau") is Ohio's largest general farm organization. The Farm Bureau is a federation of member-county Farm Bureaus, representing Ohio's 88 counties. Included in these member-county Farm Bureaus is the Lucas County Farm Bureau. Farm Bureau members in this and every other county of the state serve on boards and committees working on legislation, regulations, and issues that affect agriculture, rural areas, and Ohio's citizens in general. Many members are involved in farm and agribusiness activities, including crop and livestock production, food processing, commodity processing, conditioning and handling, biofuel production, and greenhouse operations. Members of the Farm Bureau run the gamut from small to large businesses.

While many of the Farm Bureau's members reside in unincorporated areas, there are also many members in places like Lucas, Franklin, and Cuyahoga counties who farm inside the limits of cities, villages, and other incorporated entities. All Farm Bureau members have a basic interest in ensuring the good governance of the political subdivisions in which they live and work. The Farm Bureau holds an important interest in seeing the rule of law respected and the processes required for review followed. Farm Bureau members are integral parts of their communities and local governments. Many members serve in various local government positions, including township trustee, county commissioner, school board member, and beyond. County farm bureau boards continuously partner and engage with local officials to discuss the workings of their government and how that government can be improved to better serve the people in their communities. Annually, county farm bureaus engage in a policy development process that almost invariably includes at least one session where local officials are invited to interact directly with

members and are provided the opportunity to give their own thoughts on the needs of the community. Farm Bureau members pride themselves on being educated voters and involved citizens who work together to find solutions to their communities' problems.

The Ohio Corn & Wheat Growers Association is a 501(c)(5) membership organization that represents grain farmers across Ohio with a focus on commercial production of corn and small grains such as wheat, barley, rye, and oats. The association has positioned itself as both an educational and policy leader in the space of food, farming, agriculture and ethanol for the advancement of domestic and international issues that affect the success of Ohio's corn and small grains farmers. Ohio Corn & Wheat Growers Association members take care in being stewards of arable land used for crop production. Many members are from families who have been raising crops in Ohio for multiple generations. Over those generations, farmers have experienced major advancements to production technologies and best practices including those related to soil and water conservation and soil health. Over time, industry along with the scientific community have proven that investments of time, finances and human resources in soil and water conservation and soil health not only maximizes production potential, but also contributes toward protecting the state's environment and natural resources including those located in the Western Lake Erie Basin. Thus, Ohio Corn & Wheat Growers Association members make significant investments in learning and implementing scientifically-sound soil and water conservation and soil health best management practices as an integral part of their farming and business plans and have a keen interest in related public policy.

The Ohio Pork Council was established in 1968 to serve and benefit all Ohio pork farmers. As part of its overarching mission, the organization aims to protect farmers' freedom to operate under good governance and respect of the law. With over 3,700 pork farmers in Ohio,

creating more than 10,000 jobs and having an economic impact of nearly two billion dollars, the organization's members are active residents of their communities and government to ensure their rights are upheld for generations to come. What's more, Ohio Pork Council members pride themselves not only as active community members, but educated voters willing to work with interested parties in order to find common sense solutions to complex problems. The Ohio Pork Council's interest in this case is the same as the Ohio Farm Bureau Federation's interest.

The Ohio Soybean Association is a member-driven organization providing leadership for Ohio's soybean farmers in promoting effective policies and legislation to ensure a growing and profitable soybean industry. Led by a board of farmer leaders from across Ohio, OSA represents the interests of 25,000 Ohio soybean farmers at the state and national level, providing education and advocacy on a range of issues of importance to farmers. Ohio's soybean farmers are committed to sustaining life while respecting the environment. Water quality is a high priority for our organization and all Ohio farmers, who work hard every day to protect the soil and water, while also growing safe, nutritious food for our families and communities.

The Ohio Dairy Producers Association is a grassroots legislative, research, and producer educational organization representing dairy farmers throughout Ohio, regardless of farm size, breed or production strategy, marketing preference, or political affiliation. As an organization representing the dairy segment of livestock farmers, we join with the Ohio Farm Bureau Federation and share in its interest in expressing that the Court should reject the writ of mandamus and uphold the action of the Board of Elections.

The LEBOR could have a deleterious effect on the farming way of life, not only within the city of Toledo but also outside its limits. Provisions within the LEBOR would permit any Toledo resident to litigate frivolous claims against farmers in and around the Western Lake Erie Basin,

include many members of amici. The "rights" granted by the LEBOR would open farmers up to significant legal expenses and de facto regulation-by-litigation as each farmer sought to avoid expensive-but-frivolous lawsuits. The LEBOR's provisions would extensively limit agricultural production, perhaps rendering agriculture practically impossible, because each farmer would have to reserve funds for challenges to secure their rights under licenses and permits issued by the state and federal governments.

STATEMENT OF THE CASE AND FACTS

Some five months ago, Petitioners submitted a petition to the Toledo City Council proposing the Lake Erie Bill of Rights charter amendment. The Clerk of Council sent the petition to Respondent, Lucas County Board of Elections. The Board validated the signatures and returned the petition to the Clerk of Council. The Clerk determined that the petition was sufficient and sent it back to the Board with a request to put the petition on the November 2018 ballot.

Performing its gatekeeping function, the Board rejected the petition by a 4–0 vote. Under *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 2017-Ohio-8109, 95 N.E.3d 329, the LEBOR contained provisions that no municipality has the power to enact. *State ex rel. Twitchell v. Saferin*, Slip Opinion No. 2018-Ohio-3829, ¶ 3. Among other things, the LEBOR would create a new cause of action and expand the jurisdiction of the Lucas County Court of Common Pleas to hear that new cause of action. The Board thus recognized that the LEBOR could not appear on the ballot. *Id.*

Petitioners filed Case Number 2018-1238 in this Court seeking a writ of mandamus ordering the Board to put the charter amendment on the ballot. *Id.*at ¶ 1, 4. This Court held that the Board did not abuse its discretion when it relied on *Flak* and thus denied the writ. *Id.* at ¶ 9. The Court later denied Petitioners motion for reconsideration. Case Announcements, 2018-Ohio-

4040. Issued in October, that decision exhausted Petitioners' potential remedies and permanently barred the LEBOR from the ballot. The petition was dead.

But the Toledo City Council attempted to revive the petition by passing an ordinance submitting it to the Board. Complaint at ¶ 7 and Exhibit C. The ordinance requested that the charter amendment appear on the ballot at a special election in February 2019. Relator, Joshua Abernathy, filed a written protest with the Board. Complaint at ¶ 8 and Exhibits D, E. In late December, the Board held a hearing on the protest. Complaint at ¶ 9. It heard testimony and received exhibits. *Id.* Abernathy specifically alleged that in conducting the hearing, the Board "exercised quasi-judicial power." *Id.* at ¶ 10. Ultimately, the Board denied the protest. *Id.* at ¶ 9. The Board admitted all of this in its answer. Answer at ¶ 3.

Just a few business days later, Abernathy filed this action seeking a writ of prohibition against the Board.

LAW AND ARGUMENT

A. The Court need only address the second prong required to obtain a writ of prohibition: whether the Board's exercise of its quasi-judicial power was authorized by law.

To be entitled to a writ of prohibition, Abernathy must establish that (1) the Board has exercised quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) he has no adequate remedy in the ordinary course of law. *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379.

Only the second prong is at issue here.

Abernathy satisfies the first prong because the Board admitted in its Answer that it exercised quasi-judicial power. That is accurate. Quasi-judicial power is " 'the power to hear and determine controversies between the public and individuals that *require* a hearing resembling a judicial trial.' " (Emphasis sic.) *Id.* at ¶13, quoting *State ex rel. Upper Arlington v. Franklin Cty.*

Bd. of Elections, 119 Ohio St.3d 478, 2008-Ohio-5093, 895 N.E.2d 177, ¶ 16, quoting *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*, 87 Ohio St.3d 184, 186, 718 N.E.2d 908 (1999). The Board took sworn testimony and admitted exhibits, just like a court.

Abernathy satisfies the third prong because, given the short time between now and the February 2019 special election date, he lacks an adequate remedy in the ordinary course of law.

Thus, the Court need only decide whether the Board's exercise of quasi-judicial power was authorized by law. The Court should hold that the Board's exercise of its power was not authorized by law for two reasons: (1) res judicata barred the City Council and later the Board from reviving a dead petition, and (2) the LEBOR purports to create a felony offense, which, by statute, municipalities lack the power to do.

Res judicata alleviates the need for the Court to address the Board's authority to make decisions pertaining to detailed aspects of the proposed amendment as discussed in recent cases, *see, e.g., State ex rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035. Simply put, the Board already found that the LEBOR exceeded municipal authority, and this Court rejected the Petitioners challenge to that finding. But should the Court wish to delve into the limits of the Board's power to evaluate initiatives, amici offer a path to harmonizing the constitutional provisions in Article II, Section 1f and Article XVIII, Section 9 of the Ohio Constitution.

B. The Board's exercise of quasi-judicial power was barred by res judicata and thus not authorized by law.

1. Petitioners cannot now benefit from any claim that they could have raised in their mandamus action in this Court; specifically, that the Toledo City Council failed to enact an ordinance submitting the LEBOR to the Board.

This Court's final judgment in *State ex rel. Twitchell* was just that—final. And res judicata is the doctrine that compels respect for a judgment's finality. One of the primary reasons to accord finality to judgments is to ensure the efficient use of limited judicial and quasi-judicial

resources and to bring litigation to an end. This Court has long held that res judicata bars not only the claims raised in an action, but also any claim that *could have* been raised. The upshot of these principles is that a final judgment barring a petition from the ballot leaves the petition dead. Nothing can revive it.

Res judicata includes claim preclusion, or estoppel by judgment, and issue preclusion, or collateral estoppel. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). Claim preclusion bars a later action "on the same claim or cause of action" between parties or their privies after a final judgment on the merits not tainted by fraud or collusion. *Id.*, citing *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943), paragraph one of the syllabus. Issue preclusion prevents a party from relitigating in a later action "between the same parties or their privies" any "fact or * * * point that was actually and directly at issue in a previous action" and determined by the court. *Fort Frye Teachers Assn., OEA/NEA v. State Employment Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). In short, claim preclusion prevents a party from later relitigating the same cause of action, while issue preclusion prevents a party from later relitigating an earlier-decided issue as part of a different cause of action. *Id.*, citing *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 112, 254 N.E.2d 10 (1969) (paragraph two of *Whitehead's* syllabus was overruled on other grounds by *Grava* at the syllabus).

But the claim preclusion aspect of res judicata covers more than just any claim that *was* raised. Indeed, Ohio law has long held that a final judgment between that parties " 'is conclusive as to all claims which were *or might have been* litigated in a first lawsuit.' " (Emphasis sic.) *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990). That is, res judicata forecloses Petitioners from the benefits of any ground for getting on the ballot that they asserted or could have asserted in *State ex rel. Twitchell*, Slip Opinion No. 2018-Ohio-3829.

2. Res judicata applies because the *State ex rel. Twitchell* decision is a final judgment and the same parties are involved.

Res judicata applies here because this Court issued a final judgment in *State ex rel. Twitchell*. Plus, this case satisfies the requirement that a second suit or quasi-judicial action involve the same parties or their privies. Petitioners, who served as the relators in *State ex rel. Twitchell,* intervened as respondents here, and the Board was a respondent in *State ex rel. Twitchell* and is the respondent here.

3. Res judicata barred the Board from acting on the ordinance that Toledo City Council enacted in December 2018 because Petitioners could have raised in *State ex rel. Twitchell* Council's failure to enact such an ordinance.

Petitioners cannot benefit from Toledo City Council's belated enactment of ordinance 497-18. Council did not enact the ordinance until December 4, 2018, well after this Court denied Petitioners' motion to reconsider its *State ex rel. Twitchell* decision. And while it is true that Petitioners did not raise, and thus this Court did not pass upon, Council's failure to enact an ordinance asking the Board to place the charter amendment on the ballot, Petitioners *could have* raised that issue, especially in their motion for reconsideration after it was included in the concurring opinion. So res judicata bars the Board from complying with the belatedly enacted ordinance.

In the earlier mandamus action, Petitioners were required to raise every claim that they could have then litigated. *Natl. Amusements*, 53 Ohio St.3d at 62, 558 N.E.2d 1178. They did not raise the Toledo City Council's failure to enact an ordinance requesting that the Board place the charter amendment on the ballot. Exhibits A–D, certified copies of Complaint in Mandamus, Merit Brief, Reply Brief of Petitioners, and Motion to Reconsideration of Petitioners, respectively from Case No. 2018-1238, *State ex rel. Twitchell*.

But Respondents *could have* raised that issue. The Court made that clear in *State ex rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035, a case that also arose out of a petition to amend Toledo's charter. In that case, the relators circulated a petition for an unrelated charter amendment. *Id.* at ¶ 2. The amendment would have required that any "new or renovated jail" be built in a specific district of downtown Toledo. *Id.* Like here, the Toledo City Council did not pass an ordinance requesting that the Lucas County Board of Elections place the charter amendment on the ballot. *Id.* at ¶ 20. Like here, Council had a duty to enact such an ordinance. *Id.* Not only that, but the *State ex rel. Maxcy* relators failed to allege or prove that Council passed an ordinance requesting that the board of elections place the charter amendment on the ballot. *Id.* So this Court held that the board of elections was correct in refusing to place the charter amendment on the ballot even though the board used a different rationale for its decision. *Id.*at ¶ 23.

The certified copies of Relators' filings in *State ex rel. Twitchell*, Case No. 2018-1238 show that they did not name Toledo City Council as a respondent or seek a writ compelling Council to enact an ordinance requesting that the board of elections place the charter amendment on the ballot. But *State ex rel. Maxcy* shows that Relators *could have* and *should have* named the Council in their earlier action. *State ex rel. Maxcy* at ¶ 20–23. Res judicata thus bars Respondents from benefitting from Council's belated enactment of such an ordinance (which appears driven by the Court's decision in *State ex rel. Maxcy*). *Natl. Amusements* at 62.

4. The Board's Answer attempts to justify this Court's decision in *State ex rel. Maxcy v. Saferin*, Slip Opinion No. 2018-Ohio-4035 as the type of "changed circumstances" that require a departure from res judicata principles.

The Board's Answer avers that this Court's decision in *State ex rel. Maxcy* constitutes the type of "changed circumstances" that the Court has suggested would render res judicata principles inapplicable, citing *State ex rel. Tremmel v. Erie Cty. Bd. of Elections*, 123 Ohio St.3d

452, 2009-Ohio-5773, 917 N.E.2d 792, ¶16. Aside from ignoring res judicata's purpose to preserve finality and finite judicial resources, the Board conflates changes in circumstances with changes in law. The "changed circumstances" discussed in *Tremmel* are changed *facts* not *law*. *Id.*

Take *Tremmel's* citation at of *State ex rel. Van Auken v. Brown*, 20 Ohio St.3d 21, 485 N.E.2d 248. The *Van Auken* Court explained that res judicata did not preclude a person from registering as a voter in the Kelleys Island precinct because, although the woman initially was not a Kelleys Island resident, she changed her residency status by living on the island full time and then submitted a new registration application. *Id.* In short, the underlying facts changed, not the law related to residency or voter registration.

What's more, Ohio law has held for 50 years that "a change in decisional law" that could reverse the outcome of an earlier civil case generally does not bar res judicata's application. *Natl. Amusements*, 53 Ohio St.3d at 63, 558 N.E.2d 1178. That rule typically applies with equal force to changes in constitutional law. *Id.* Exceptions to this rule are rare. *See id.*, quoting *Sanders v. United States*, 373 U.S. 1, 8, 83 S.Ct. 1068, 1073, 10 L.Ed.2d 148 (1963) (explaining that habeas actions receive special treatment because " '[c]onventional notions of finality of litigation have no place where life or liberty is at stake * * *.' " (Alteration and omission sic.)).

5. This Court's final judgment in *State ex rel. Twitchell* left the petition dead—nothing could revive it.

When a court issues a final judgment finding a petition defective, res judicata compels the conclusion that the petition fails. Once a petition fails, it is, in essence, a nullity—it never happened. It cannot be that the petition signatures exist in suspended animation waiting for a city council or board of elections to act on them. There is thus nothing left for a city council to revive.

Because the petition was dead, res judicata barred the Board from placing the charter amendment on the February 2019 ballot. Its action was thus unauthorized by law, and the Court should grant Abernathy his requested writ of prohibition.

C. No textual conflict exists between Article II, Section 1f and Article XVIII, Section 9 of the Ohio Constitution; the Court should construe them together and give effect to each.

1. Article II, Section 1f and this Court's cases provide boards of election and the General Assembly with the power to limit municipality's initiative power as "provided by law."

The initiative power preserved in Article II, Section 1f, Ohio constitution, provides an umbrella of provisions for initiatives, while Article XVIII, Sections 7–9, Ohio Constitution, supplement those overarching provisions with some charter-amendment-specific provisions. These provisions complement each other rather than conflict (at least under the circumstances here).

Article II, Section 1f of the Ohio Constitution provides that: "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

Article XVIII, Section 9 of the Ohio Constitution provides that:

> Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments may be mailed to the electors as hereinbefore provided for copies of a proposed charter, or, pursuant to laws passed by the General Assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any

> amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

Nothing in these provisions conflicts with respect to limits set by the General Assembly on the initiative and referendum powers. Article II, Section 1f, Ohio Constitution allows the General Assembly to provide "by law" how a municipality can exercise those powers. Article XVIII, Section 9, Ohio Constitution, is specific to charter amendments. In short, the General Assembly may establish limits on how a municipality and its citizens may exercise the initiative and referendum power. The General Assembly can thus permit boards of elections to perform a gatekeeping function for initiatives.

The General Assembly established just such a limit when it enacted R.C. 3501.11(K)(2). That provision requires a board of elections to examine all initiative petitions "to determine whether the petition falls within the scope of authority to enact via initiative * * *." *Id.* It further says that a petition is invalid "if any portion of the petition is not within the initiative power." *Id.* To be sure, some members of this Court have suggested that this statute is unconstitutional. *See, e.g.*, *State ex rel. Maxcy*, Slip Opinion No. 2018-Ohio-4035 at ¶ 26–54 (Fischer, J., dissenting, joined by O'Connor, C.J., and DeGenaro, J.).

But the Court need not address that issue in this case. That issue has greater relevance if a board attempts to make a home-rule determination, which implicates an administrative body addressing constitutional issues, long forbidden by this Court's decisions. *E.g.*, *State ex rel. Columbus S. Power Co. v. Sheward*, 63 Ohio St.3d 78, 81, 585 N.E.2d 380 (1992). Under the circumstances presented by the petition here, the Board had no need to conduct a home-rule review that might implicate the constitution because the petition exceeded the municipality's powers in other respects.

Plus, this Court's cases have allowed boards of elections to enforce these "limits provided by law" for some time. That is not controversial.

2. The LEBOR violates multiple limits to the initiative power "provided by law" and should not be placed on the ballot.

The LEBOR violates limits to the initiative power that are "provided by law" under the authority of Article II, Section 1f, Ohio Constitution. Specifically, it attempts to create a felony and attempts to control administrative actions by invalidating any conflicting "permit, license, privilege, charter, or other authorization" issued to a corporation. When an initiative attempts to control administrative actions, the Board must withhold it from the ballot. The Board should have withheld the LEBOR from the ballot for at least two reasons.

First, this Court has held that under Article II, Section 1f, Ohio Constitution, municipalities can only submit an ordinance that "involve[s] a subject which a municipality is authorized by law to control by legislative action." This was true long before the General Assembly amended R.C. 3501.11. *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 34.

The petition here attempts to create a felony—a power forbidden to municipalities—by hiding that ordinance in a municipal charter. This Court recently reiterated that a municipality cannot make the violation of one of its ordinances a felony. *State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elections*, 148 Ohio St.3d 176, 2016-Ohio-5919, 69 N.E.3d 696, ¶ 10. That Petitioners took this tack is problematic because a municipal charter is analogous to a city constitution that prescribes the structure of city government and the procedure for the workings of that government—it is not the place for criminal ordinances. *See State ex rel. Davis Inv. Co. v. Columbus*, 175 Ohio St.337, 194 N.E.2d 859 (1963) (observing that "a municipality which has adopted a comprehensive charter is governed by the terms of the charter"). But it is more

problematic because R.C. 715.67 limits municipalities' power to determine the level of a violation of its ordinances. "Any municipal corporation may make the violation of any of its ordinances a misdemeanor * * *." R.C. 715.67. The charter amendment attempts to subvert this law.

Initially, the Court may wonder how the offense can be a felony if it prescribes no prison time. To be sure, the provision is not artfully drafted. Perhaps the charter amendment intends for later ordinances to flesh out these details? Not so. "All rights secured by this law are inherent, fundamental, and unalienable, and *shall be self-executing* and enforceable against both private and public actors. *Further implementing legislation shall not be required* * * *." (Emphasis added.) Section 1(d). Nonetheless, the felony nature of the offense comes by its jurisdictional limitations.

The charter amendment would limit court jurisdiction over the offense to "the Lucas County Court of Common Pleas, General Division." Section 3(b).

Municipal courts and courts of common pleas have concurrent jurisdiction over misdemeanors. R.C. 1901.20(A)(1) (a "municipal court has jurisdiction to hear misdemeanor cases committed within its territory and has jurisdiction over the violation of any ordinance of any municipal corporation within its territory"—again, under R.C. 715.67, violations of ordinances must be misdemeanors); R.C. 2931.03 (courts of common pleas have "original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the" courts of common pleas). To be clear, the *minor offenses* language of R.C. 2931.03 does not refer to misdemeanors. *State ex rel. Cross v. Hoddinott*, 16 Ohio St.2d 163, 164, 243 N.E.2d 59 (1968), citing *Small v. State*, 128 Ohio St. 548, 192 N.E. 790 (1934).

Yet municipal courts and courts of common pleas do not share the same fully overlapping jurisdiction over felonies. Municipal courts have jurisdiction over felony matters only to the extent that "the court may conduct preliminary hearings and other necessary hearings prior to the indictment of the defendant or prior to the court's finding that there is probable and reasonable cause to hold or recognize the defendant to appear before a court of common pleas." R.C. 1901.20(B). As part of the preliminary-hearing and probable-cause-determination power, a municipal court can "discharge, recognize, or commit the defendant." *Id.* Notably, a municipal court cannot convict or sentence a felony offender. *See id.*; Crim.R. 5(B)(8) ("A municipal or county court retains jurisdiction on a felony case following the preliminary hearing, or a waiver thereof, until such time as a record of the appearance, docket entries, and other matters required for transmittal are filed with the clerk of the court in which the defendant is to appear.")

In sum, the charter amendment's provision limiting the enforcement of its provisions against a "corporation or government" that is "guilty of an offense" to jurisdiction in the Lucas County Court of Common Pleas, General Division compels the conclusion that this backdoor ordinance impermissibly attempts to create a felony offense. That alone is a sufficient reason to reject it.

Second, the charter amendment involves a second subject that municipalities are not authorized by law to control by legislative action: administrative actions. "Administrative actions are not subject to initiative." *State ex rel. N. Main St. Coalition*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222 at ¶ 34**.** "The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence." *Id.* Here, the charter amendment would affect the administration of other laws in several ways.

The charter amendment would affect permits, licenses, and other authorizations made by the state and even the federal government. "No permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law, shall be deemed valid within the City of Toledo." Section 2(b). For instance, all permits issued by the federal EPA, the Ohio EPA, or the federal or state departments of agriculture would be deemed invalid within Toledo to the extent they conflict with a citizen's conception of the LEBOR's provisions. Worse, as noted in the Introduction, the Lake Erie-watershed aspects of the charter amendment are far reaching—figuratively and geographically. This provision would therefore invalidate permits, licenses, and more issued by *other states'* administrative agencies. Corporations that violate or even "seek to violate this law" would lose their status as "persons" to the extent that their status as persons "would interfere with the rights or prohibitions enumerated by this law, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by this law * * *." Section 4(a). Things that would interfere with these rights include "the power to assert state or federal preemptive laws in an attempt to overturn this law, or the power to assert that the people of the City of Toledo lack the authority to adopt this law." *Id.*

Placing such an infirm measure before the voters violates, on some level, the fundamental principles of maintaining the integrity of the ballot. If passed, the LEBOR will create a platform for protracted litigation at taxpayer expense and will create economic uncertainty. Such issues are squarely within this Court's authority to address. At some point, judicial economy and common sense dictate that an expedited elections process is not the appropriate vehicle to authorize a doomed measure for the ballot. Amici respectfully urge this Court to find that under

these circumstances, the Board's action placing it on the ballot was not authorized by law. Thus, the Court should grant Abernathy's requested writ of prohibition.

CONCLUSION

Because res judicata barred the Board from further action on the petition, and because the charter amendment includes multiple provisions not subject to initiative, the Board should have performed its gatekeeping function and kept the charter amendment off the February 2019 special election ballot. Thus, the Board's act was unauthorized by law. There is no question that the Board also exercised quasi-judicial power and that Abernathy has no adequate remedy in the ordinary course of law. This Court should grant him a writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of this brief via electronic mail on December 31, 2018, upon the following:

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Exhibit A

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel.* Bryan Twitchell 2509 Aldringham Rd. Toledo, Ohio 43606	)	Case No.
and Julian C. Mack 2124 Joffre Avenue Toledo, Ohio 43607	)	**VERIFIED COMPLAINT FOR WRIT OF MANDAMUS (Expedited Election Case Pursuant To S.C.R.P. 12.08)**
and Sean M. Nestor 4640 288th Street Toledo, Ohio 43611, *Relators,* -vs- Dr. Bruce Saferin, Chairman Brenda Hill Joshua Hughes David Karmol, Members Lucas County Board of Elections One Government Center, Ste. 300 Toledo, OH 43604 , *Respondents.*	)	

* * * * *

Relators, Bryan Twitchell, Julian C. Mack and Sean M. Nestor, members of the Committee of Petitioners ("Committee") sponsoring a proposed amendment to the Municipal Charter of the City of Toledo, Ohio entitled "Lake Erie Bill of Rights" ("LEBOR" or "Proposed Charter Amendment"), proceeding by and through counsel, set forth their Verified Complaint as

follows:

PRELIMINARY STATEMENT

1. Relators seek a writ of mandamus to compel the Respondents, Dr. Bruce Saferin, Brenda Hill, Joshua Hughes and David Karmol, all of whom are members of the Lucas County Board of Elections, ("Respondents," "BOE") to comply with the requirements of the Municipal Charter of the City of Toledo and Ohio constitutional, statutory, and common law to place the proposed LEBOR, an initiated charter amendment, onto the Toledo, Ohio ballot for the November 6, 2018 general election. The Committee circulated the proposal within the City of Toledo for the purpose of gathering requisite numbers of elector signatures during 2017 and 2018. A copy of the Proposed Charter Amendment petition is attached hereto as Exhibit A and is incorporated fully by reference as though herein rewritten.

JURISDICTION

2. Jurisdiction generally lies with this Court pursuant to O.R.C. Chapter 2731, which governs mandamus proceedings in the courts, and specifically lays jurisdiction in Ohio's Supreme Court by O.R.C. § 2731.02.

3. The claims in this matter arise from Respondents' denial of Relators' legal rights, which occurred when Respondents refused on August 28, 2018 to perform their legal duty to place the LEBOR on the ballot for the November 6, 2018 general election, as further delineated below.

THE PARTIES

4. Relators, Bryan Twitchell, Julian C. Mack and Sean M. Nestor, members of the Petitioners Committee sponsoring the LEBOR, are registered electors in the City of Toledo who

associated for the purpose of gathering elector signatures on a formal petition for a public vote on a Proposed Charter Amendment to change the local environmental laws of Toledo. The Proposed Charter Amendment creates a Bill of Rights for Lake Erie stating that Lake Erie and its watershed possess a right to exist, flourish and naturally evolve; that the people of Toledo have a right to a clean and healthy Lake Erie; a collective and individual right to self-government in their local community and a right to a system of government that protects their rights; and that any corporation or government that violates the rights of Lake Erie could be prosecuted by the city or and/or be held civilly liable for all harm to the Lake caused by their activities.

5. Relators bring this suit on behalf of themselves and on behalf of other electors who desire to vote for the Proposed Charter Amendment in Toledo.

6. Respondents, Dr. Bruce Saferin, Brenda Hill, Joshua Hughes and David Karmol, all of whom are members of the Lucas County Board of Elections, are being sued in their official capacities for their failure and refusal to place the proposed LEBOR on the November 6, 2018 election ballot. As BOE members, they are capable of being sued and of having their decisions challenged in, and determined by, Ohio courts.

FACTUAL AVERMENTS

7. On August 6, 2018. Relators and their supporters turned in part-petitions bearing approximately 10,500 signatures to require placement of LEBOR on the next electoral ballot. On August 10, 2018, the Lucas County Board of Elections notified the Clerk of Toledo City Council that at least 6,438 signatures were verified as those of current registered voters, easily surpassing the minimum requirement of 5,244 registered voter signatures and meeting the signature threshold required to qualify the initiative to the ballot.

8. On or about August 14, 2018, the Clerk of Toledo City Council, pursuant to his express responsibility under § 5 of the Toledo Municipal Charter, instructed the BOE to put the LEBOR on the November 6, 2018 ballot for a public vote.

9. On August 28. 2018, the BOE voted 4-0 to reject the LEBOR from the ballot for the reason that, in the opinion of the BOE, the Proposed Charter Amendment contains provisions that are purportedly beyond the scope of the City of Toledo to enact.

10. In reaching its decision, the BOE improperly reviewed the substance of the LEBOR, pre-election, claiming that the BOE was required by unnamed decisions of the Ohio Supreme Court to bar the initiative from the ballot, in direct conflict with the Clerk of Toledo City Council's order to place the initiative on the ballot.

STATUTORY AND LEGAL FRAMEWORK

11. The pathway for the filing and processing of initiative petitions originating with the Electors of the City of Toledo is set by a combination of the Toledo City Charter. the Ohio Constitution and Ohio Revised Code.

12. Section 5 of the Charter allows Proposed Charter Amendments to be initiated:

> Any amendment to this Charter may be submitted to the electors of the City for adoption by resolution of the Council, two-thirds of the members thereof concurring, and shall be submitted when a petition is filed with the Clerk of the Council setting forth the proposed amendment and signed by not less than ten percent of the electors. In either case, the proposed amendment shall be voted upon at the next regular municipal election if one shall occur not less than sixty, nor more than one hundred and twenty days after the passage of a resolution therefor by the Council. Otherwise, a special election shall be called and held within the time aforesaid for the consideration of such proposed amendment. It shall be the duty of the Clerk to notify the election authorities of the adoption by the Council of a resolution for submission of a proposed amendment, or of his or her determination that a sufficient petition for submission has been filed with him or her; and the Clerk shall request the election authorities to provide for an election as aforesaid.

The phrase "10 percent of the electors" means 10 percent of the number of electors voting in the most recent municipal election, per *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 662 N.E.2d 339 (1995); *State ex rel. Wilen v. City of Kent,* 144 Ohio St.3d 121, 41 N.E.3d 390, 2015-Ohio-3763 (2015).

13. After the Clerk of Toledo City Council, on or about August 14, 2018, requested the Lucas County BOE to put the LEBOR on the ballot, the BOE was legally obligated to do so no later than September 7, 2018, sixty (60) days before the November 6, 2018 general election, according to § 5 of the Toledo Charter. The BOE, however, failed and neglected to discharge this duty.

14. The technical, ministerial requirements that govern the BOE's processing of initiative petitions appear in O.R.C. § 3501.38, which requires petitions to be signed by electors qualified to vote on the issue. Signatures must be made in ink; each signer must place on the petition the signer's name, date of signing, and location of voting residence. The petitions must have, on each paper, the circulators' indication of number of signatures and the circulators' statement that they witnessed the signatures of qualified signers. The Petition must be submitted with all part petitions at one time. It is undisputed that these requirements were properly observed by Relators and that sufficient numbers of valid signatures were timely submitted on petition forms which complied with the requirements of statute, specifically, O.R.C. § 731.28.

15. The Lucas County BOE correctly discharged its ministerial O.R.C. § 731.28 responsibilities. But in the Board's deliberations on August 28, 2018 concerning whether or not to put the LEBOR on the ballot, the BOE engaged in unconstitutional pre-election review of the substance of the Proposed Charter Amendment and voted unanimously to reject the LEBOR

from the ballot ostensibly because the Proposed Charter Amendment contains provisions that are beyond the power of the City of Toledo to enact and the Ohio Supreme Court ostensibly "requires" the LEBOR to be stricken.

16. The BOE's decision to keep the LEBOR off the ballot contradicts decisions of the Ohio Supreme Court that prohibit county boards of elections from invalidating municipal initiatives from the ballot based on substantive evaluations of legality. See *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, ¶ 4, 144 Ohio St. 3d 239, 240 ("The boards of elections, however, do not have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms. . . ."); *Morris v. Macedonia City Council,* 71 Ohio St.3d 52, 55, 641 N.E.2d 1075 (1994).

17. Respondents members of the BOE are barred by the Ohio Supreme Court's interpretations of relevant constitutional principles from peremptorily "invalidating" the LEBOR on the ground of the proposal's substantive content; or because the initiative purportedly is beyond the power of the City of Toledo to enact. Since the LEBOR conforms to the structural requirements of constitution and statute, with the requisite numbers of eligible elector signatures, it must be put to a formal public vote at the November 6, 2018 general election. Respondents' formal vote to deny placement of the LEBOR was unconstitutional, arbitrary, illegal, and an abuse of their legal authority and discretion. By doing so, Respondents members of the BOE unconstitutionally deprived Relators and all Toledo voters of their right to petition for and vote on an initiative, and further denied due course of law to Relators and also denied Relators their constitutional free speech rights and rights of association.

FIRST CAUSE OF ACTION
(Elections Officials May Not Determine Substantive Legality or Constitutionality of Charter Proposals)

18. Relators incorporate by reference as though fully rewritten herein the contents of the foregoing paragraphs 1 through 17.

19. The Lucas County BOE is constitutionally barred from deciding whether the Proposed Charter Amendment conforms to a legal standard or interpretation of Ohio law. The BOE is strictly limited to reviewing the sufficiency of the Petition and to signature validity, and may not review or pass upon the initiative's substantive terms.

20. The BOE's rejection of the Proposed Charter Amendment abridged the City of Toledo's home rule powers under Ohio Const. XVIII, §§ 3 and 7 and also the right of the electors of Toledo, including the Committee of Petitioners, to have the fruits of those powers in the form of a public vote.

21. Also, the BOE decision exceeded its powers under O.R.C. § 731.28 and other statutes, as well as multiple Supreme Court interpretations of the initiative right under the Ohio Constitution which form the common law that limits the BOE to the exercise of ministerial review of initiatives such as the LEBOR.

22. The BOE's determination that the LEBOR initiative was "outside the scope of the City of Toledo to enact" necessarily involved scrutiny of the content of the Proposed Charter Amendment and invocation of BOE members' subjective beliefs about whether the LEBOR falls outside the scope of permissible enactments by Toledo as a charter city. The analytical process used by the BOE and drawn from unnamed Ohio Supreme Court scoping decisions resulted in a BOE decision months before the election that the LEBOR is illegal and/or unconstitutional. The

Respondents members of the BOE improperly neglected and refused to place the Proposed Charter Amendment on the ballot at their August 28, 2018 meeting.

23. Respondents members of the BOE, by their rejection of the Proposed Charter Amendment from the ballot, deprived Relators of their constitutional right under Ohio Const. Art. I, § 2 to change the form and manner of government via initiative petition. The adverse BOE decision further violated Relators' rights under Art. I, § 2 by depriving them of the right to legislate via initiative petition. It further deprived Relators of their rights of free speech and association for the purpose of petitioning their government for redress of grievances by means of election initiatives under U.S. Const. First Amendment and Ohio Const. Art. I, §§ 3 and 11.

24. Relators are entitled to a writ of mandamus from the Court ordering Respondents, members of the BOE, to place the Proposed Charter Amendment (Exhibit A) on the ballot for the November 6, 2018 election.

SECOND CAUSE OF ACTION
(LEBOR Is Within the Scope of Toledo's Authority to Enact Via Initiative)

25. Relators incorporate by reference as though fully rewritten herein the contents of the foregoing paragraphs 1 through 24.

26. Contrary to the legal conclusion clearly at the core of the decision of the Lucas County BOE to rule the LEBOR off the ballot, the petition falls within the scope of a municipal political subdivision's authority to enact via initiative.

27. Mandamus will lie to compel a board of elections to submit a charter amendment proposed by initiative petition to the electorate if the amendment involves a subject which a municipality is authorized by law to control by legislative action. *State ex rel. N. Main St.*

Coalition v. Webb, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 34; Ohio Constitution, Article II, Section 1f; *State ex rel. Sensible Norwood v. Hamilton County Bd. of Elections,* 148 Ohio St.3d 176, 2016-Ohio-5919, ¶ 9 (2016).

28. "Administrative actions are not subject to initiative." *N. Main St. Coalition*, 2005-Ohio-5009 at ¶ 34, cited at *Sensible Norwood*, ¶ 13. The LEBOR does not propose administrative provisions. It enacts new law, repeals no existing law nor does it refer to or incorporate existing charter or ordinance provisions of Toledo's local law. The LEBOR centrally advances the legal doctrine of the rights of nature and legislates enforcement mechanisms for its implementation.

29. The LEBOR falls within the scope of a municipal political subdivision's authority to enact via initiative because any initiative proposing legislative enactments may be placed on the ballot for a vote by the electors. Pre-election substantive review by the BOE is unlawful. *E.g., State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223 (headnote: "County board of elections not authorized to decide legality or constitutionality of proposed charter amendment's substantive terms"); *accord, State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 2018-Ohio-1602, ¶ 12 (Fischer, J., concurring in judgment only).

30. The Lucas County Board of Elections' 4-0 vote on August 28, 2018 to keep the LEBOR off the November 6, 2018 general election ballot was arbitrary, an abuse of discretion, and unlawful and under principles governing mandamus actions it must be placed on the ballot.

RELATORS ARE ENTITLED TO A WRIT OF MANDAMUS

31. The writ of mandamus is an extraordinary remedy that arose historically to deal with situations like this, where there is no other avenue for justice. It is the Court's duty in such

situations to review the actions of respondent boards of elections to place limits on the exercise of their discretion to ensure that discretion is not exercised arbitrarily, or abused. It is further the Court's duty, when a governmental official has refused to undertake a nondiscretionary act, to order such act to be undertaken.

32. At the August 28, 2018 BOE meeting to determine whether or not to place the LEBOR on the ballot, Relators' counsel informed the BOE members both orally in a statement, and by letter of their nondiscretionary duty to place the LEBOR on the ballot. (Exhibit B). Since Respondents barred the LEBOR from the November 6, 2018 ballot, and the election is fewer than 70 days away, as of the filing of this Verified Complaint, Relators have no adequate remedy at law and must be allowed to pursue mandamus relief in this Court.

32. The Respondents' collective refusal to place the LEBOR on the ballot was improper, unlawful, an abuse of discretion and arbitrary, and must be overruled by this Court.

33. The acts or omissions of Respondents were *ultra vires* insofar as they ignored constitutional and statutory requirements. Respondents' acts and omissions must be corrected by a specific mandate from the Court. The Court must intervene to vindicate the rights of all of the Relators and to protect their rights under the Ohio Constitution and Toledo City Charter to vote on properly-initiated municipal charter amendments.

34. Relators are entitled to a writ of mandamus to compel the Respondents members of the Lucas County BOE to comply with the requirements of the Ohio Constitution and statutes and to place the LEBOR proposal on the ballot for the November 6, 2018 general election.

REQUEST FOR EXPEDITED REVIEW

35. Due to the proximity of the November 6, 2018 election, Relators request an expedited

determination of this lawsuit, pursuant to S.C.R.P. 12.08. This lawsuit is being filed approximately 67 days prior to the election. Relators have no plain or adequate remedy at law to correct the unlawful, unreasonable and/or arbitrary acts and abuses of discretion committed by the Respondents. Expedited review is necessary for a timely decision to allow placement of the LEBOR proposal on the ballot in time for the election.

WHEREFORE, Relators pray the Court issue a peremptory writ of mandamus, or alternatively, an alternate writ, pursuant to O.R.C. Chapter 2731, which requires Respondents members of the Lucas County Board of Elections to immediately place the Lake Erie Bill of Rights Charter Amendment proposal on the November 6, 2018 general election ballot for a public vote. Relators further request that they be awarded their costs and reasonable attorney fees, and such other and further relief at law or in equity as the Court may deem necessary and proper in the premises.

Respectfully submitted,

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Co-Counsel for Relators

VERIFICATION

I, Bryan Twitchell, am a Relator in this lawsuit. I have reviewed the allegations in the Verified Complaint and swear that the allegations are made upon my personal knowledge. I further swear that I am competent to testify as to all averments of the Verified Complaint because I am a member of the committee of petitioners for the Lake Erie Bill of Rights proposed charter amendment in Toledo, Ohio. I was directly involved in circulating the initiative petition for the proposed charter amendment in Toledo.

Bryan Twitchell

STATE OF OHIO)
) ss:
COUNTY OF LUCAS)

Sworn to before me and subscribed in my presence this 29th day of August, 2018.

Notary Public
Attorney at Law
Nonexpiring Commission

VERIFICATION

I, Sean M. Nestor, am a Relator in this lawsuit. I have reviewed the allegations in the Verified Complaint and swear that the allegations are made upon my personal knowledge. I further swear that I am competent to testify as to all averments of the Verified Complaint because I am a member of the committee of petitioners for the Lake Erie Bill of Rights proposed charter amendment in Toledo, Ohio. I was directly involved in circulating the initiative petition for the proposed charter amendment in Toledo.

Sean M. Nestor

STATE OF OHIO)
) ss:
COUNTY OF LUCAS)

Sworn to before me and subscribed in my presence this 29th day of August, 2018.

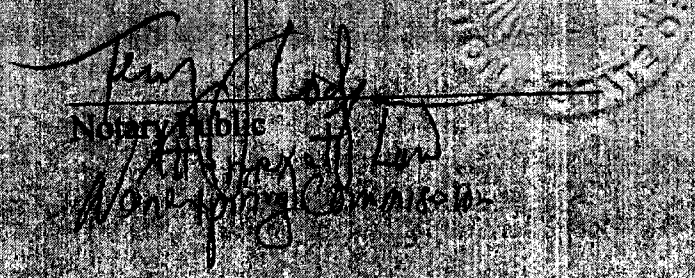
Notary Public
Attorney at law
My commission does not expire

I, Julian C. Mack, am a Relator in this lawsuit. I have reviewed the allegations in the Verified Complaint and swear that the allegations are made upon my personal knowledge. I further swear that I am competent to testify as to all averments of the Verified Complaint because I am a member of the committee of petitioners for the Lake Erie Bill of Rights proposed charter amendment in Toledo, Ohio. I was directly involved in circulating the initiative petition for the proposed charter amendment in Toledo.

Julian C. Mack

STATE OF OHIO)
) ss:
COUNTY OF LUCAS)

Sworn to before me and subscribed in my presence this 29 day of August, 2018.



Notary Public

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel.* Bryan Twitchell, *et al.,*	)	Case No.
Relators,	)	
-vs-	)	**VERIFIED COMPLAINT FOR WRIT OF MANDAMUS**
Lucas County Board of Elections, *et al.*,	)	**(Expedited Election Case Pursuant To S.C.R.P. 12.08)**
Respondents.	)	
	)	***Exhibits volume***
	)	
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* * * * *

PETITION FOR SUBMISSION OF PROPOSED AMENDMENT TO CHARTER

Constitution of Ohio, Art. XVIII, Section 9 and 14; Revised Code 731.28 - .41, 3503.06

To be signed by ten percent of the electors, based upon the total vote cast at the last preceding general municipal election.

NOTICE – Whoever knowingly signs this petition more than once, signs a name other than his own, or signs when not a legal voter, is liable to prosecution.

To the Council, the legislative authority of the City of Toledo, Ohio:

We, the undersigned, qualified electors of the City of Toledo, Ohio respectfully petition the legislative authority to forthwith provide by Ordinance, for the submission to the electors of the City of Toledo, the following proposed amendment to the Charter of the City of Toledo to-whit:

LAKE ERIE BILL OF RIGHTS

ESTABLISHING A BILL OF RIGHTS FOR LAKE ERIE, WHICH PROHIBITS ACTIVITIES AND PROJECTS THAT WOULD VIOLATE THE BILL OF RIGHTS

We the people of the City of Toledo declare that Lake Erie and the Lake Erie watershed comprise an ecosystem upon which millions of people and countless species depend for health, drinking water and survival. We further declare that this ecosystem, which has suffered for more than a century under continuous assault and ruin due to industrialization, is in imminent danger of irreversible devastation due to continued abuse by people and corporations enabled by reckless government policies, permitting and licensing of activities that unremittingly create cumulative harm, and lack of protective intervention. Continued abuse consisting of direct dumping of industrial wastes, runoff of noxious substances from large scale agricultural practices, including factory hog and chicken farms, combined with the effects of global climate change, constitute an immediate emergency.

We the people of the City of Toledo find that this emergency requires shifting public governance from policies that urge voluntary action, or that merely regulate the amount of harm allowed by law over a given period of time, to adopting laws which prohibit activities that violate fundamental rights which, to date, have gone unprotected by government and suffered the indifference of state-chartered for-profit corporations.

We the people of the City of Toledo find that laws ostensibly enacted to protect us, and to foster our health, prosperity, and fundamental rights do neither; and that the very air, land, and water – on which our lives and happiness depend – are threatened. Thus it has become necessary that we reclaim, reaffirm, and assert our inherent and inalienable rights, and to extend legal rights to our natural environment in order to ensure that the natural world, along with our values, our interests, and our rights, are no longer subordinated to the accumulation of surplus wealth and unaccountable political power.

We the people of the City of Toledo affirm Article 1, Section 1, of the Ohio State Constitution, which states: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

We the people of the City of Toledo affirm Article 1, Section 2, of the Ohio State Constitution, which states: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."

And since all power of governance is inherent in the people, we, the people of the City of Toledo, declare and enact this Lake Erie Bill of Rights, which establishes irrevocable rights for the Lake Erie Ecosystem to exist, flourish and naturally evolve, a right to a healthy environment for the residents of Toledo, and which elevates the rights of the community and its natural environment over powers claimed by certain corporations.

Section 1 – Statements of Law – A Community Bill of Rights

(a) *Rights of Lake Erie Ecosystem.* Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve. The Lake Erie Ecosystem shall include all natural water features, communities of organisms, soil as well as terrestrial and aquatic sub ecosystems that are part of Lake Erie and its watershed.

(b) *Right to a Clean and Healthy Environment.* The people of the City of Toledo possess the right to a clean and healthy environment, which shall include the right to a clean and healthy Lake Erie and Lake Erie ecosystem.

(c) *Right of Local Community Self-Government*. The people of the City of Toledo possess both a collective and individual right to self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.

(d) *Rights as Self-Executing*. All rights secured by this law are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors. Further implementing legislation shall not be required for the City of Toledo, the residents of the City, or the ecosystems and natural communities protected by this law, to enforce all of the provisions of this law.

Section 2 – Statements of Law – Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful for any corporation or government to violate the rights recognized and secured by this law. "Corporation" shall include any business entity.

(b) No permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law, shall be deemed valid within the City of Toledo.

Section 3 – Enforcement

(a) Any corporation or government that violates any provision of this law shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this law, shall count as a separate violation.

(b) The City of Toledo, or any resident of the City, may enforce the rights and prohibitions of this law through an action brought in the Lucas County Court of Common Pleas, General Division. In such an action, the City of Toledo or the resident shall be entitled to recover all costs of litigation, including, without limitation, witness and attorney fees.

(c) Governments and corporations engaged in activities that violate the rights of the Lake Erie Ecosystem, in or from any jurisdiction, shall be strictly liable for all harms and rights violations resulting from those activities.

(d) The Lake Erie Ecosystem may enforce its rights, and this law's prohibitions, through an action prosecuted either by the City of Toledo or a resident or residents of the City in the Lucas County Court of Common Pleas, General Division. Such court action shall be brought in the name of the Lake Erie Ecosystem as the real party in interest. Damages shall be measured by the cost of restoring the Lake Erie Ecosystem and its constituent parts at least to their status immediately before the commencement of the acts resulting in injury, and shall be paid to the City of Toledo to be used exclusively for the full and complete restoration of the Lake Erie Ecosystem and its constituent parts to that status.

Section 4 – Enforcement – Corporate Powers

(a) Corporations that violate this law, or that seek to violate this law, shall not be deemed to be "persons" to the extent that such treatment would interfere with the rights or prohibitions enumerated by this law, nor shall they possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or prohibitions enumerated by this law, including the power to assert state or federal preemptive laws in an attempt to overturn this law, or the power to assert that the people of the City of Toledo lack the authority to adopt this law.

(b) All laws adopted by the legislature of the State of Ohio, and rules adopted by any State agency, shall be the law of the City of Toledo only to the extent that they do not violate the rights or prohibitions of this law.

Section 5 – Effective Date and Existing Permit Holders

This law shall be effective immediately on the date of its enactment, at which point the law shall apply to any and all actions that would violate this law regardless of the date of any applicable local, state, or federal permit.

Section 6 – Severability

The provisions of this law are severable. If any court decides that any section, clause, sentence, part, or provision of this law is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of the law. This law would have been enacted without the invalid sections.

Section 7 – Repealer

All inconsistent provisions of prior laws adopted by the City of Toledo are hereby repealed, but only to the extent necessary to remedy the inconsistency.

Pursuant to Charter Section 94, we hereby designate the following petitioners as a committee to be regarded as filing this petition or its circulation:

1. Brittney Ann Bradner, 1655 Kedron St Toledo, Ohio 43605
2. Julian C. Mack, 2124 Joffre Ave Toledo, Ohio 43607
3. Michelene McGreevy, 2621 Whiteway Rd Apt 5 Toledo, Ohio 43606
4. Sean M. Nestor, 4640 288th Street, Toledo, Ohio 43611
5. Bryan Twitchell, 2509 Aldringham Rd Toledo, Ohio 43606

NOTICE – Whoever knowingly signs this petition more than once, signs a name other than his own, or signs when not a legal voter, is liable to prosecution.

Signatures on this petition must only be from the City of Toledo, Lucas County, Ohio and must be written in ink.

#	Signature	Printed Name	Residence in Toledo, OH (Street and Number)	Date
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AFFIDAVIT OF CIRCULATOR – Toledo Charter Section 92

I, _____, [PRINT NAME OF CIRCULATOR], being first duly sworn, do depose and say that I am the circulator of the foregoing initiative petition containing _____ [NUMBER] signatures and to the best of my knowledge and belief each signature is the genuine signature of the person it purports to be, and that it was made in my presence. I make this affidavit under penalty of election falsification.

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY IN THE FIFTH DEGREE

_____
Signature of Circulator

_____
Permanent Resident Address of Circulator

NOTARY

The foregoing was sworn to me and subscribed in my presence on this _____ day of _____, 20___.

_____
Notary Public

Exhibit B

Law Office
TERRY JONATHAN LODGE

316 N. Michigan Street, Suite 520
Toledo, Ohio 43604-5627

Phone (419) 205-7084
Fax (419) 452-8053
lodgelaw@yahoo.com

August 28, 2018

Dr. Bruce Saferin, Chairman
Brenda Hill
Joshua Hughes
David Karmol
c/o Lavera Scott, Director
c/o Theresa Gabriel, Deputy Director
Lucas County Board of Elections
One Government Center, Ste. 300
Toledo, OH 43604
Via hand-delivery

RE: Lake Erie Bill of Rights initiative petition (memorandum on legal obligations of Board of Elections)

Dear Members of the Lucas County Board of Elections, Director Scott and Deputy Director Gabriel:

On behalf of Brittney Ann Bradner, Julian C. Mack, Michelene McGreevy, Sean M. Nestor, and Bryan Twitchell, the sponsoring Committee of Petitioners for the Lake Erie Bill of Rights (hereinafter "Committee"), I'm writing to provide the legal context in which the Board of Elections ("BOE") is required to consider and act upon the Bill of Rights proposal (hereinafter "LEBOR").

BOE Consideration of Whether Parts of the Proposal Are Outside Of Municipal Power to Enact Is Unconstitutional and Impermissible

The central principle that governs the BOE's deliberations over whether to put LEBOR on the ballot is that the Board's role is ministerial and limited. At least 6,438 signatures - many more than necessary - were gathered on part-petition forms that met applicable format requirements. The proposal represents a unified approach to an identified public health and environmental crisis involving the Lake Erie watershed; it meets single-subject requirements. The Committee has a clear legal right to placement of the LEBOR on the ballot, free of any considerations by the BOE of its contents or speculation as to whether parts of it may be legally unenforceable if LEBOR is voted into law by the electors. The BOE has no discretion to reject LEBOR from the ballot.

There are many Ohio Supreme Court cases supporting this conclusion.

We acknowledge that in 2016, the General Assembly enacted House Bill 463 ("HB 463") concerning the authority of boards of elections. HB 463 changed the Ohio Revised Code in several places: O.R.C. § 3501.11(K)(2), O.R.C. § 3501.38(M), and O.R.C. § 3501.39(A)(3). In particular, O.R.C. § 3501.38(M)(1)(a) added this new responsibility: "(a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot."

There is much controversy over this new wording, and the Ohio Supreme Court has struck these provisions of HB 463, as explained below. Boards of elections are part of the Executive Branch, under the Secretary of State. Courts are part of the Judicial Branch. Boards of election have ministerial responsibilities such as counting and verifying the adequacy of elector signatures on petitions. The new § 3501.38 gave powers to boards of election that are the province of the courts. *i.e.*, determining whether an initiative falls within limits imposed by the Ohio Constitution and certain statutes. Most members of boards of elections are not lawyers and are not qualified to make legal decisions. And even when they are lawyers, the General Assembly's use of magic words such as "within the scope of authority" cannot lawfully transform a BOE's ministerial review into a legal veto. Boards of elections have no authority under the separation of powers doctrine, which allocates different powers to the Executive and Judicial branches, to take on court-like review of the LEBOR.

In 2015, the Supreme Court, in *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, ¶ 4, 144 Ohio St. 3d 239, 240, 41 N.E.3d 1229, 1231, directed the Mahoning County Board of Elections to put a charter amendment proposal similar to the LEBOR on the ballot. The BOE had claimed that the proposed amendment was unconstitutional and refused to put it up for a vote by the electors. In finding that the BOE abused its discretion, the Ohio Supreme Court said:

> The boards of elections, however, do not have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms. ***An unconstitutional amendment may be a proper item for referendum or initiative***. Such an amendment becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction. Any other conclusion would authorize a board of elections to adjudicate a constitutional question and require this court to affirm its decision even if the court disagreed with the board's conclusion on the underlying constitutional question, so long as the board had not abused its discretion.

Id. at ¶ 11. (Emphasis added). The BOE has no authority to even ask whether the proposed law would be constitutional were it enacted.

The Mahoning BOE had acted on the personal opinions of its members about the constitutionality of the proposal. But questions of legality and constitutionality are for judges to decide based on objective considerations, and not until after the election.

The Ohio Supreme Court in *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223, 2017 WL 4701143 (2017) (Slip Op.) held that boards of elections cannot use O.R.C. 3501.38(M)(1)(a) to keep a proposed measure off the ballot. The Court recognized that the scope of authority review codified by HB 463 is unconstitutional:

> This attempt by the General Assembly to grant review power to the election boards violates the Constitution because "'the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.'" *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 45, quoting *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus. ***To the extent that R.C. 3501.38(M)(1)(a) authorizes and requires boards of elections to make substantive, preenactment legal evaluations, it violates the separation-of-powers doctrine and is unconstitutional.***"

(Emphasis added). *Espen*, ¶ 15.

In *State ex rel. Flak v. Betras*, 2017-Ohio-8109, ¶¶ 41-42, decided only weeks before *Espen,* Supreme Court Justice Fischer had dissented along with Justices O'Connor and O'Neil, giving this assessment of the illegality of O.R.C. 3501.11(K)(2) and 3501.38(M):

> This court's jurisprudence limiting the authority of county boards of elections to review the constitutionality of proposed ballot measures rested squarely on separation-of-powers considerations. *Youngstown,* 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, at ¶ 11 (holding that questions of constitutional interpretation are resolved by the courts, not the elections boards); *State ex rel. Ebersole v. Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶ 6 ("Nor can the city council assess the constitutionality of a proposal, because that role is reserved for the courts"). It follows that the General Assembly's grant of judicial-review power to the elections boards violates the Constitution, because "[the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers," *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus. For these reasons, ***I would hold that R.C. 3501.11(K)(2) is unconstitutional to the limited extent that it requires elections boards to make constitutional and legal conclusions pursuant to R.C. 3501.38(M).*** See *Hazel*, 80 Ohio St.3d at 169, 685 N.E.2d 224; *Thurn*, 72 Ohio St.3d at 293, 649 N.E.2d 1205.

State ex rel. Flak v. Betras, 2017-Ohio-8109, ¶ 44 (Fisher, J., dissenting) (emphasis added).

The Ohio Supreme Court has observed that "it is sometimes difficult to distinguish

between a provision that a municipality is not authorized to adopt by legislative action (something an elections board may determine per *Sensible Norwood*) and one that is simply unconstitutional (something an elections board may not determine, per *Youngstown*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, at ¶ 12)." *Flak*, 2017 -Ohio- 8109, ¶ 14.

If the BOE vetoes the LEBOR f rom the ballot, it will not only violate the separation-of-powers doctrine, it will also violate the people's constitutional right to use initiative to alter the form of their government, and it will infringe the people's exercise of core political rights. The members of BOE cannot put their own opinions about constitutionality and legality above the ability of the courts to make those decisions decisions, which the courts recognize can only happen after the people have spoken. *See State ex rel. Walker v. Husted*, 2015-Ohio-3749, ¶ 16:

> An unconstituional proposal may still be a proper item for referendum or initiative. If passed, the measure becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction. Until then, the people's power of referendum remains paramount. This conclusion is consistent with our rule that we "will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature." *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5, 6, 454 N.E.2d 1321 (1983).

The BOE cannot exercise a pre-election veto just because it happens to disagree with a qualified initiative. Ohio courts have long held that BOEs have no power to prevent the enactment of law merely because the law, if passed, will be invalid. *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 501 (1941); *Pfeifer v.Graves*, 88 Ohio St. 473, 487-88 (1913). The Ohio Supreme Court would never allow the Governor to forbid the state legislature from voting on a proposed bill. Separation of powers forbids that. The Ohio Supreme Court has made clear that the Ohio legislature cannot authorize the BOE to decide whether an initiative is valid to appear on the ballot, regardless of how strongly the BOE disagrees with the proposed measure or may believe that it is not constitutional.

Pre-election review guarantees adjudication of unripe proposals and risks ill-considered effects. "[The ripeness requirement 'prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Roll v. Edwards*, 156 Ohio App. 3d 227, 2004-Ohio-767, ¶ 27 (4th App. Dist.) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), abrogated on other grounds by *California v. Sanders*, 430 U.S. 99 (1977)). The same logic and law applies to boards of elections. By deciding the constitutionality, validity, legality, scope–whatever one may call it–of a proposed measure, the BOE will necessarily be assuming hypothetical facts and adjudicating a future controversy that does not yet exist, and may never exist if the people vote down the initiative. A pre-election veto is nothing more than trial by speculation.

The BOE doesn't have the power to decide when and where the Ohio Constitution applies to protect the people's rights. The BOE's members cannot deny the public a vote just because they disagree with the proposal. The LEBOR represents hundreds of volunteer hours of signature

gathering and campaign work. The Committee's detailed, thoughtful proposal is required to be accorded the same respect, legally speaking, that is given the introduction and passage of legislation by the Ohio General Assembly. No one can dispute that the public must wait until the General Assembly has enacted a law before a court is allowed to review its lawfulness, even if the court believed it were clear from the start that the General Assembly's result would be illegal. Treatment of LEBOR as worthy of less respect than legislative proposals in the General Assembly will not only insult the public's voluminous efforts to propose it; it will violate core rights of the people under the Ohio Constitution to decide it, too.

Thank you very much.

For the Committee of Petitioners,

/s/ Terry J. Lodge
Terry J. Lodge

cc: Committee of Petitioners

Exhibit B

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel* Bryan Twitchell, et al.,	)	
Relators,	)	Case No. 2018-1238
-vs-	)	
Lucas Cty. Bd. of Elections, et al.,	)	**Expedited Election Case Pursuant to S.Ct.Prac.R. 12.08**
Respondents.	)	

RELATORS' MERIT BRIEF

IN SUPPORT OF VERIFIED COMPLAINT

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Counsel for Respondents

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I. STATEMENT OF FACTS

The Lucas County Board of Elections ("BOE") unlawfully held invalid Relators' petitioned municipal charter amendment for placement on the upcoming November 6, 2018 ballot for the unlawful reasons that, as board member Karmol stated, "the Supreme Court has said that we are required to determine whether the proposed Charter Amendment goes beyond the authority of the Charter. That's the issue here. That's the only issue, not the constitutionality of what's being proposed. We're not dealing with the - - the subject matter. We're dealing with the - - the scope of the Charter of the City of Toledo." Oral motion to reject LEBOR, Transcript ("Tr.") 22.

Board member Hughes elaborated, claiming that the BOE was not doing judicial review:

> We're not [sitting as judges.] What we are doing, however, is exercising the duties, not the – you know, what we're choosing to do, a duty imposed upon us by Ohio Revised Code Section 3501.11. It's Board duties.
>
> [Board member Hughes then paraphrases O.R.C. 3501.11(K)(2), which states in full "Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power."]
>
> [Board member Hughes then quotes O.R.C. 3501.38(M)(1)(a), which states in full that "the board of elections shall examine the petition to determine: (a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power; or . . . ."]
>
> The United – the Ohio Supreme Court in *Flak* – in *State ex rel. Flak v. Betras* – the cite for you, Mr. Lodge, is 152 Ohio St. 3d 244. It's not a very long decision, so I'm sure you'll be able to find the – the cite. It says, A municipality is not authorized to create new causes of action, only the General Assembly may do so. That's Section 3,

> Article XVIII of the Ohio Constitution, and they're quoting, again, the Ohio Supreme Court, where they said, State law determines what injuries are recognized and what remedies are available.

Tr. 23-25.

Relators are the members of the Petition Committee, consisting of Bryan Twitchell, Julian C. Mack, and Sean M. Nestor ("Committee"), who are sponsors of the proposed amendment to the Municipal Charter of the City of Toledo, Ohio entitled "Lake Erie Bill of Rights" (hereinafter "LEBOR" or "Proposed Charter Amendment").

On August 6, 2018, the Petition Committee submitted part-petition forms containing approximately 10,500 signatures in support of placement of the Proposed Charter Amendment on the ballot. On August 10, 2018, the BOE notified the Clerk of Toledo City Council that it had determined at least 6,438 signatures were valid signatures of registered voters, which exceeded the signature threshold required to qualify the initiative to the ballot. Answer of Respondents to Relators' Complaint in Mandamus ("Answer of BOE"), ¶ 7.

The proposed Lake Erie Bill of Rights charter amendment contains a comprehensive community bill of rights that among other things:

- Recognizes Lake Erie, and the Lake Erie watershed, as possessing the right to exist, flourish, and naturally evolve;
- Recognizes that the people of the City of Toledo possess the right to a clean and healthy environment, including a clean and healthy Lake Erie and Lake Erie ecosystem;
- Declares the people of the City of Toledo's collective and individual right to self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights;

• Prohibits corporations or governments from violating those rights, making such violation "an offense," and authorizes the City or any resident of the City to enforce those rights;

• Allows any resident to bring a private right of action to enforce the rights and prohibitions in the charter amendment, and allows for the recovery of costs and attorneys' fees for any action brought by a private citizen or the city under the charter amendment;

• Denies personhood to any corporation that violates the charter amendment.

An exemplar of the Petition appears in the Exhibits Volume accompanying the Verified Complaint ("Exh. Vol.") as Exh. A.

The Toledo Municipal Charter Section 5 requires "the [City] Clerk to notify the election authorities [the BOE] . . . of his or her determination that a sufficient petition for submission has been filed with him or her; and the Clerk shall request the election authorities to provide for an election as aforesaid." Relators' believe the Clerk did so on or about August 14, 2018, instructing the BOE to put the LEBOR on the November 6, 2018. Br., ¶ 8. The BOE proceeded to hold a vote on August 28, 2018, and based on the arguments quoted above, voted 4-0 to reject the LEBOR appearing on the ballot. Answer of BOE, ¶ 9. The BOE's determination had nothing to do with the validity of signatures or form of the petition, and everything to do with the BOE's review of the substantive content of the Proposed Charter Amendment.

II. ARGUMENT

A. <u>Proposition of Law No. 1:</u> Relators Have a Clear Legal Right to the Relief Requested, Respondents are under a Clear Legal Duty to Provide the Requested Relief, and Relators have no plain and adequate remedy in the ordinary course of law.

This case is merely the most recent version of the recurring word game used to masquerade the quasi-judicial role that has been fashioned from certain Supreme Court decisions and HB 463. The BOE's gross intrusion on the prerogatives of the Judicial Branch (by conducting judicial review, albeit of a proposed rather than enacted law) and Legislative Branch

(by interfering in the people's legislative process of charter amendment) was admitted and exposed. Once again, Relators call upon this Court to settle this perpetual, unnecessary, conflict. The Court must issue a bright-line rule prohibiting pre-enactment review of the content of proposed initiatives.

Mandamus relief is appropriate where (1) the respondents have a clear legal duty, (2) the relators have a clear legal right to the relief sought, and (3) there is no plain and adequate remedy in the ordinary course of the law. *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 45, 693 N.E.2d 794 (1998); *State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 53, 572 N.E.2d 649 (1991) (ordering a proposed charter amendment onto the ballot for which it had been petitioned, despite delay caused by objections to the amendment's substantive content).

1. Relators have a clear legal right to relief.

Relators have a clear legal right to placement of the Proposed Charter Amendment on the ballot. Several constitutional provisions safeguard the ballot initiative process. Under Ohio Constitution Article I, § 2, the people have the right to change the form and manner of government via initiative petition, and under Article I, § 16, the people have the right to due course of law. The First Amendment of the U.S. Constitution and Article 1, §§ 3 and 11 of the Ohio Constitution protect the ballot initiative process as political speech. The people's reserved direct democracy rights are constitutionally protected. Ohio Const. Art. I, § 20; Art. II, § 1; Art. XVIII, §§ 3, 7.

The pathway for the filing and processing of charter amendment petitions originating with the Electors of the City of Toledo is set by a combination of the Charter of the City of Toledo, the Ohio Constitution and Ohio Revised Code. Constitutional principles and provisions must govern, and therefore the BOE has no authority to invade the legislative process, despite

whatever purported authority the state legislature claims to give the BOE: the legislature has no power itself to order the BOE to violate separation of powers, due process, or political rights.

After being instructed by the City Clerk to place the Proposed Charter Amendment on the ballot, the Respondents had a legal obligation to place it on the ballot no later than September 7, 2018, sixty (60) days before the November 6, 2018 general election, in compliance with the Municipal Charter, Section 5, timing requirement for ballot placement pursuant to the City's power under the Home Rule Amendment, Const. XVIII, §§ 3 and 7. The BOE, however, failed and neglected to discharge this duty.

The technical, ministerial requirements governing the BOE's processing of initiative petitions appear in O.R.C. § 3501.38. Petitions must be signed by electors qualified to vote on the issue. Signatures must be made in ink; each signer must place on the petition the signer's name, date of signing, and location of voting residence. The petitions must have, on each paper, the circulators' indication of number of signatures and the circulators' statement that they witnessed the signatures of qualified signers. The petition must be submitted with all part petitions at one time. All of these requirements were properly observed by Relators and sufficient numbers of valid signatures were timely submitted on petition forms which complied with the requirements of statute, specifically, O.R.C. § 731.28.

The Lucas County BOE correctly discharged these ministerial O.R.C. § 731.28 responsibilities. But prior to rejecting the Proposed Charter Amendment on August 28, 2018, the BOE engaged in unconstitutional pre-election review of the Proposed Charter Amendment's substance and voted unanimously to reject LEBOR from the ballot ostensibly because it contained provisions beyond the power of the City of Toledo to legislate.[1]

---

1 If the Toledo City Council had chosen to pass the Lake Erie Bill of Rights, the BOE could not have interfered, further illustrating the separation-of-powers issues that arise from pre-election review.

The BOE's decision to keep LEBOR off the ballot contradicts decisions of the Ohio Supreme Court that prohibit county boards of elections from invalidating municipal initiatives from the ballot based on substantive evaluations of legality. *See State ex rel. Espen v. Wood County Board of Elections*, 2017-Ohio-8223, ¶ 16, Case No. 2017-1313 (October 19, 2017) (Board of Elections had no authority to invalidate a charter amendment petition based on substantive evaluation of its legality; O.R.C. § 3501.38(M)(1)(a) ruled unconstitutional); *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 55, 641 N.E.2d 1075 (1994).

In its legislative summary of HB 463, the Ohio Legislative Service Commission suggested that the act would "prevent an initiated city ordinance from appearing on the ballot if the board of elections determined that the proposed ordinance would be unenforceable because of a conflict with state law. Or, the act might prevent a county charter proposal from appearing on the ballot if the board determined that the substance of the proposed charter would be unconstitutional." OLSC Final Analysis of Sub. H.B. 463, App. 111. HB 463 was overtly aimed at unlawfully expanding boards of elections' authority, in violation of the separation-of-powers doctrine and the people's constitutional rights.

The Lucas County BOE should have followed the lead of the Wood County Board of Elections, whose vote in favor of putting a similar initiative on the ballot was upheld in *Espen*. The *Espen* court so held because "The boards of elections . . . do *not* have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms. An unconstitutional amendment may be a proper item for referendum or initiative." *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶ 11, quoted at *State ex rel. Espen v. Wood County Board of Elections*, 2017-Ohio-8223, ¶ 13 (Emphasis in *Youngstown*). This limitation derives from separation-of-powers considerations that are "implicitly embedded in the entire framework of those sections of the Ohio Constitution

that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136 (1986).

Boards of elections are part of the Executive Branch, and they cause separation-of-powers conflicts with both of the other two branches. One conflict occurs where BOEs exercise judicial powers by ruling on legal and constitutional aspects of a law (although even the judiciary refrains from judicial review until a proposed law is actually enacted law). Equally significant, however, is the conflict between Executive Branch BOEs and the people, acting as the Legislative Branch, promoting their own legislation and serving as a check on General Assembly enactments. The people's legislative powers are expressed in Article II of the Ohio Constitution:

> The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives *but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls.* The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

Ohio Const. Art. II, § 1 (Emphasis added).

The power of the people to act as legislators is further expressed in their constitutional, and inherent, right to local community self-government and the right to alter their form of government. Ohio Const. Art.1, § 2 provides that "[a]ll political power is inherent in the people" and that the people "have the right to alter, reform, or abolish the same, whenever they may deem it necessary." The power of the people further lies in Ohio Const. Art. II, § 1f, which states:

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities *may now or hereafter be authorized by law to control by legislative action*; such powers shall be exercised in the manner now or hereafter provided by law.

(Emphasis added).

From these constitutional roots, it follows that HB 463 created a separation-of-powers conflict by conferring a veto power on BOEs to prohibit the people's exercise of their constitutional rights to consult with one another and vote legislatively on proposals which they, themselves, have originated.

No Ohio court has the power, before an election, to stop election balloting on an initiated measure. It follows that there can be no authority legislated by the General Assembly for an Executive Branch BOE to forbid initiative elections because of the content of initiated proposals. HB 463 grants superior powers by statute to BOEs that supersede the legislative powers possessed by the people and the judicial powers possessed by the Ohio Supreme Court by constitution.

Indeed, the Ohio Supreme Court has foretold the dark path that unfolds before the factitious logic advanced by the General Assembly in HB 463, and executed by the Lucas County BOE. In *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, 144 Ohio St. 3d 239, 240 (2015), the Court observed that if boards of elections have the authority to "adjudicate a constitutional question," then the Supreme Court is required "to affirm its decision even if the court disagreed with the board's conclusion on the underlying constitutional question, so long as the board ha[s] not abused its discretion." *Id.* at ¶ 11. ***The bottom-line effect of HB 463 is to make boards of elections the sole judicial authority in Ohio over the exercise of the people's initiative right.*** There is nothing anywhere in the Ohio Constitution which allows or legally sustains such a move. The General Assembly may not legislate the revocation of rights under the Ohio Constitution.

Justice Fischer recognized the scope of authority review given to BOEs by HB 463 codification as unconstitutional:

> This attempt by the General Assembly to grant review power to the election boards violates the Constitution because "'the administration of justice by the judicial

> branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.'" *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 45, quoting *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus. *To the extent that R.C. 3501.38(M)(1)(a) authorizes and requires boards of elections to make substantive, preenactment legal evaluations, it violates the separation-of-powers doctrine and is unconstitutional."*

Espen, ¶ 15 (emphasis added).

Before *Espen*, Justice Fischer's dissenting opinion, joined by Justices O'Connor and O'Neil, in *State ex rel. Flak v. Betras*, 2017-Ohio-8109, ¶¶ 41-42, underscored the illegality of O.R.C. 3501.11(K)(2) and 3501.38(M):

> This court's jurisprudence limiting the authority of county boards of elections to review the constitutionality of proposed ballot measures rested squarely on separation-of-powers considerations. *Youngstown*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, at ¶ 11 (holding that questions of constitutional interpretation are resolved by the courts, not the elections boards); *State ex rel. Ebersole v. Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶ 6 ("Nor can the city council assess the constitutionality of a proposal, because that role is reserved for the courts"). It follows that the General Assembly's grant of judicial-review power to the elections boards violates the Constitution, because "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers," *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus. For these reasons, *I would hold that R.C. 3501.11(K)(2) is unconstitutional to the limited extent that it requires elections boards to make constitutional and legal conclusions pursuant to R.C. 3501.38(M). See Hazel*, 80 Ohio St.3d at 169, 685 N.E.2d 224; *Thurn*, 72 Ohio St.3d at 293, 649 N.E.2d 1205.

State ex rel. Flak v. Betras, 2017-Ohio-8109, ¶ 44 (Fisher, J., dissenting) (emphasis added).

The legislature's passage of the offending provisions of HB 463 brought to a head the inconsistencies in Ohio case law. As the Court recognized in *Flak*, 2017-Ohio-8109, ¶ 14: "[i]t is fair to say that it is sometimes difficult to distinguish between a provision that a municipality is not authorized to adopt by legislative action (something an elections board may determine per *Sensible Norwood*) and one that is simply unconstitutional (something an elections board may not determine, per *Youngstown*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, at ¶ 12)."

The Court went on to say "[b]ut that is the line our caselaw has drawn." *Flak*, ¶ 14.

The Court now has another opportunity to make very clear that substantive review pre-election is unconstitutional. The Court did so a few weeks after *Flak*, in its *Epsen* ruling, but the BOE here completely disregarded *Epsen's* express holding that O.R.C. 3501.38(M)(1)(a) is unconstitutional in this application. Indeed, BOE member Hughes quoted this unconstitutional statutory subsection to justify the BOE's "no" vote.[2] It does not matter if the BOE's process is called "scope of authority review" or "review of a measure's constitutionality." It involves the same impermissible pre-election examination of a measure's legality, in violation of the people's right to ballot access, to alter their form of government, and to legislate through their reserved power of direct democracy without interference by the Executive or Judicial Branches.

Rather than exercising restraint dictated by the Ohio Constitution, the BOE elected to ignore the Court's precedent and determine that LEBOR was unconstitutional. That is, four members of an Executive Branch agency censored for all residents of Toledo what they can and cannot vote on, and what is or is not politically allowed for debate in their community. The BOE's action not only violates the separation-of-powers doctrine, but violates the constitutionally-secured right to initiative, to alter the form of government, and to exercise core political rights. The BOE ignored *Espen* and prior case law, which held that the statutory "mandate" the BOE thought it was under was an *ultra vires* move by the General Assembly to codify the BOEs' invasion of Legislative and Judicial Branch powers. And HB 463 contains the added poison pill that "The petition shall be invalid if any portion of the petition is not within the initiative power." O.R.C. § 3501.38(M)(1)(a). This further denies the people the right of severability. The General Assembly's take-no-prisoners veto power transference from the Judicial Branch to the Executive Branch cannot stand.

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2 Board member Hughes identified himself as a lawyer. Tr. at 16:22-24.

2. The Lake Erie Bill of Rights Is Within the Scope of City's Authority to Enact Via Initiative and thus Respondents are under a Clear Legal Duty to Provide the Requested Relief.

This Court can and must rectify the inconsistencies between the *Flak/Sensible Norwood* approach and the compelling simplicity of *Espen's* bright-line separation of powers approach.

The fairly similar features among the charter proposals in Youngstown (2015, 2017 and 2018) and Bowling Green (2017 *Espen* decision) illustrate that the *Flak/Sensible Norwood* approach of politicized targeting of small "Achilles" portions of charter proposals in order to collapse them entirely not only destroys real local democracy, but ensures the spread of inconsistent standards by ill-trained executive branch political appointees. And it also subverts the constitutional role of the judicial branch.

The 2015 Youngstown charter amendment, which the Mahoning BOE tried to exclude from the ballot, guaranteed the right of local self-government to residents while banning the extraction of oil and gas within the city, the storage and handling of waste byproducts of oil and gas extraction. Toxic trespass would be forbidden; the legal rights of nature would be recognized. Misdemeanor criminal penalties were proposed, along with civil enforcement by the City government as well as by individual legal action. A severability clause was included.

The two charter amendments proposed in Youngstown in 2017 were the People's Bill of Rights for Fair Elections and Access to Local Government ("the Elections Amendment"), and the "Youngstown Drinking Water Protection Bill of Rights" ("the Water Amendment"). The Elections Amendment would have amended the Youngstown City Charter to declare a public right to fair elections and access to local government by prohibiting campaign contributions to local candidates or issues from anyone other than registered Youngstown voters. Contributions would be capped at $100 per contributor per candidate or issue, there would be a "top-two"

primary election for mayor and for ward representative, and paper ballots would be mandated to verify electronic election results. A section of the Elections Amendment affirmed the right of the people of Youngstown to enforce the rights set forth in the amendment, individually, if public officials did not do so.

The 2017 Water Amendment declared that the people of Youngstown, "along with ecosystems and natural communities within the city, possess the right to clean water, air, and soil, and to be free from activities that would violate this right and expose citizens to the harmful effects of contaminants in their water supply, including, but not limited to, the drilling of new wells or extraction of oil and gas." Private citizens would be authorized to enforce their rights through nonviolent direct action or by filing suit as a private attorney general. The Water Amendment barred City of Youngstown law enforcement, and cooperating agencies acting within the jurisdiction of the City of Youngstown, from "surveil[ing], detain[ing], arrest[ing], or otherwise imped[ing] natural persons enforcing these rights."

The Bowling Green charter amendment in *Espen* proposed a public right to a healthy environment and livable climate, including freedom from new infrastructure for fossil fuel transportation within the City of Bowling Green or on property owned by the City of Bowling Green. The citizens of Bowling Green were specifically empowered by the charter change to take enforcement action if the municipal government of Bowling Green did not do so, and would be granted immunity from prosecution for privately seeking enforcement of the charter amendment. The amendment stripped corporations that violate the public rights of their legal personhood, and affirmed the people's right to local community self-government, including the right to make law through local initiative processes. The amendment forbade interference with initiative power by attempting to stop the placement of an initiative onto the ballot on the basis of claimed substantive illegality or unconstitutionality based on review of an initiative's contents before its

enactment into law.

The 2018 Youngstown charter amendment proposal created a right to clean air, water and soil; held violators of the rights strictly liable; empowered the City of Youngstown to prosecute violations of the charter amendment; restricted income to the City from water and sewer services to be applied to the improvement of water and sewer infrastructure; guaranteed the right to local community self-government; and made its provisions severable. In April 2018, this Court issued a writ of mandamus compelling that BOE to place the proposed charter amendment on the ballot, because the BOE had abused its discretion in finding that the proposed charter amendment exceeded the city's legislative power. *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 2018-Ohio-1602.

The oversight by boards of elections in these instances demonstrate very different results. This Mahoning BOE declined to put the 2015 proposed charter amendment on the ballot and this Court overruled the agency, noting that "An *unconstitutional* amendment may be a proper item for referendum or initiative." *State ex rel. City of Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, ¶ 11 (emphasis added).

In *Flak*, the Supreme Court deemed *Sensible Norwood* to be directly on point, because the 2017 proposals purported to create a private cause of action for enforcement, something the Court considered beyond the scope of power of a municipality to do. *Id.*, ¶ 15.

But then, when the majority in *Espen* applied *Sensible Norwood's* administrative/ legislative test, the Court found that "the current proposal cannot fairly be characterized as administrative when considered in its totality." *Espen*, ¶ 12 fn. 1. The Wood County BOE's determination that it could not inquire into the substantive legality of the 2017 Bowling Green charter amendment was affirmed because it was not deemed administrative when read in context.

Then earlier this year, the Mahoning BOE had excluded the 2018 Youngstown proposal from the ballot ostensibly because *Espen* is not controlling authority, the pre-existing *Flak* decision supposedly remains viable, and the 2018 Youngstown Drinking Water Protection Bill of Rights supposedly falls outside the scope of what a local government may enact. This Court held the BOE had abused its discretion and issued a writ compelling the initiative to appear on the ballot. *Khumprakob*, 2018-Ohio-1602. Now, here, the Lucas BOE did exactly the same thing based on exactly the same reasoning that this Court has – twice in the last year alone – held to be an abuse of discretion by the BOE.

The BOE is doing something it has no power to do: veto duly-qualified proposed initiatives from appearing on the ballot. This Court must rule clearly to end these inconsistent and unconstitutional actions by county executive boards.

3. The *Espen* Rule must be affirmed to finally overrule the *Flak/Sensible Norwood* administrative/legislative distinction

The Court would never allow the Governor to forbid the state legislature from voting on a proposed bill. Separation of powers forbids that. Yet when the people propose legislation through the initiative power, the Court has left open the door to separation-of-powers violations by *ad hoc* decisions which, piecemeal, permit some quasi-judicial pre-election review of the proposed law by boards of elections. BOEs, as creatures of the Ohio Secretary of State, are executive branch entities. The bright line rule of *Espen* prohibits pre-election substantive review of proposed initiatives because of the separation of powers among the executive, legislative and judicial branches, and is necessary to preserve the people's legislative political rights and powers of petition, redress, and initiative.

Flak and *Sensible Norwood*, by allowing pre-election review of proposed measures, intrude into the power of the people to legislate laws and extirpate the power of initiative from the people. This Court has, on a case-by-case basis, spawned two incongruent lines of case law.

In one, the favored means of BOE and Secretary of State decisions that prohibit initiatives from going to the ballot, the executive branch decider tries to distinguish between "whether the ballot measure falls within the scope of the constitutional power of referendum (or initiative)" and "the legality or constitutionality of a ballot measure's substantive terms." *State ex rel. Walker v. Husted*, 2015-Ohio-3749, ¶ 15. Despite the difference in terms, at its heart, "scope of the constitutional power" is, necessarily, a question of "the legality or constitutionality of a ballot measure's substantive terms."

The other line of precedent produces writs of mandamus ordering initiatives onto the ballot based on the principle that "[t]he boards of elections, however, do *not* have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms. An *unconstitutional* amendment may be a proper item for referendum or initiative." *State ex rel. City of Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, ¶ 11 (emphasis added).

This fundamental conflict was manifest in *Espen*. The Wood County Board of Elections asserted that it did not have the power to make a legal ruling, pre-election, about the *Flak/ Sensible Norwood* administrative/legislative distinction. That BOE reserved the question for actual *review*, that is, post-election review by the courts, when a proposal has truly been enacted by plebiscite and is ripe for determination of matters of legality and constitutionality.

Similarly, the General Assembly's legislative process may not be enjoined, attacked, or restricted from General Assembly vote; challenges to defects, violations of the single-subject rule, and constitutionality are not open until there is enacted legislation on the books. It remains "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Conversely, it is emphatically not the province and duty of the judicial department to wade into the legislative process – regardless of whether it is the legislative process of the people's representatives or of the people acting in their sovereign

capacity – and decide *a priori* that a *proposed* measure is illegal, unconstitutional, invalid, "beyond the scope," or otherwise unable to be voted upon by the legislative branch.

The people of Ohio amended the Ohio Constitution in 1912 to ensure that they hold ultimate control over their government by creating the institutional tools of direct democracy: referendum and initiative. Cases such as *Flak* and *Sensible Norwood* vitiate the people's political power, and should be clearly overruled as they contradict the Ohio Constitution, which also states that "[a]ll political power is inherent [and remains] in the people." Const. Art. I, § 1 (alteration added).

Indeed, the present case illustrates that under the *Flak/Sensible Norwood* regime, granting pre-election review to boards of election is unworkable and unconstitutional because it actually empowers an executive branch board with the purported authority to deliberate and reinterpret what the Ohio Supreme Court meant in the *Espen* decision. The Lucas BOE willfully ignored *Espen* and similar cases, just as this Court held Mahoning BOE had abused its authority by doing earlier this year.

4. Respondents abused their discretion by ignoring Supreme Court precedent.

Only by the tactic of denying legitimacy to the *Espen* holding can Respondents argue that they have not abused their discretion. When *Espen* is accorded the customary stature of a Supreme Court decision, the abuse of discretion is obvious. Substantive review of initiatives by BOEs was unconstitutional both before and after the passage of H.B. 463. The prior court decisions created unworkable distinctions between "scope of authority to enact" and substantive inquiry. Respondents cannot reconcile the cases, and must hope instead for the Court to issue *ad hoc* decisions. But the Court cannot deprive the Relators of mandamus relief based on a claimed lack of a clear legal duty on the BOE's part in light of *Espen* and also given the Supreme Court's recognition in *Flak* that "it is sometimes difficult to distinguish between a provision that a

municipality is not authorized to adopt by legislative action . . . and one that is simply unconstitutional. . . ." *Flak*, ¶ 14. *Espen* cannot and should not be reconciled with *Flak*, and for the following reasons, this Court must draw a bright line rule against pre-election review.

5. Pre-election review violates the separation of powers by allowing the judicial or executive branch to prevent the legislative branch from making laws.

Ohio courts have long held that they have no power to prevent the enactment of law merely because the law, if passed, will be invalid. *State ex rel. Cramer v. Brown*, 7 Ohio St. 3d 5, 6 (1983); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 501 (1941); *Pfeifer v. Graves*, 88 Ohio St. 473, 487-88 (1913). A court's power to grant declaratory relief does not increase its jurisdiction in this regard; it merely provides an additional remedy where the court does have power. *Cf. Malloy v. Westlake*, 52 Ohio St. 2d 103, 105 (1977).

This rule is grounded in the separation-of-powers doctrine and should apply with equal force to the initiative lawmaking process of the people as well as the legislative acts of elected officials. Laws enacted through either process can be subjected to judicial review at the appropriate time, which is after they have been enacted into laws.

6. Pre-election review is not justiciable, because the courts lack the authority to review a proposed law.

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . ." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Pre-election review raises all of these justiciability warning signs.

The Ohio Constitution is clear that "[t]he legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve .

. . the power to adopt or reject any law . . . ." Ohio Const. Art. II, § 1. In Article II the Constitution also provides that "[t]he initiative and referendum powers are hereby reserved to the people of each municipality . . . ." § 1f. Without a doubt, the initiative is a legislative process, and neither the judicial branch nor the executive branch have any legitimate role to play in telling the people what they can and cannot propose as an initiative measure. The Ohio Constitution is clearly "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker, supra.*

In fact, the present controversy epitomizes the "lack of judicially discoverable and manageable standards for resolving" the pre-election review issue. The spectacle of the Lucas BOE deliberating as a pretend court and ultimately "resolving" the issue by following a statute and line of case law which this Court has declared unconstitutional, exemplifies the hazards of politically-unaccountable lay jurists deciding, often in political fashion, which court decisions they will follow, and which they will not. The people's exercise of their lawmaking powers must not be left to procedurally and substantively unmanageable standards such as whether a measure falls within the scope of what a municipality may enact. Instead, there is a clear standard available: no pre-election substantive review.

It bears noting that pre-election review comprises a judicial or executive veto over proposed legislation before the people even vote on it. Thus, pre-election review often makes an "initial policy determination of a kind clearly for nonjudicial discretion," *Baker, supra.* Questions such as whether an initiative is legislative or administrative, or *ultra vires,* are not easily resolved and can take into account a judge's particular political philosophy. It is not for the judiciary to decide whether it likes a proposed measure, nor is it for the BOE. The paradoxical, convoluted, and internally inconsistent standards used in pre-election challenges allow a judge or a BOE to reach almost any conclusion desired.

Pre-election review meets all the criteria for being a political question. The Court should refrain from deciding whether *proposed* measures are valid, and should also forbid the executive branch from doing so, too.

In pre-election challenges, other justiciability issues also arise, namely standing, ripeness, and advisory opinion. Standing requires an injury–but no one is actually concretely harmed by a duly-qualified proposed measure appearing on the ballot since it has not gone into effect, and it may not even survive the election.

Pre-election review guarantees unripe proposals and risks ill-considered effects. "[T]he ripeness requirement 'prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Roll v. Edwards*, 156 Ohio App. 3d 227, 2004-Ohio-767, ¶ 27 (4th App. Dist.) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), abrogated on other grounds by *California v. Sanders*, 430 U.S. 99 (1977)). By deciding the constitutionality, validity, legality, scope–whatever one may call it–of a merely proposed measure not yet enacted into law, the court (or the BOE) necessarily applies an abstract, hypothetical set of facts to adjudicate an assumed, future, controversy. Pre-election review, by definition, will not produce decisions characterized by ripeness.

Then there is the advisory opinion problem. In allowing the BOE to decide whether a proposed measure is valid, or by determining as much itself, the courts issue speculative opinions on the legality of proposed measures which are not enacted laws. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, this Court reiterated that Ohio courts cannot issue advisory opinions:

> It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062, 1999-Ohio-123 (1998), quoting *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 35, 257 N.E.2d 371, 372 (1970).

Thus, in pre-election review, the courts do what they expressly should not do: provide advisory guidance on proposals that are still part of the legislative process.

7. Pre-election review–when practiced by the Boards of Election–is executive branch judicial review, and is scrutinized only for "abuse of discretion" by the judiciary.

Appellate courts "review the constitutionality of a statute *de novo*." *E.g., State v. Rodgers*, 166 Ohio App. 3d 218, 2006-Ohio-1528, ¶ 6 (10th App Dist.). Thus, in a post-election challenge to a new law enacted by the people as an initiative, the courts would apply the *de novo* standard. But review of decisions of a board of elections is only for "abuse of discretion." This Court is well aware of the trade-off caused by the "abuse of discretion" standard:

> Husted's interpretation of R.C. 307.95(C) would permit him to disqualify ballot initiatives before they are submitted to the electorate based on his legal opinion of their constitutionality. Challenges to his decisions would then come before this court in mandamus, and the question would be whether the secretary abused his discretion. As is well established, abuse of discretion means more than an error of law or of judgment. *Sivit v. Village Green of Beachwood, L.P.*, 143 Ohio St.3d 168, 2015-Ohio-1193, 35 N.E.2d 508, ¶ 9. Rather, it "implies an attitude * * * that is unreasonable, arbitrary, or unconscionable." *Ojalvo v. Ohio State Univ. Bd. of Trustees*, 12 Ohio St.3d 230, 232, 12 Ohio B. 313, 466 N.E.2d 875 (1984). In close cases, therefore, we might very well be compelled to find that the secretary reasonably disqualified a ballot measure, in the exercise of his discretion, even if we, in the exercise of our constitutional duties, would deem the measure constitutional. *In that scenario, the voters would be denied the opportunity to vote on a constitutional ballot measure, and decisions of constitutional interpretation would be made by the chief elections official, rather than the supreme court of the state.*

State ex rel. Walker v. Husted, 144 Ohio St.3d 361, 43 N.E.3d 419, 2015-Ohio-3749, ¶ 18 (2015) (emphasis added).

So, even if a BOE's pre-election review to ascertain whether an initiative is within the "scope of authority to enact" may actually have been a substantive review to determine constitutionality, scrutiny by the courts would be limited to "abuse of discretion." By contrast, a

constitutionality determination by a trial court would be reviewed *de novo*. Strategically, an initiative's opponents have a better chance by focus on defeating an initiative pre-election, by convincing three BOE officials that the initiative is illegal, unconstitutional, or otherwise "beyond the scope" of the initiative power. Getting an initiative rejected from the ballot by a BOE, with the difficult "abuse of discretion" standard to contend with by the loser, is greatly preferred by initiative opponents as a much better bet than going to the difficulty and expense of running a political campaign to defeat an initiative, or filing a post-enactment legal challenge against it (which would be court-reviewed *de novo*). Ironically, by according BOEs the power to review the constitutionality/validity/legality/scope of a proposed measure, the courts surrender their responsibility to be the final arbiter of constitutional issues in Ohio law.

8. Under the *Flak/Sensible Norwood* scheme, BOEs can outlaw initiatives as a conscious means of enforcing legislative pre-emption.

If the BOE's become the dominant player in vetoing local initiatives based on "scope of authority" reasoning, then as the legislature continues to pass laws that preempt local lawmaking on issue after issue, the ultimate end result will be to strip the people of their constitutional rights, issue by issue. The Ohio General Assembly has already pre-empted local control over the past decade or so on oil/gas, guns regulations, predatory lending, minimum wage, local hire, residency of public safety workers, placement of micro wireless technology in communities, and the sales of puppies bred in puppy mills. There is no end in sight for legislative pre-emption. If the interpretation of "outside the scope of the municipal authority to enact" allows a board of elections to cut off challenges to any law passed by the General Assembly, no otherwise properly-circulated initiatives proposed by the people will be allowed on the ballot.

The right to initiative is the people's check and balance on a legislature that is no longer representing their interests. Allowing arbitrary BOE initiative vetoes to predominate eliminates the ability to challenging state-level enactments that the people find oppressive and harmful.

9. Precedent may be overturned when circumstances do not justify it, it is unworkable, and it would not create undue hardship based on past reliance.

"A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, syll. ¶ 1. Any or all of these reasons would sustain the overruling of the practice of allowing executive or judicial pre-election review of proposed measures.

The practice of pre-election review is neither so entrenched nor widely-accepted that it could be abandoned only with difficulty. The post-election review practice has existed and been invoked for over 100 years. And the experience of post-enactment judicial review (of laws passed through both direct and representative democracy) proves that the courts are perfectly capable of figuring out which laws are legal and/or constitutional, after the legislative process is over.

Abandoning the practice of pre-election review would not create an undue hardship for those who have relied on it. Rather, doing away with pre-election review of proposed measures would clarify the proper role of the executive and judicial branches in regard to the lawmaking powers of the people, and would make that process consistent between lawmaking by the people and lawmaking by their representatives. The burden of this Court in having to resolve mandamus challenges would likely be reduced in favor of post-election challenges taking the more normal course through the court system. Abolishment of the pre-election challenge would change the timing of when such claims could be introduced into court to the point when a proposed measure actually becomes a law.

10. The scope-of-authority review is unconstitutional and impermissible, and thus Respondents are under a Clear Legal Duty to Provide the Requested Relief.

It is unconstitutional to determine, pre-election, whether a proposed measure involves a subject which a municipality is authorized to control by legislative action. This inquiry necessitates impermissible constitutional review. To the extent the BOE relies on *State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elections*, 2016-Ohio-5919, ¶ 9, 148 Ohio St. 3d 176, 178, 69 N.E.3d 696, 699, it abused its discretion. Footnote 1 of the *Espen* opinion clearly found that a similar proposed measure could not "fairly be characterized as administrative when considered in its totality." Pre-election review violates the people's constitutional rights to ballot access, due course, initiative, and to alter their government. The facts of this case illustrate the dangers of pre-election review, including violation of separation of powers and principles of statutory interpretation. Petitioners submit that all provisions of the proposed measure are constitutional (although that determination is for a later date, post-enactment, by a court). And in that post-enactment review, the court might determine that certain provisions are valid while others are not, and severability analysis would determine which provisions, if any, are struck. How is it that members of a board of elections can make decisions about the constitutionality of certain provisions of the proposed charter amendment, and thereby decide to prevent the people from voting on the whole measure? The answer is they cannot. And the reason why is apparent.

The BOE's vote to reject the Proposed Charter Amendment from the ballot was unlawful and unconstitutional in multiple ways. Respondents' vote to reject reflects their lay opinions of the constitutionality and legality of the initiative and whether the "scope" of what a municipality may enact has been exceeded. The HB 463 procedure is impermissibly content-based and it confers on an Executive Branch agency (the BOE) a pre-election veto over any popular initiative with which this agency government disagrees.

11. Relators have no Plain and Adequate Remedy in the Ordinary Course of Law.

In order to constitute an adequate remedy at law, "[t]he alternative must be complete, beneficial, and speedy. . ." *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2004-Ohio-5469, 816 N.E.2d 245, ¶ 8; *State ex rel. Smith v. Cuyahoga Cty. Court of Common Pleas*, 106 OhioSt.3d 151, 2005-Ohio-4103, 832 N.E.2d 1206, ¶ 19 (same).

Several Ohio Supreme Court mandamus cases arise in the election context where, as here, with a fast-approaching election, the party lacks an adequate remedy in the ordinary course of law. *See, e.g., State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 26, 941 N.E.2d 782, 793 (2011) ("because of our recognition of mandamus as the appropriate remedy and the need to resolve this election dispute in a timely fashion, relators lack an adequate remedy in the ordinary course of the law"); *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 2007-Ohio-5346, ¶ 8, 115 Ohio St. 3d 405, 406 ("Given the proximity of the November 6 election, Duncan has established that he lacks an adequate remedy in the ordinary course of law."); *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, 841 N.E.2d 757, ¶ 30 ("Given the proximity of the November 8 election, Canales-Flores has established that she lacks an adequate remedy in the ordinary course of law.").

The electors have the right to vote on the Proposed Charter Amendment. Damages cannot provide adequate compensation for a violation of voters' fundamental right to participate in the democratic process. Relators have acted promptly, timely, diligently and responsibly to bring this matter before the Court. Their efforts and momentum toward adoption of their Petition would be undermined by a delay in election cycles. Expedited review is essential to securing the people's right to participate in their community governance. *See State ex rel. Cope v. Cooper*, 121 Ohio St. 519, 525, 169 N.E. 701 (1930) ("in emergent cases, where defendant should be brought into court at an earlier date, application may and should be made to the court, and a time

fixed for appearance and to show cause why the writ should not be granted, within a shorter period than that fixed by the Code relating to services of summons."). Relators, therefore, satisfy the third requirement for mandamus relief.

B. <u>Proposition of Law No. 2:</u> Respondents' refusal to certify the Proposed Charter Amendment petitions to the ballot violates Relators' Rights Under the First Amendment of the U.S. Constitution and Article I, § 11 of the Ohio Constitution

The U.S. Constitution prohibits pre-enactment review of an initiative's content because such review is content-based discrimination against core political speech that lacks a compelling government interest. Fourteenth Amendment protections "govern any action of a state, whether through its legislature, *through its courts*, or through its executive or administrative officers." *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (emphasis added) (citations omitted). Pre-election review (whether by the BOE or the courts) that results in an order vetoing an initiative from appearing on the ballot is a state action that must not violate the people's political rights. *See Shelley v. Kraemer*, 334 U.S. 1, 16-18 (1948).

The Free Speech Clause of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. Amend. I.[3] Ohio Const. Article I, § 11 similarly provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."[4]

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3 The First Amendment is applicable to the political subdivisions of the states under the Due Process Clause of the Fourteenth Amendment. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n. 1 (1996).

4 Ohio courts are generally guided by case law interpreting the First Amendment of the United States Constitution in interpreting Article I, § 11 of the Ohio Constitution, with some exceptions. *See City of Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 709 N.E.2d 1148, 1152 (1999) ("First Amendment is the proper basis for interpretation of Section 11, Article 1, [of the] Ohio Constitution"); *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 427 (S.D. Ohio 2011) ("The Ohio Constitution goes beyond the federal Constitution in that certain false statements of opinion are protected. This protection exists as a separate and independent guarantee ancillary to freedom of expression and requires a reviewing court to determine whether the language in question is fact or opinion.").

The U.S. Supreme Court has held that "the circulation of a[n initiative] petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (footnote omitted). The *Meyer* Court rejected arguments that "the State has the authority to impose limitations on the scope of the state-created [sic[5]] right to legislate by initiative," holding instead that in the area of citizen initiative lawmaking "the importance of First Amendment protections is 'at its zenith" and the state's burden to justify restrictions on that process is "well-nigh insurmountable." *Id.* at 424-25.

The ballot initiative process constitutes political speech to which the First Amendment applies. Indeed, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The First Amendment protects Relators' right not only to advocate their cause but also to select what they believe to be the most effective means of achieving that. *Id.* at 424.

In *Meyer*, the United States Supreme Court recognized that the state cannot place restrictions on the exercise of the initiative procedure that unduly burden First Amendment rights. The state infringes on the people's core political rights when it "limits the size of the audience they can reach" or "limit[s] their ability to make the matter the focus of [jurisdictionwide] discussion." *Id.* at 423; *see also Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) ("A person's First Amendment free speech right is at its highest when that person engages in 'core political speech,' which includes issue-based advocacy related to ballot initiatives.") (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S.

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5 Here the *Meyer* Court was referring to the initiative as a state, rather than federal, lawmaking power, thus the use of the term "state-created." But it needs to be clarified that the right to legislate by initiative is a reserved inherent political power of the people; it is not created by the state.

334, 347, 351 (1995)). In other words, "a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). States may only impose "necessary and proper ballot controls that do not unjustifiably inhibit the circulation of ballot-initiative petitions." *In re Protest of Brooks*, 2003-Ohio-6525, ¶ 18, 155 Ohio App. 3d 384, 388, 801 N.E.2d 514, 517 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999)).

Limitations on political expression are subject to strict scrutiny. *Meyer*, 486 U.S. at 420 ("We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny."); *Buckley*, 525 U.S. at 207-08 (1999). Initiative procedures that contain content-based restrictions are generally unconstitutional.

It is irrelevant that the people may have other means to express themselves. "The First Amendment protects [the people's] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Meyer* at 424. The state infringes on the people's core political rights when it "limits the size of the audience they can reach" or "limit[s] their ability to make the matter the focus of [jurisdiction-wide] discussion." *Id.* at 423. "[T]he principle stated in *Meyer* is that a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993).

Obviously, a pre-election order that rules on the validity of a proposed measure and strikes that measure from the ballot will necessarily limit future discussion of the proposed policy, and thus infringe the people's First Amendment rights.

It remains true that BOEs and courts can have a legitimate role in the initiative process, such as enforcing "nondiscriminatory, *content-neutral* limitations on the [people's] ability to initiate legislation," like the signature threshold for ballot placement. *Id.* at 297 (emphasis added). But in the present litigation, the *Sensible Norwood* and *Flak* decisions allow BOEs to bar initiatives even when they have properly qualified for the ballot. The BOEs have relied entirely on the *content* of the initiatives, and when they issue an order that strikes the initiative from appearing on the ballot, they thereby infringe upon the people's political rights. The signature threshold is the mechanism the people have chosen for determining which proposed initiatives will appear on the ballot. But this Court has given the executive and judicial branches the power to dissect the *content* of the proposed measure and veto the proposal. In other words, the courts are assuming the power to restrict "core political speech" precisely *because* of the proposed initiative's content.

No compelling interest can justify this infringement on the people's First Amendment rights.[6] The best argument to justify this infringement is that the court is protecting the integrity of the initiative process by striking initiatives from the ballot that are "beyond the scope of the initiative power." But this argument only works if the First Amendment only protects speech that is "valid," as judged by the court. The First Amendment guarantees far more than that: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998) (quoting *Meyer*, 486 U.S. at 419) (quotation omitted).

Letting a court or executive official decide which political speech is valid is antithetical to the fundamental purpose of the First Amendment. The First Amendment is about protecting

6 While the argument above is focused on *Meyer*, which itself focused on political speech, the First Amendment rights of assembly and petition are also implicated here. U.S. Const., 1st Amend. ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

the *debate*, and is not a means of discarding "invalid" proposals through a judicial validation process. *See, e.g., id.* at 626 ("The State cannot substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." (quotation and citation omitted)).

Striking a duly-qualified proposed measure from the ballot in the course of pre-election review is inherently not "narrowly-tailored." It is the most extreme remedy possible because it abolishes the actual political significance of the people's constitutionally-protected debate. Further, judicial review of *proposed* legislation is inherently *unnecessary*, since the people may vote it down. The Court has no authority to police the content of proposals that the people put forward through duly-qualified initiatives. This Court must hold that the First Amendment prohibits striking an initiative from the ballot based on the initiative's content, which means that pre-election review and veto is not allowed.

Here, the manner in which Respondents applied Ohio statutes pertaining to the pre-election determination of a petition's validity violated Relators' First Amendment right to political speech free from content-based restrictions. Respondents' reviews went beyond the ministerial act of counting the number of valid signatures and determining whether the petitions met the procedural requirements of law.

When the BOE ignored the *Espen* ruling, wherein the municipal governmental parts of HB 463 were stricken as unconstitutional, and applied HB 463 to allow pre-election content review of charter proposals, Respondents violated Relators' First Amendment rights. The Constitution does not allow this type of content-based review, and the Court should not allow the BOE to interpret the relevant statutes in a manner inconsistent with the Constitution. *See State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, ¶ 15 (2015) (the "authority to determine whether a ballot measure falls within the scope of the constitutional power of

referendum (or initiative) does not permit election officials to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms."); *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.") (quoting *Meyer*, 486 U.S. 419) (quotation omitted). Consistent with Relators' constitutional rights, Respondents' review under Ohio statutes is limited to form – not content – and validity of signatures.

Finally, Respondents cannot survive strict scrutiny because they can show no compelling interest that would justify content-based review. No compelling interest can justify this infringement on the people's First Amendment rights by preemptively preventing them from voting, nor is that remedy even necessary, since a legal challenge to the Proposed Charter Amendment could be brought, post-election. Ratification of Respondents' approach of allowing content-based pre-election review by the BOE encourages an unfair and arbitrary initiative process dependent upon the subjective views of government officials. HB 463 improperly burdens voting rights secured by the First and Fourteenth Amendments because it allows a BOE to discriminate based on political content and prevents access to the ballot. *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998).

C. <u>Proposition of Law No. 3:</u> HB 463 is unconstitutional because it violates the "one-subject rule" of Art. II, § 15(D) of the Ohio Constitution.

Article II, § 15(D) of the Ohio Constitution recognizes the role of the one-subject rule in the legislative process.[7] Since its enactment to the state constitution in 1851, the primary purpose of the one-subject rule has been to prevent logrolling, a legislative practice where two or more unrelated provisions are included in a single piece of legislation for the purpose of facilitating the

7 Art. II, § 15(D) reads: "*No bill shall contain more than one subject*, which shall be clearly expressed in its title." (Emphasis added).

passage of laws that may otherwise lack majority support. *See Pim v. Nicholson*, 6 Ohio St. 176, 179 (1856); *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 142 (1984); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 533, 715 N.E.2d 1062 (1999).

Ohio courts have required legislation to serve a "common purpose or relationship" in order to comply with the one-subject rule. Consistently following the reasoning in *Dix*, Ohio courts have found legislation unconstitutional where there is "an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act." *Dix*, 11 Ohio St.3d at 157; *see also, Hoover v. Board of County Com'r, Lucas County*, 19 Ohio St.3d 1, 6, 482 N.E. 2d 575 (1985); *Beagle v. Walden*, 78 Ohio St.3d 59, 62 (1991); *Sheward*, 86 Ohio St.3d 533.

Under Ohio jurisprudence, HB 463 clearly violates the one-subject rule of Art. II, §15(D). The subjects addressed by HB 463 lack a common purpose or relationship. The bill makes or alters law concerning: (1) the powers of county commissioners concerning the adoption of county charters, (2) taxes on real property, (3) the removal of elected officers, (4) commercial transactions, (5) health insurance coverage for autism spectrum disorder, (6) foreclosures, (7) child abuse prevention councils, (8) duties of the Board of Elections, and (9) the Civil Rights Commission.[8] The Ohio Legislative Service Commission's bullet-point summary of the various statutory enactments contained within HB 463 covers five single-spaced pages. OLSC Final Analysis, App. 82-86. These topics are so diverse as to defy any common purpose or relationship to comply with the one-subject rule. HB 463 typifies political logrolling.

8 HB 463 itself includes this list of subjects: "the Ohio Uniform Commercial Code, real property foreclosure and escrow transactions, and local ballot initiatives; to require the coverage of autism spectrum services; to reimburse child abuse and child neglect regional prevention council members for expenses and prohibit conflict of interest; and to amend the statutory procedure for recalling certain municipal officials to include a deadline for filing a petition for recall." *H.B. No. 463, 131st General Assembly, Regular Session, 2015-2016.*

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, the Ohio Supreme Court analyzed an act much like HB 463. 86 Ohio St.3d 451 (1999). The court noted that the "bill affects some eighteen different titles, thirty-eight different chapters, and over one hundred different sections of the Revised Code, as well as procedural and evidentiary rules and hitherto uncodified common law." *Id.* at 497. The court found that "[t]he various provisions in this bill are so blatantly unrelated that, if allowed to stand as a single subject, this court would be forever left with no basis upon which to invalidate any bill, no matter how flawed." *Id.* at 498.

Similarly to the bill in *Sheward*, HB 463 is long and diverse, affecting eleven different titles, eighteen different chapters, and fifty-one sections of the Ohio Revised Code. Also, like the *Sheward* bill, there is no single subject that could possibly incorporate the breadth of subjects addressed without wholly ignoring the central purpose of the one-subject rule. *See also, State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL–CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122 (2004) (assertion that an appropriations bill's subject is the effects on the state budget renders the one-subject rule "meaningless.").

Ohio courts have consistently recognized that while the *multiplicity* of topics in a single act is not objectionable, the *disunity* of subjects is unlawful under the one-subject rule. *Id.* at 534; *see also, Dix*, 11 Ohio St.3d at 146; and *Hoover*, 19 Ohio St.3d at 6. In HB 463, the disunity of the topics addressed is fatal to the bill.[9] Therefore, HB 463 is unconstitutional under the one-subject rule of Art. II, § 15(D).

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9 Where legislation has been found to be unconstitutional under the one-subject rule, when possible, Ohio courts have rescued legislation by determining the primary portion of the legislation, and severing the unrelated additional provisions. *Sheward, supra*, at 500. However, in *Sheward*, the court was unable to sever portions of the act because the complexity of determining the *primary* portion of the act was beyond the judicial function of the court. *Id.* The same logic applies to HB 463; it is not rescuable.

III. CONCLUSION

Judicial review of legislation, looking at the legal and constitutional substance – the text of the proposed measure, must be ruled off limits until the proposal has been actually passed into law. Only then can judicial review occur. This Court has upheld that principle but has also simultaneously and inconsistently entertained a contradictory line of case law that allows the courts and executive election officials to veto the process of lawmaking by the people. The contradictory process has wreaked havoc on the people's core political rights, and tested the notions of judicial restraint as well as justiciability standards. This Court should now definitively overrule those cases that allow pre-election review, and firmly enforce the bright line rule that prevents judicial and executive encroachment into the legislative power. Ohio can no longer tolerate pre-election review. This Court should find that the Lucas BOE abused its discretion by engaging in unconstitutional substantive pre-election review in violation of the people's constitutional rights and contrary to the Court's decision in *Espen*.

The Lucas County Board of Elections acted unlawfully and abused its discretion by prohibiting the proposed Charter Amendment from appearing on the ballot. As part of the Executive Branch, boards of elections have no authority to review the substance of measures proposed by the people before the people have enacted those measures into law.

Nor does the Ohio General Assembly have the power to authorize BOEs to conduct such substantive review. The purported authorization through HB 463 is unconstitutional because it violates the separation of powers by granting judicial review powers to the Executive Branch, withdrawing those powers from the Judicial Branch and the People, acting as part of the Legislative Branch, and because HB 463 comprises a content-based prior restraint on political speech. Last year this Court agreed with these arguments in *Espen*.

In addition, the General Assembly fatally erred in its passage of HB 463 by combining the BOE review "authorization" with numerous other provisions, which blatantly violates the single-subject rule.

Relators lack an adequate remedy at law because there is no challenge mechanism available which will conclude in time to ensure that the Proposed Charter Amendment appears on the November 6, 2018 ballot. In these circumstances, the Supreme Court should grant Relators the requested writ, and order the BOE to place the Proposed Charter Amendment on the Toledo city election ballot for November 6, 2018.

WHEREFORE, Relators pray the Court reverse the August 28, 2018 decision of the Lucas County Board of Elections to reject the proposed Lake Erie Bill of Rights from appearing on the ballot, and that it order the measure to be placed on the ballot for a vote on November 6, 2018.

Respectfully submitted,

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IV. CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2018, I sent a copy of the foregoing "Relators' Merit Brief" via electronic mail to the following:

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Appendix Table of Contents

A. United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

B. United States Constitution Fourteenth Amendment

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by

a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

C. Ohio Constitution Article I, Section 2

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

D. Ohio Constitution Article I, Section 3

The people have the right to assemble together, in a peaceable manner, to consult for the common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances.

E. Ohio Constitution Article I, Section 11

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

F. Ohio Constitution Article I, Section 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits maybe brought against the state, in such courts and in such manner, as may be provided by law.

G. Ohio Constitution Article I, Section 20

This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

H. Ohio Constitution Article II, Section 1

The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as herein after provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

I. Ohio Constitution Article II, Section 1f

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

J. Ohio Constitution Article II, Section 15(D)

No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

K. Ohio Constitution Article XVIII, Section 3

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

L. Ohio Constitution Article XVIII, Section 7

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

M. Columbus Charter Section 42-11

Council action on a petition for any proposed ordinance, referendum, or charter amendment shall be by ordinance. No city officer may consider the subject matter of a petition when determining the legal sufficiency thereof, except as required to assure compliance with applicable provisions of this charter, general laws of the state, or ordinance of council. Any petition and any signatures upon the part-petitions thereof found to be sufficient as provided herein shall be presumed to be in all respects sufficient, unless not later than forty-five days before the election, it shall be otherwise proven.

N. Columbus Charter Section 43-1

Upon receipt of the report regarding the validation of signatures, the city clerk shall read a summary of the same into the record. Within fourteen days thereafter, the council shall determine the sufficiency of the petition by ordinance. Should the council find such petition sufficient, it shall vote within thirty days to either adopt the proposed ordinance without alteration, or by ordinance forthwith order and provide for the submission of such proposed ordinance in its original form to a vote of the electors of the city.

O. Columbus Charter Section 43-2

The aforesaid ordinance shall require that such proposed ordinance be submitted at the next regular municipal election if one shall occur not less than sixty nor more than one-hundred-twenty days after its passage. If no such election will be held within the period herein provided, the council shall, at its sole discretion, order and provide for the submission of such proposed ordinance to a vote of the electors of the city at either a special election within such period, or at the next regular municipal election.

P. Ohio Revised Code Section 731.28

Ordinances and measures proposed by initiative petition.

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

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

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

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

Q. Ohio Revised Code Section 3501.11(K)(2)

Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

R. Ohio Revised Code Section 3501.38(M)

(1) Upon receiving an initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, concerning a ballot issue that is to be submitted to the electors of a county or municipal political subdivision, the board of elections shall examine the petition to determine:

(a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power; or

(b) Whether the petition falls within the scope of a county's authority to enact via initiative, including whether the petition conforms to the requirements set forth in Section 3 of Article X of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county officers by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The finding of the board shall be subject to challenge by a protest filed pursuant to division (B) of section 307.95 of the Revised Code.

(2) After making a determination under division (M)(1)(a) or (b) of this section, the board of elections shall promptly transmit a copy of the petition and a notice of the board's determination to the office of the secretary of state. Notice of the board's determination shall be given to the petitioners and the political subdivision.

(3) If multiple substantially similar initiative petitions are submitted to multiple boards of elections and the determinations of the boards under division (M)(1)(a) or (b) of this section

concerning those petitions differ, the secretary of state shall make a single determination under division (M)(1)(a) or (b) of this section that shall apply to each such initiative petition.

City of Toledo
Office of the Clerk of Council
One Government Center, Suite 2140
Toledo, Ohio 43604

Date: August 15, 2018

To: LaVera R. Scott, Director, Lucas County Board of Elections
Theresa M. Gabriel, Deputy Director, Lucas County Board of Elections

From: Gerald E. Dendinger, Clerk of Council

Subject: Two (2) Petitions

Attached are two (2) Petitions that I have received, determined to be sufficient and hereby request the Lucas County Board of Election to provide for an election at the November 6, 2018 General Election. The two (2) Petitions are:

Lake Erie Bill of Rights
Keep the Jail in Downtown Toledo

Attached are a paper-copy of the two (2) Petitions. I have also e-mailed the two (2) Petitions to you.

Thanks!

RECEIPT FOR RESOLUTIONS

Board of Elections of Lucas County, Ohio

Receipt Number: 000021
Date: August 15, 2018
Time: 2:34 PM

Received of: Gerald Dendinger

☐ Tax Levy: _____

☐ Bond Issue: _____

☒ Charter Amendment: Lake Erie Bill of Rights - Petition determined to be sufficient and hereby request the Lucas County Board of Elections to provide for an election at the November 6, 2018 General Election

☐ Other: Copy attached and copy emailed to Lavera Scott & Theresa Gabriel

Miesha Hughley
Board of Election's Staff Signature

Customer Copy

Law Office
TERRY JONATHAN LODGE

316 N. Michigan Street, Suite 520
Toledo, Ohio 43604-5627

Phone (419) 205-7084
Fax (419) 452-8053
lodgelaw@yahoo.com

August 23, 2018

Dr. Bruce Saferin, Chairman
Brenda Hill
Joshua Hughes
David Karmol
c/o Lavera Scott, Director
c/o Theresa Gabriel, Deputy Director
Lucas County Board of Elections
One Government Center, Ste. 300
Toledo, OH 43604
Via email to lscott@co.lucas.oh.us and tgabriel@co.lucas.oh.us

RE: Lake Erie Bill of Rights initiative petition (memorandum on legal obligations of Board of Elections)

Dear Members of the Lucas County Board of Elections, Director Scott and Deputy Director Gabriel:

On behalf of Brittney Ann Bradner, Julian C. Mack, Michelene McGreevy, Sean M. Nestor, and Bryan Twitchell, the sponsoring Committee of Petitioners for the Lake Erie Bill of Rights (hereinafter "Committee"), I'm writing to provide the legal context in which the Board of Elections ("BOE") is required to consider and act upon the Bill of Rights proposal (hereinafter "LEBOR").

BOE Consideration of Whether Parts of the Proposal Are Outside Of Municipal Power to Enact Is Unconstitutional and Impermissible

The central principle that governs the BOE's deliberations over whether to put LEBOR on the ballot is that the Board's role is ministerial and limited. At least 6,438 signatures - many more than necessary - were gathered on part-petition forms that met applicable format requirements. The proposal represents a unified approach to an identified public health and environmental crisis involving the Lake Erie watershed. The Committee has a clear legal right to placement of the LEBOR on the ballot, free of any considerations by the BOE of its contents or speculation as to whether parts of it may be legally unenforceable if LEBOR is voted into law by the electors. The BOE has no discretion to reject LEBOR from the ballot.

There are many Ohio Supreme Court cases supporting this conclusion.
We acknowledge that in 2016, the General Assembly enacted House Bill 463 ("HB 463")

to the authority of boards of elections. HB 463 added and amended the Ohio Revised Code in several places: O.R.C. § 3501.11(K)(2), O.R.C. § 3501.38(M), and O.R.C. § 3501.39(A)(3). In particular, O.R.C. § 3501.38(M)(1)(a) added this new responsibility: "(a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot."

There is much controversy over this new wording. Boards of elections are part of the Executive Branch, under the Secretary of State. Courts are part of the Judicial Branch. Boards of election have ministerial responsibilities such as counting and verifying the adequacy of elector signatures on petitions. Section 3501.38 imposes standards that only the courts may apply upon members of boards of elections, many of whom are not lawyers and are not qualified to make legal decisions. A legislative mandate using magic wording such as "within the scope of authority" cannot transform the BOE's ministerial review into a legal veto. Judicial-like review of LEBOR by an Executive Branch board of elections would be illegal.

In 2015, the Supreme Court, in *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, ¶ 4, 144 Ohio St. 3d 239, 240, 41 N.E.3d 1229, 1231, directed the Mahoning County Board of Elections to put a charter amendment proposal similar to the LEBOR on the ballot. The BOE had claimed that the proposed amendment was unconstitutional and refused to put it up for a vote by the electors. In finding that the BOE abused its discretion, the Ohio Supreme Court said:

> The boards of elections, however, do not have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms. ***An unconstitutional amendment may be a proper item for referendum or initiative***. Such an amendment becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction. Any other conclusion would authorize a board of elections to adjudicate a constitutional question and require this court to affirm its decision even if the court disagreed with the board's conclusion on the underlying constitutional question, so long as the board had not abused its discretion.

Id. at ¶ 11. (Emphasis added).

The Mahoning BOE had acted on the personal opinions of its members about the constitutionality of the proposal. But questions of legality and constitutionality are for judges to decide based on objective considerations, and not until after the election.

The Ohio Supreme Court in *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223, 2017 WL 4701143 (2017) (Slip Op.) held that boards of elections cannot use O.R.C. 3501.38(M)(1)(a) to keep a proposed measure off the ballot. The Court recognized that the scope of authority review codified by HB 463 is unconstitutional:

> This attempt by the General Assembly to grant review power to the election boards violates the Constitution because "'the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.'" *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 45, quoting *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus. ***To the extent that R.C. 3501.38(M)(1)(a) authorizes and requires boards of elections to make substantive, preenactment legal evaluations, it violates the separation-of-powers doctrine and is unconstitutional.***"

(Emphasis added). *Espen*, ¶ 15.

In *State ex rel. Flak v. Betras*, 2017-Ohio-8109, ¶¶ 41-42, decided only weeks before *Espen,* Supreme Court Justice Fischer had dissented along with Justices O'Connor and O'Neil, giving this assessment of the illegality of O.R.C. 3501.11(K)(2) and 3501.38(M):

> This court's jurisprudence limiting the authority of county boards of elections to review the constitutionality of proposed ballot measures rested squarely on separation-of-powers considerations. *Youngstown,* 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, at ¶ 11 (holding that questions of constitutional interpretation are resolved by the courts, not the elections boards); *State ex rel. Ebersole v. Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶ 6 ("Nor can the city council assess the constitutionality of a proposal, because that role is reserved for the courts"). It follows that the General Assembly's grant of judicial-review power to the elections boards violates the Constitution, because "[the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers," *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus. For these reasons, ***I would hold that R.C. 3501.11(K)(2) is unconstitutional to the limited extent that it requires elections boards to make constitutional and legal conclusions pursuant to R.C. 3501.38(M).*** See *Hazel*, 80 Ohio St.3d at 169, 685 N.E.2d 224; *Thurn*, 72 Ohio St.3d at 293, 649 N.E.2d 1205.

State ex rel. Flak v. Betras, 2017-Ohio-8109, ¶ 44 (Fisher, J., dissenting) (emphasis added).

The Ohio Supreme Court has observed that "it is sometimes difficult to distinguish between a provision that a municipality is not authorized to adopt by legislative action (something an elections board may determine per *Sensible Norwood*) and one that is simply unconstitutional (something an elections board may not determine, per *Youngstown*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, at ¶ 12)." *Flak*, 2017 -Ohio- 8109, ¶ 14.

If the BOE vetoes the LEBOR f rom the ballot, it will not only violate the separation-of-powers doctrine, it will also violate the people's constitutional right to initiative in order to alter the form of their government, and it will frustrate the people's exercise of core political rights.

The members of BOE cannot put their own opinions about constitutionality and legality above the ability of the courts to make those decisions only after the people have spoken.

The BOE cannot exercise a pre-election veto just because it happens to disagree with a qualified initiative. Ohio courts have long held that BOEs have no power to prevent the enactment of law merely because the law, if passed, will be invalid. *State ex rel. Cramer v. Brown*, 7 Ohio St. 3d 5, 6 (1983); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 501 (1941); *Pfeifer v.Graves*, 88 Ohio St. 473, 487-88 (1913). The Ohio Supreme Court would never allow the Governor to forbid the state legislature from voting on a proposed bill. Separation of powers forbids that. Yet under HB 463, when the people propose legislation through the initiative power–and are thus acting as their own legislators--they must overcome the frustrating position by some BOEs that they can destroy a legislated enactment of the people based on sheer disagreement with the ideasbeing offered for a vote.

Pre-election review guarantees unripe proposals and risks ill-considered effects. "[The ripeness requirement 'prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Roll v. Edwards*, 156 Ohio App. 3d 227, 2004-Ohio-767, ¶ 27 (4th App. Dist.) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), abrogated on other grounds by *California v. Sanders*, 430 U.S. 99 (1977)). The same logic and law applies to boards of elections. By deciding the constitutionality, validity, legality, scope–whatever one may call it–of a merely proposed measure, the BOE will necessarily be assuming hypothetical facts and adjudicating a future controversy that doesn't yet exist. A pre-election legal veto is nothing more than trial by speculation.

The BOE doesn't have the power to decide when and where the Ohio Constitution applies to protect the people's rights. The BOE's members cannot deny the public a vote just because they disagree with the proposal. The LEBOR represents hundreds of volunteer hours of signature gathering and campaign work. The Committee's detailed, thoughtful proposal is required to be accorded the same respect, legally speaking, that is given the introduction and passage of legislation by the Ohio General Assembly. No one can dispute that the public must wait until the General Assembly has enacted a law before a court is allowed to review its lawfulness, even if it is clear from the start that the General Assembly's result will be illegal. Treatment of LEBOR as worthy of less respect that legislative proposals in the General Assembly will not only insult the public's voluminous efforts to propose it; it will violate core rights of the people under the Ohio Constitution to decide it, too.

Thank you very much.

For the Committee of Petitioners,
/s/ Terry J. Lodge
Terry J. Lodge

cc: Committee of Petitioners

LUCAS COUNTY BOARD OF ELECTIONS

SPECIAL MEETING

TUESDAY, AUGUST 28, 2018

- - -

In Re:

KEEP THE JAIL IN DOWNTOWN TOLEDO INITIATIVE

and

LAKE ERIE BILL OF RIGHTS INITIATIVE

- - -

BE IT REMEMBERED that upon the hearing of the above-entitled matters, commencing on Tuesday, the 28th day of August, 2018, the following proceedings were had, digitally recorded, electronically transmitted, and transcribed via audible playback.

MICHELLE L. SCHILLING
Court Reporter & Notary Public
9924 Portage Street, N.W.
Canal Fulton, Ohio 44614
(330) 844-2188
E-Mail: michelle.l.schilling@gmail.com

APPEARANCES:

Lucas County Board of Elections:

Dr. Bruce Saferin, Chairman
Brenda Hill
Joshua Hughes
David Karmol

Edward Feeny, Assistant Director

On Behalf of the Board of Elections:

Kevin A. Pituch, Assistant Prosecutor
Lucas County, Ohio

On Behalf of Lake Erie Bill of Rights Group:

Terry Lodge, Esq.

- - -

P R O C E E D I N G S

CHAIRMAN SAFERIN: Next one is the Downtown Jail Initiative.

And, Mr. Pituch, if you could discuss that.

MR. PITUCH: Sure. Let me stand -- there's enough people. I'll stand over here.

The people here for the first time should know my -- my name's Kevin Pituch. I'm an Assistant Lucas County Prosecutor, and it's my job and it's been my job for at least seven years now to represent the Board of Elections.

I'm here today to -- since we do have an audience, but also to discuss this with the Board. It's my recommendation, as to both initiatives, that you deny them access to the ballot, and let me explain why.

UNIDENTIFIED SPEAKER: I need you to speak up please.

MR. PITUCH: I'll do it as best I can.

UNIDENTIFIED SPEAKER: Dr. Hans (phonetic) doesn't want to hear you.

MR. PITUCH: Well, I am recommending that they deny access to the ballot for both initiatives. The Ohio Supreme Court has said --

I've got Ohio Supreme Court case law in front of me -- that the Board has the authority to determine whether a ballot measure or an issue falls within the scope of the constitutional power of the municipality to put on the ballot via referendum or initiative.

The Supreme Court's also told us that a board of elections may properly refuse to certify a proposed ordinance to the ballot where the ordinance encompasses a matter beyond the scope of the municipality's authority to enact, something beyond the power of the city or its voters to enact.

Both initiatives -- I don't know if they were written by the same person, I don't know if there's -- any of these people went to the same Web site, but there are portions of both initiatives that are identical, that deal with enforcement, and one of the things the Supreme Court has told us is that a municipality may not -- is not authorized to create a new cause of action, and that's exactly what both ordinances do.

They both contain the language that permit a private individual to sue in the Lucas

County Common Pleas Court for a violation. Both the Downtown Jail Ordinance has this provision, and the Bill -- Lake Erie Bill of Whites -- Bill of Rights. The Supreme Court has said that that's a power the municipality does not possess, and it can't be part of any initiative, a private cause of action, a private right to sue like this.

It's also created jurisdiction, created the power of the court to hear something in the common pleas court, at least that's what each initiative purports to do. The problem there is only the Ohio General Assembly can create subject-matter jurisdiction, not the city or its voters.

UNIDENTIFIED SPEAKER: Is this House Bill 463 that you're referencing?

MR. PITUCH: No. It doesn't have anything to do with any sort of House Bill. It has to do with case law from the Supreme Court that tells me how to apply the law in situations like this, and in any situation where the ordinance is beyond the scope --

CHAIRMAN SAFERIN: I know.

MR. PITUCH: -- of the power to enact,

then it's my recommendation that they do so.

You should know that this recommendation has nothing to do with whether the ordinances, either the jail one or the Lake Erie Bill of Rights are unconstitutional. The Board does not have the power to assess the constitutionality or unconstitutionality of it. I haven't looked at these to see whether they're constitutional. I don't know if they're not -- they are or not, but that's -- actually, has no role in my analysis here.

You should also know it is not the Board's decision -- or the Board's decision today is not really based on whether this is a good idea or a bad idea.

UNIDENTIFIED SPEAKER: So why you are giving recommendations?

MR. PITUCH: Again, that's a power -- that's a power --

CHAIRMAN SAFERIN: Excuse us. Excuse us. We're not discussing --

MR. PITUCH: -- a power they don't have.

CHAIRMAN SAFERIN: He's discussing with the Board, not with you folks, please.

UNIDENTIFIED SPEAKER: Okay.

UNIDENTIFIED SPEAKER: Don't we exist?

MR. PITUCH: There are certain powers that are -- that are possessed by the people and certain powers that are not. Both objectives sought by both may be good objectives, but in terms of creating a private cause of action, that's something the voters cannot do. The Supreme Court has said so. They struck down an ordinance last year.

UNIDENTIFIED SPEAKER: Do we not have rights?

UNIDENTIFIED SPEAKER: People are tired of the government.

UNIDENTIFIED SPEAKER: This is crazy.

MR. PITUCH: That's my recommendation.

CHAIRMAN SAFERIN: Okay. Thank you.

UNIDENTIFIED SPEAKER: We have will.

UNIDENTIFIED SPEAKER: Your recommendation sucks.

MR. LODGE: A point of order --

CHAIRMAN SAFERIN: Let's take --

MR. LODGE: A point of order, it's my understanding --

CHAIRMAN SAFERIN: No.

MR. LODGE: -- first of all, the Assistant Prosecutor --

CHAIRMAN SAFERIN: No. You're not -- you're -- you're not recognized.

MR. LODGE: Sir, I -- I am raising a point of order.

MS. HILL: No.

CHAIRMAN SAFERIN: You're -- you're still not recognized. I'm running the meeting.

MR. LODGE: Well, my name is Terry Lodge, and I'm a local attorney, and I submitted a letter overnight requesting that the Board accept public comments, receive public comments.

CHAIRMAN SAFERIN: I -- I -- I understand that, but I'm not ready for the public comments yet, so thank you.

I would entertain a motion addressing the -- the first one, the Downtown Jail Initiative.

MR. HUGHES: Mr. Chairman, I have had a chance to review --- -

UNIDENTIFIED SPEAKER: Hear from the people first.

MR. HUGHES: -- communications submitted to the Board from our counsel. I

respect his legal advice he's given us. I've had a chance to independently review the case law upon which he relies, and it is clear. In 2017, just last fall, the Supreme Court said that the only body that can create a cause of action is the general assembly; therefore, I move that we not allow the Downtown Jail Initiative on the ballot.

MR. KARMOL: Second.

CHAIRMAN SAFERIN: There's a second.

Okay. Discussion?

Okay. Sir, I'm going to recognize you.

MR. KARMOL: Mr. Chairman, I -- I -- I do want to say --

CHAIRMAN SAFERIN: Okay.

MR. KARMOL: -- say for the record here that, following what Mr. Pituch has said and what Mr. Hughes has said, we're talking here about the limitations on home rule, and basically, the -- what the -- the Charter of the City of Toledo, as a home rule city, is limited by what the state says that home rule -- home rule is. In other words, where the state law states general rules, the -- the -- the Charter does not give the City of Toledo power to go beyond that. It is

limited. It's not unlimited home rule.

And that's -- that's the issue here, that where the -- the power to create a cause of action, the power to create jurisdiction for the courts is with the Ohio General Assembly. It is not the right of the City of Toledo to go beyond that. That's all this is about.

CHAIRMAN SAFERIN: Any other comments from the Board?

Okay. I'm going to take your comments, sir. You have three minutes, and yours is the only comment that we're taking.

UNIDENTIFIED SPEAKER: Object to that.

MR. LODGE: I just want to --

UNIDENTIFIED SPEAKER: You don't even get three minutes.

MR. LODGE: I have -- I have enough copies, but I'm going to have to refer to one first before I'll give you my extra one.

MR. KARMOL: Mr. Chairman, this is with regard to the next item.

MR. LODGE: Yeah.

MR. KARMOL: This is not with regard to the jail.

CHAIRMAN SAFERIN: Yeah. We're -- this

is -- you're not talking about the jail?

MR. LODGE: Yes, please.

CHAIRMAN SAFERIN: Fine. Okay. So you're not discussing the jail.

Okay. So we have a motion and a second.

Mr. Feeny.

MR. FEENY: Mr. Karmol.

MR. KARMOL: Yes.

MR. FEENY: Dr. Saferin.

CHAIRMAN SAFERIN: Yes.

MR. FEENY: Ms. Hill.

MS. MILL: Yes.

MR. FEENY: Mr. Hughes.

MR. HUGHES: Yes.

CHAIRMAN SAFERIN: Okay. So the jail -- the Downtown Jail Initiative will not appear on the ballot.

UNIDENTIFIED SPEAKER: Of course not.

UNIDENTIFIED SPEAKER: Yeah. That's because it's not being built in your backyard. You guys suck, all of you.

CHAIRMAN SAFERIN: Okay.

MR. HUGHES: Mr. Chairman --

CHAIRMAN SAFERIN: Our -- our -- our

next -- our next initiative --

UNIDENTIFIED SPEAKER: Democracy in action, not.

CHAIRMAN SAFERIN: -- will be for the Lake Erie Bill of Rights.

I would entertain a motion please.

UNIDENTIFIED SPEAKER: So how much were you paid?

MR. HUGHES: Mr. Chairman, I -- for the same reasons that Mr. Pituch gave for -- he gave them together, for both the Downtown Jail Initiative and the Lake Erie Bill of Rights, I would move to not allow the Lake Erie Bill of Rights initiative on the ballot in November.

MR. KARMOL: Second.

UNIDENTIFIED SPEAKER: Silence.

CHAIRMAN SAFERIN: Okay. Any discussion?

MR. HUGHES: Yes. If I may, I'd like to address the -- the shouts and statements from the gallery. Those that suggest that this is not democracy in action, democracy in action --

UNIDENTIFIED SPEAKER: Who elected you?

UNIDENTIFIED SPEAKER: Who elected you?

UNIDENTIFIED SPEAKER: Yeah. Who

elected you?

UNIDENTIFIED SPEAKER: Who elected you?

UNIDENTIFIED SPEAKER: We're citizens, and --

MS. HILL: Call security.

MR. HUGHES: And that's my point. If you want -- if you want change, go to your state legislators.

MR. KARMOL: Where's the sheriff?

MR. HUGHES: You elect your representatives.

UNIDENTIFIED SPEAKER: We are citizens of the United States of America.

MR. HUGHES: You elect your representatives. That's what they do.

MR. KARMOL: Where is he?

UNIDENTIFIED SPEAKER: We are the representatives. We are voters.

MR. KARMOL: Call for order.

MR. HUGHES: That's right. Vote for your representatives --

CHAIRMAN SAFERIN: Okay.

MR. KARMOL: They shouldn't be arguing.

MR. HUGHES: -- your state senators.

UNIDENTIFIED SPEAKER: You're taking

away our right to vote on our initiatives.

CHAIRMAN SAFERIN: Excuse us.

UNIDENTIFIED SPEAKER: Are we not citizens?

CHAIRMAN SAFERIN: We're not discussing this.

UNIDENTIFIED SPEAKER: Do we not pay taxes?

UNIDENTIFIED SPEAKER: No, of course not.

CHAIRMAN SAFERIN: If we don't have quiet, I will ask you all to leave, and we'll have an empty room and conduct our business --

UNIDENTIFIED SPEAKER: It's secret.

CHAIRMAN SAFERIN: -- and I can do that.

UNIDENTIFIED SPEAKER: It's secret.

CHAIRMAN SAFERIN: Okay.

MR. HUGHES: Look. I understand the frustration, but the -- the --

UNIDENTIFIED SPEAKER: Do you?

UNIDENTIFIED SPEAKER: No, you don't.

MR. HUGHES: Will you let me finish?

UNIDENTIFIED SPEAKER: No.

MR. HUGHES: I understand your

frustration, but that's why you have to make sure you vote for your state legislators, both in the House and the Senate --

UNIDENTIFIED SPEAKER: With rigged elections.

MR. HUGHES: -- who you support.

UNIDENTIFIED SPEAKER: So how do we vote them out of office? Recall.

CHAIRMAN SAFERIN: Okay. Is there any other discussion?

UNIDENTIFIED SPEAKER: Recall.

CHAIRMAN SAFERIN: Mr. Karmol?

Mr. Pituch?

MR. KARMOL: Well, I'd like a moment to read Mr. Lodge's letter, if I -- if I could.

MR. HUGHES: Yeah. I haven't even had it -- received it yet, so I --

MR. KARMOL: So I -- I -- I just would -- this just was handed to me.

CHAIRMAN SAFERIN: Okay.

MR. KARMOL: So if we -- you know, obviously --

CHAIRMAN SAFERIN: Mr. Pituch, do you have any other comments or --

MR. KARMOL: -- I'm happy to take a few

moments to read this.

MR. PITUCH: Nothing in here changes my opinion.

MS. HILL: I would just like to make one quick comment. The reason we're voting no is not because we don't like the initiatives.

MR. HUGHES: Correct.

MS. HILL: The reason we're voting no is because it was legally written improperly. That's the reason we have to vote no, not because we don't want Lake Erie protected.

UNIDENTIFIED SPEAKER: Wood County Board of Elections put theirs on the ballot.

MS. HILL: Wait a minute. Wait. Not because we don't like Lake Erie or not because we don't want the jail or anything else. It was legally not well written, and so by law, we have to do what we have to do, and we don't have a choice. We have a prosecuting attorney, you just heard him --

MR. HUGHES: Ma'am, yes.

UNIDENTIFIED SPEAKER: Are you a lawyer?

MR. HUGHES: Yes, I am.

UNIDENTIFIED SPEAKER: Can we listen to

Terry Lodge? He's a lawyer.

MR. KARMOL: Yes.

MR. HUGHES: As am I, as is Mr. Karmol, and as is Kevin Pituch.

MS. HILL: And we have our pros -- our prosecuting attorney --

CHAIRMAN SAFERIN: Mr. Lodge, do you want to --

MS. HILL: -- is Mr. Pituch.

CHAIRMAN SAFERIN: -- come up and address this please.

MR. LODGE: I certainly would.

UNIDENTIFIED SPEAKER: Thank you.

MR. LODGE: I am not objecting with the -- the jail petition; however, to the extent that my comments might have affectability to that, I hope you will reconsider what you've just done respecting that.

Very simply put, I -- I'm a little offended that your legal counsel suggests that this is just material pulled off of Web sites. These are very thoughtful proposals that were put forth by people who then invested thousands of hours pounding the pavement collecting signatures, so it's a little bit demeaning, but I

think what is more demeaning is perhaps the templated instructions from the Secretary of State's Office that must have been filtered down to the Prosecutor's Office because what he gave was a very incomplete rendition of Ohio Supreme Court recent decisions on the matter of whether or not there's a separation of powers problem.

You are making comments this morning like little judges. This is not a little court. You're exercising power today that goes beyond what the Ohio Supreme Court can do. The principle since 1913, emblazoned in 25 Ohio Supreme Court decisions or more -- I haven't -- I've lost count in the last year or so -- is that you may not, as a board of elections, pass on the substance, even if it is not lawful, even if the petition would not be lawful if voted into law.

There was a 2015 decision by the Ohio Supreme Court in Mahoning County on a very similar bill of rights that says, The boards of election, however, do not have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms. An unconstitutional amendment -- this was a charter amendment -- may be a proper item for referendum

or initiative. Such an amendment becomes void and unenforceable only when declared un -- unconstitutional by a court of competent jurisdiction.

You are not a court, with respect. You have ministerial responsibilities to make sure there's enough valid signatures, that the forms are filled out right, that they're notarized, that sort of thing. That is the limit. I don't care what House Bill 463 says because one year ago, almost to the day, within a month of the day, the Wood County Board of Elections put a very similar bill of rights provision onto the Bowling Green ballot. It was a charter amendment. They had the same law before them. Their county prosecutor said, The law says we have to do this, and in -- and in fact, when the protester there took the matter to the Ohio Supreme Court, the Ohio Supreme Court ruled four to three that boards of election, indeed, don't have power to inquire into the substance.

You don't get to say -- you -- you're not umpires. You don't get to say, That's illegal, that might be legal, but I don't -- I'm not sure I agree with you. You don't get to say

these things. You don't get to make such a finding. You are not a court.

Thank you.

(Clapping.)

CHAIRMAN SAFERIN: Again, I'm asking to be able to run this meeting. I will have the officer escort you out if you can't be quiet.

Mr. Pituch.

MR. PITUCH: Let me just read to you from a Supreme Court decision from this year, April of this year. I talked about how the case that I cited to you, about how the Board did not have the authority to put that on the ballot. The Supreme Court examined it and said, We agreed with the board's determination that a municipality lacks legislative power to authorize Youngstown residents to file suit as a private attorney general because a municipality cannot create a new cause of action. That's from a Supreme Court case this year.

So --

CHAIRMAN SAFERIN: Okay.

MR. PITUCH: -- what I said was a proper statement of law as it pends right now, and you have the, I think, ability and, in fact,

the duty to keep this thing off -- and, actually, keep both of them off the ballot given the -- their attempts to create private causes of action.

CHAIRMAN SAFERIN: Okay.

MR. KARMOL: So let me just make this statement to --

CHAIRMAN SAFERIN: Please.

UNIDENTIFIED SPEAKER: Let us vote.

UNIDENTIFIED SPEAKERS: Let us vote. Let us vote. Let us vote. Let us vote. Let us vote. Let us vote. Let us vote. Let us vote. Let us vote. Let us vote.

CHAIRMAN SAFERIN: Mr. Karmol.

MR. KARMOL: If I may, Mr. Chairman, and I'm -- I'm going to stop speaking if I'm interrupted, and we can take all day if these people just want to yell and scream.

UNIDENTIFIED SPEAKER: We've been interrupted too.

UNIDENTIFIED SPEAKER: Yeah.

UNIDENTIFIED SPEAKER: Yeah.

UNIDENTIFIED SPEAKER: Legislature passes illegal laws all the time.

UNIDENTIFIED SPEAKER: Yeah.

MR. KARMOL: I'll wait.

UNIDENTIFIED SPEAKER: It's supposed to be a democracy.

UNIDENTIFIED SPEAKER: This is what democracy looks like.

CHAIRMAN SAFERIN: This is my last warning. I will ask you to leave, or you will be escorted out. I want to finish this meeting.

Mr. Karmol.

MR. KARMOL: Yeah. We're not -- Mr. Lodge has indicated that he thinks we're acting as a judge and jury here on the constitutionality of this. We're not -- we're not discussing the constitutionality of what is being proposed here.

What Mr. -- Mr. Pituch is saying is that the Supreme Court has said that we are required to determine whether the proposed Charter Amendment goes beyond the authority of the Charter. That's the issue here. That's the only issue, not the constitutionality of what's being proposed. We're not dealing with the -- the subject matter. We're dealing with the -- the scope of the Charter of the City of Toledo. If the City Council and Mayor had proposed this,

it still would not be legal.

UNIDENTIFIED SPEAKER: No. It would be law. It would be law. And someone would have to challenge it in court. That's all we're asking for.

MR. LODGE: Respectfully, Mr. --

UNIDENTIFIED SPEAKER: Put it on the ballot. Let us vote. Then you can challenge it.

MR. LODGE: Respectfully, Mr. Karmol, if the city officials had proposed it, it wouldn't be covered by that statute, and it would be placed on the ballot. You don't have the authority statutorily to veto a provision that would have been -- would -- would have been by the city.

MR. HUGHES: Mr. Chairman, if I may, I didn't have the benefit of receiving Mr. Lodge's letter. I know they e-mailed it last night around 9:00 or so.

MR. LODGE: I have an extra copy.

MR. HUGHES: I haven't had a chance to review it. But if I could simply respond to your -- your -- your statement made here live that we're sitting as judges, we're not. What we are doing, however, is exercising the duties, not

the -- you know, what we're choosing to do, a duty imposed upon us by Ohio Revised Code Section 3501.11. It's Board duties. Each board of elections shall exercise and shall perform all of the duties imposed by law, and shall do all of the following:

Subsection (K), subsection (2), Examine each initiative petition to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

Subsection (M) of 3501.38, subsection (1), subsection (a), Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, other similar regulations as are not in conflict with general laws, and whether the petition

satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power.

The United -- the Ohio Supreme Court in Flak -- in State ex rel. Flak v. Betras -- the cite for you, Mr. Lodge, is 152 Ohio St. 3d 244. It's not a very long decision, so I'm sure you'll be able to find the -- the cite. It says, A municipality is not authorized to create new causes of action, only the General Assembly may do so. That's Section 3, Article XVIII of the Ohio Constitution, and they're quoting, again, the Ohio Supreme Court, where they said, State law determines what injuries are recognized and what remedies are available.

Both of these initiatives purport to create causes of action vesting jurisdiction with Lucas County Court of Common Pleas and, as such, are outside of the scope of the authority of that initiative, which is why we're excluding them from the ballot, as plainly as that, sir.

CHAIRMAN SAFERIN: Thank you, Mr. Davis.

MR. LODGE: You're -- you're -- the

very phraseology you just used is that a judge would use. You are not a court. The courts are --

MR. HUGHES: I'm not.

MR. LODGE: The courts are --

MR. HUGHES: You're right.

MR. LODGE: The courts are responsible for sorting things out after a vote has occurred. This is essentially an act of censorship because you're keeping a First Amendment petition for regressive grievances off the ballot, even if unconstitutional.

And incidentally, I -- I appreciate the point that you're making, and I very familiarly reflect, because I was involved here, but the -- the -- the decision that you are making runs headlong into the two dozen or more Ohio Supreme Court decisions, including in the Espen case in Wood County last year that says it's a separation of powers problem. You're an executive branch agency, you are not part of the judiciary, and the courts exist for a reason, that being to apply informed, intelligent analysis after an election has been held.

Thank you.

CHAIRMAN SAFERIN: Thank you very much, sir.

All right. Is there any other discussion from the Board or our Prosecutor?

Okay. There is a motion to deny the initiative. There's a second.

UNIDENTIFIED SPEAKER: It didn't matter what we said.

UNIDENTIFIED SPEAKER: No.

UNIDENTIFIED SPEAKER: Yeah, yeah.

MR. FEENY: Mr. Karmol.

MR. KARMOL: Yes.

MR. FEENY: Dr. Saferin.

CHAIRMAN SAFERIN: Yes.

MR. FEENY: Ms. Hill.

MS. HILL: Yes.

MR. FEENY: Mr. Hughes.

MR. HUGHES: Yes.

CHAIRMAN SAFERIN: Okay.

UNIDENTIFIED SPEAKER: Boo.

CHAIRMAN SAFERIN: Next -- next initiative is the Harbor View Marijuana Initiative.

UNIDENTIFIED SPEAKER: How are the people ever supposed to change the government,

alter and reform it, when you, the very government, block the people altering and reforming their government?

UNIDENTIFIED SPEAKER: How could all of four unelected people have just rejected hundreds of thousands of --

MR. KARMOL: Just go on with the agenda.

UNIDENTIFIED SPEAKER: -- countless times?

CHAIRMAN SAFERIN: Kevin, do you want to discuss that one or not?

UNIDENTIFIED SPEAKER: How do you justify that? How do you justify the Board of Elections denying an election? You're going against the very purpose that you exist for. I don't know how you sleep at night. Go to hell.

UNIDENTIFIED SPEAKER: Those are your new monarchs up there. Give them all crowns.

MR. PITUCH: This has -- this has to do with -- it's hard to explain what they -- they did at Harbor.

MS. HILL: Can you hear him?

MR. KARMOL: No.

I can't hear you, so you're going to

have to speak up.

UNIDENTIFIED SPEAKER: 91 years old, 91 years old and lived in this here state all my life --

UNIDENTIFIED SPEAKER: Mother.

UNIDENTIFIED SPEAKER: -- born, and I think it's terrible that you turned that down for the simple reason I lived in that neighborhood, and the taxes would go up so damn high I couldn't afford it, and I worked all my life for my house, and it's well kept up, and I think it's terrible. I think you're terrible, turning that down. I'm sorry. I'm really, really sorry for you because they'll remember every one of your faces.

CHAIRMAN SAFERIN: Okay.

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(Thereupon, the proceedings in the above-captioned matter were concluded)

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C E R T I F I C A T E

STATE OF OHIO,)
) SS:
STARK COUNTY.)

I, Michelle L. Schilling, Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the proceedings in the cause aforesaid were digitally recorded, electronically transmitted, and transcribed by me upon a computer via audible playback; and that the foregoing is a true and correct transcription to the best of my ability of the proceedings so given in the cause aforesaid.

I do further certify that I am not a relative, employee of or attorney for any of the parties in the above-captioned action; I am not a relative or employee of an attorney of any of the parties in the above-captioned action; I am not financially interested in the action.

IN WITNESS HEREOF, I have hereunto set my hand and affixed my seal of office at Canal Fulton, Ohio on this 2nd day of September, 2018.

Michelle L. Schilling, Notary Public
in and for the State of Ohio.

My Commission expires April 4, 2022.

UPDATED VERSION*

OHIO LEGISLATIVE SERVICE COMMISSION

Final Analysis Aida S. Montano, Sam Benham, Carla Napolitano, and other LSC staff

Sub. H.B. 463

131st General Assembly
(As Passed by the General Assembly)

Reps. Dever, Becker, Boccieri, Hambley, Perales, Sprague, Terhar, Leland, Anielski, Antonio, Arndt, Baker, Blessing, Brown, Buchy, Burkley, Celebrezze, Conditt, Craig, Dovilla, Duffey, Ginter, Green, Grossman, Henne, Lepore-Hagan, Manning, McClain, McColley, M. O'Brien, S. O'Brien, Patterson, Reece, Reineke, Retherford, Ryan, Scherer, Schuring, Slaby, Slesnick, K. Smith, Strahorn, Sweeney, Young

Sens. Coley, Bacon, Eklund, Hackett, Hite, Jones, Lehner, Patton, Seitz, Uecker

Effective date: April 6, 2017

ACT SUMMARY

Real property foreclosures

- Modifies how property taxes are collected out of the sale proceeds when real estate is sold in foreclosure or other court-ordered sale.
- Expressly requires the court to hold an oral hearing in determining whether to proceed in an expedited manner in a foreclosure action.
- Eliminates the requirement that the purchaser pay the recording fee required at a foreclosure sale and instead requires the collection of the sale deposit under continuing law.
- Clarifies that excess private selling officer fees may be paid by the buyer of the property.
- Establishes that when both the judgment creditor and the first lienholder seek to redeem the foreclosed property, the first lienholder prevails.
- Modifies the foreclosure sale minimum bid requirements.

* This version updates the effective date.

- Requires that if the appraisal requirement is not met, the appraised value of the property should be the county auditor's most recent appraised value instead of the fair market value.

- Prohibits the use of plywood to secure real property that is deemed vacant and abandoned under continuing law.

Escrow transactions

- Modifies when disbursements may be made from an escrow account in connection with residential real estate and the types of funds that may be accepted for immediate disbursement.

Ohio Civil Rights Commission

- Makes permissive the awarding of actual damages and attorney's fees in housing discrimination cases before the Civil Rights Commission.

- Permits the Commission as part of the penalty for a housing discrimination case to require remediation in the form of a class, seminar, or any other type of remediation approved by the Commission.

- Allows the Commission, to vindicate the public interest, to assess a civil penalty against a person found to have engaged in unlawful housing discrimination, instead of allowing the Commission to award the complainant punitive damages under prior law.

- Authorizes alternative dispute resolution of discrimination cases in addition to other informal methods of addressing allegations of discrimination.

- Allows a person to recover attorney's fees if the Commission finds that the person did not engage in an unlawful discriminatory practice.

- Permits a housing complaint to be amended at any time up to seven days prior to the hearing.

Commercial paper; bank deposits and collections

No obligation for double payment

- Generally provides that a note is paid if payment is made by the party obliged to pay to a person formerly entitled to enforce the note only if that party has not received notification that the note has been transferred and payment is to be made to the transferee.

- Specifies that unless a transferee complies with a request to furnish proof that the note has been transferred, a payment to the person formerly entitled to enforce the note discharges the obligation to pay even if the party obliged to pay has received notification of the transfer.

- Generally provides that a transferee or person acquiring rights to the instrument from a transferee is deemed to have notice of any payment under the preceding dot points after the date the note is transferred to the transferee but before the party obliged to pay received notification of the transfer.

Unsigned, telephonically authorized checks

- Defines "remotely created consumer item," for purposes of the following provisions on commercial paper and bank deposits and collections, as an item drawn on a consumer account that is not created by the payor bank and does not bear a handwritten signature purporting to be the drawer's signature.

- Provides that, with respect to a remotely created consumer item, specified persons warrant that the person on whose account the item is drawn authorized the item's issuance in the amount for which it is drawn.

Defenses and claims in recoupment

- Makes a claim and defense available if, in a "consumer transaction," any law other than the Commercial Paper Law requires an instrument to include a statement that a holder's rights are subject to a claim or defense that the issuer could assert against the original payee and the instrument does not contain such statement.

Electronic records and signatures

- Changes the reference in various provisions of the UCC laws on commercial paper and bank deposits and collections from "writing" or "written" to "record," defined as information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form.

Modernized suretyship and guaranty rules

- Replaces provisions on the discharge of indorsers and accommodation parties with rules on the discharge of the obligations of a principal obligor or secondary obligor when the obligation is released or modified.

- Provides that generally a secondary obligor's obligation is not discharged unless the person entitled to enforce the instrument knows that the person is a secondary

obligor or has notice under continuing law that the instrument was signed for accommodation.

- Generally provides that a secondary obligor asserting a discharge has the burden of persuasion both with respect to the occurrence of the acts alleged to harm the secondary obligor and loss or prejudice caused by those acts.

- Provides that a signer of an instrument as an accommodation party is obliged to pay the amount due on the instrument to the person entitled to enforce it in the same circumstances as the accommodated party is obliged without prior resort to the accommodated party by the person entitled to enforce the instrument.

Property tax exemptions

- Extends the maximum term of a Community Reinvestment Area (CRA) tax exemption for remodeled property.

- Changes the basis for determining the tax-exempt value of remodeled structures for property in a CRA.

- Establishes a definite starting point and method for determining the tax-exempt value of contaminated ("brownfield") property.

Coverage of autism services and insurance mandates

- Requires health plan issuers to provide coverage for autism spectrum disorder and prescribes minimum coverage requirements.

- Allows a health plan issuer to review an autism spectrum disorder treatment plan on an annual basis, or more often if the overseeing physician agrees.

- Requires the Superintendent of Insurance to conduct an actuarial study on the costs of health care mandates under Ohio law that apply to non-ERISA individual and group health insurance plans.

- States the General Assembly's intent to implement a two-year moratorium on new health care mandates and to develop potential tax credits that offset additional employer costs associated with health care mandates.

Child Abuse and Child Neglect Regional Prevention Council members

- Provides that Child Abuse and Child Neglect Prevention Regional Council members are to be reimbursed for expenses incurred in the performance of official duties.

- Prohibits members from participating in Council matters that may pose a conflict of interest.

Local initiative petitions

- Requires a board of elections or the Secretary of State to invalidate a local initiative petition if the board or the Secretary determines that the petition or any portion of it falls outside the local government's constitutional authority to enact ordinances or fails to satisfy the statutory prerequisites to place the issue on the ballot.

- Changes the deadline to file a county charter petition with the board of county commissioners from 110 to 115 days before the day of the general election at which the proposal is to appear on the ballot.

Recall of municipal officials

- Specifies that a municipal recall petition is not valid after 90 days from the date of the first signature.

- Requires a recall election to be held at the next primary or general election occurring more than 90 days from the date the petition is certified as sufficient.

TABLE OF CONTENTS

CONTENT AND OPERATION

Real property foreclosures

Property taxes paid from property sale proceeds

The act modifies the manner in which property taxes are collected when real property is purchased by a plaintiff through a partition action, in a sale by an administrator, executor, guardian, or trustee (hereafter "administrative sale"), or in some kinds of court-ordered sales ("judicial sales"). Under prior law largely unchanged by the act, if such property was purchased by the plaintiff, any property taxes, assessments, penalties, or interest (hereafter "property charges") that attached as a lien before the sale date but had not yet been determined could not be taken out of the sale proceeds unless the plaintiff approved that deduction.[1] If the plaintiff did not approve,

[1] The lien for annual property tax attaches January 1, even though the taxes are not due until the ensuing December 31 or, typically, the ensuing January when extensions are added. The actual amount due for a year may not be finally determined until late in the calendar year.

the charges were added to the tax list for the current year and were payable when the current year taxes fell due.[2]

In the case of a judicial sale, the act specifies that it is the judgment creditor of the property, not the plaintiff, who may approve or disapprove of the property charges being taken out of the sale proceeds. (In many cases the plaintiff and the judgment creditor are the same party, but they are not necessarily the same in all cases.)

The act also clarifies, in the case of property purchased through an administrative or judicial sale, that it is the court, not the officer conducting the sale, that determines whether property charges may be taken out of the sale proceeds (subject to the judgment creditor's approval).[3]

Expedited proceedings

Under the act, the court is expressly required to hold an oral hearing when deciding a motion to proceed in an expedited manner in a foreclosure action. The expedited proceeding provisions continue to require the court to determine whether the property subject to the action is vacant and abandoned in order to proceed in an expedited manner. Prior law did not expressly require an oral hearing.[4]

Fees

The act eliminates the requirement that the purchaser pay the recording fee and associated costs at the foreclosure sale. Instead it requires the officer conducting the sale to collect the sale deposit required under continuing law. Under continuing law, if the purchaser is the judgment creditor then the purchaser is not required to make a sale deposit, however all other purchasers must pay a specified amount.[5]

The purchaser of the property also may be required to pay excess private selling officer fees under the act. Under continuing law, the judgment creditor or the judgment creditor's portion of the proceeds of the sale are required to cover private selling officer fees that exceed the amount permitted to be taxed as costs in the foreclosure case.[6]

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[2] R.C. 323.47(B).

[3] R.C. 323.47(A) and (B).

[4] R.C. 2308.02(C).

[5] R.C. 2327.02(C) and 2329.211.

[6] R.C. 2329.152(D)(1)(c).

Minimum bid

The Foreclosure Law regulates minimum bids in both foreclosures sales initiated by the county prosecutor and foreclosure sales in general. Under the act, residential foreclosure sales initiated by the county prosecutor, pursuant to continuing law, require the minimum bid for the sale to be equal to the total amount of the unpaid taxes and court costs. However, if that amount is greater than the appraised value of the property, the court is required to determine the minimum bid, which cannot exceed the appraised value of the property. If the property is sold for less than the unpaid taxes and court costs, then the court is required to order the county auditor to discharge all unpaid taxes and court costs.[7] Under the prior law, there was no set minimum bid for these sales. In addition, under continuing law, generally, when residential real property subject to foreclosure is not sold after two auctions, the property may be offered without regard to the minimum bid requirement. The act adds, however, that the minimum bid must include the costs, allowances, and real estate taxes.[8]

Appraisal

The act changes the way in which real property is valued when the appraisal requirement under continuing law is not met. The prior law required the value of the property to equal the fair market value. The act, instead, requires the value of the property to be the county auditor's most recent appraised value.[9]

Redemption

In foreclosure sales of residential properties, if the judgment creditor and the first lienholder each seek to redeem the property according to continuing law, then under the act the court must resolve the conflict in favor of the first lienholder.[10]

Plywood

The act prohibits the use of plywood to secure real property that is deemed vacant and abandoned; however the prohibition does not apply to persons that use or used plywood prior to the act's effective date.[11]

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[7] R.C. 2329.071(B).

[8] R.C. 2329.311(A) and 2329.52(B).

[9] R.C. 2329.17(C).

[10] R.C. 2329.311(B).

[11] R.C. 2308.02, not in the act, and 2308.031.

Escrow transactions

The Ohio "Good Funds Law" regulates disbursements made in residential real estate escrow transactions; the act modifies these disbursements. Under continuing law, an escrow or closing agent may not knowingly disburse funds from an escrow account in an escrow transaction unless certain conditions are satisfied relating to the receipt of good funds. The law applies only to transactions involving residential real property.[12]

Under prior law, changed in part by the act, before disbursing funds, the escrow agent had to determine the funds had been either (a) transferred electronically or deposited into the escrow account of the escrow or closing agent and available for withdrawal or disbursement or (b) physically received by the agent prior to disbursement and intended for deposit no later than the next banking day after the date of disbursement. The act adds that the funds described in (a) above must be *immediately* available for withdrawal and disbursement, and also limits the criterion in (b) to funds that in an aggregate amount do not exceed $1,000. The act also clarifies that funds drawn on a special or trust bank account complies with the Good Funds Law requirements.[13] The chart below shows the changes.

Prior law	The act
Have been deposited in the account and are available for withdrawal and disbursement; or	Additionally requires the funds be available for *immediate* withdrawal and disbursement;
Have been physically received by the agent prior to disbursement and are intended for deposit no later than the next banking day.	Limits this criterion to an aggregate amount of not more than $1,000.
	Are funds drawn on special or trust bank accounts.

The act also modifies the types of funds that may be accepted for immediate disbursement as described in the chart below:[14]

[12] 1-5 Ohio Real Property Law and Practice § 5.08.

[13] R.C. 1349.21(A) and R.C. 4735.18(A)(26), not in the act.

[14] R.C. 1349.21.

Prior law, modified in part by the act	The act
Cash.	Same.
Electronically transferred funds.	Electronically transferred funds via the automated clearinghouse system initiated by the U.S. or by Ohio, or an agency, instrumentality, or political subdivision of the U.S. or Ohio.
	Electronically transferred funds via the gross settlement system provided by the federal reserve banks.
A personal check in an amount not exceeding $1,000.	Personal checks in an aggregate amount not exceeding $1,000.
Certified checks, cashier's checks, official checks, or money orders that were drawn on an existing account at a federally insured bank, savings and loan association, credit union, or savings bank.	Same, but limits the checks to an aggregate amount not exceeding $1,000.
A check issued by the U.S. or by Ohio, or an agency, instrumentality, or political subdivision of the U.S. or Ohio.	Same
No provision.	Business checks drawn on special or trust bank accounts (a clarification, not a change) or other business checks that are in an aggregate amount not exceeding $1,000.
A check drawn on the escrow account of a title insurance company or title insurance agent, provided the escrow or closing agent had reasonable and prudent cause to believe that sufficient funds were available for withdrawal in the account upon which the check is drawn at the time of disbursement.	No provision.

Ohio Civil Rights Commission

The Ohio Fair Housing Law generally prohibits discrimination in renting, selling, or negotiating for the rental or sale of a home. The act changes the timing for amending a housing compliant, the possible penalties for a violation of the Law, and several procedures, and adds the possibility of alternate dispute resolution.

Amendment of complaint

The act specifies that a complaint related to housing discrimination may be amended up to seven days prior to the hearing, but not after this time. Under the prior law, the complaint could be amended at any time up until the hearing.[15]

Penalty for housing discrimination

If the Ohio Civil Rights Commission (OCRC) finds that a person is engaging in unlawful housing discrimination, along with actions required by continuing law to eliminate the discrimination, the act permits the OCRC to require the person to pay actual damages and reasonable attorney's fees, and, to vindicate the public interest, permits it to assess a civil penalty. The OCRC also may require the person to undergo remediation in the form of a class, seminar, or any other type of remediation it approves.[16]

The prior law required the assessment of actual damages and attorney's fees, and permitted the assessment of punitive damages for housing discrimination claims. If the OCRC finds that a housing discrimination violation has occurred, continuing law also requires it to serve an order on the person requiring the person to (1) cease and desist from the unlawful discriminatory practice, (2) take any further affirmative or other action that will effectuate the purposes of the Civil Rights Commission Law, including, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, and (3) report to the OCRC the manner of compliance.[17]

Alternative dispute resolution

The act adds alternative dispute resolution as an alternative to the informal methods of addressing allegation of discrimination, and specifies that the materials and proceedings related to alternative dispute resolution, like the informal methods, are considered confidential. The act permits alternative dispute resolution to be entered into at any time, whereas the informal methods are to be attempted prior to a formal hearing.[18]

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[15] R.C. 4112.05(C)(1)(b).

[16] R.C. 4112.05(G)(1)(b).

[17] R.C. 4112.05(G)(1)(a).

[18] R.C. 4112.05.

Award of attorney's fees if no finding of unlawful discrimination

Under the act, if, upon all evidence presented at a hearing on a charge of engaging in an unlawful discriminatory practice, the OCRC finds that a person has not engaged in any unlawful discriminatory practice against the complainant or others, it may award to the person reasonable attorney's fees to the extent provided in federal law[19] and accompanying regulations.[20]

Oath making

Under continuing law, an allegation of discrimination must be made under oath. The act authorizes the oath to be made in any form the person making the oath deems binding on the person's conscience, including declarations made under penalty of perjury.[21] In addition, if an allegation is timely filed but signed under oath after the filing deadline, the signing will relate back to the original filing date.[22] The act also authorizes the following individuals to administer oaths, take affidavits, and acknowledgments in relation to official duties:

- An OCRC administrative law judge, mediator, field coordinator, or supervisor;
- An Ohio notary public.[23]

Office information filings

The act requires the OCRC to update filings with the Secretary of State containing the name and residence address of the occupant of certain offices on a quarterly basis, as opposed to the prior law, which required these filings to be cancelled and refiled whenever the pertinent information changes. The offices included in this requirement are the OCRC executive director, an OCRC compliance officer, field investigator, and regional director, and the officers described above under "**Oath making**."[24]

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[19] 5 United States Code (U.S.C.) 504.

[20] R.C. 4112.05(H).

[21] R.C. 4112.05(B)(1)(a).

[22] R.C. 4112.05(B)(1)(b).

[23] R.C. 4112.09.

[24] R.C. 4112.09.

Relocation of existing exemptions

The act relocates, but does not substantively change, the existing exemptions to the general prohibition against unlawful housing discrimination.[25]

Commercial paper; bank deposits and collections

This portion of the act primarily makes changes to the Ohio Uniform Commercial Code (UCC) laws on commercial paper and bank deposits and collections based on the Uniform Law Commission's revision of UCC Articles 3 and 4.

No obligation for double payment

The act expands on continuing law, which provides generally that an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument and to a person entitled to enforce the instrument.[26] The act generally provides that a note is paid to the extent payment is made by or on behalf of a party obliged to pay the note to a person formerly entitled to enforce the note *only* if at the time of payment such party has not received notification that the note has been transferred and payment is to be made to the transferee. A notification is adequate only if it is "signed" (defined below) by the transferor or transferee; it reasonably identifies the transferred note; and it provides an address at which payments subsequently are to be made. Upon request, a transferee must furnish reasonable proof that the note has been transferred. Unless the transferee complies with the request, a payment to the person formerly entitled to enforce the note is effective for purposes of a discharge even if the party obliged to pay the note has received such notification. To the extent of a payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument by another person under applicable law.[27]

Generally, a transferee, or any party that has acquired rights in the instrument from a transferee, including such party with rights as a holder in due course, is deemed to have notice of any payment under the act, described above, after the date the note is transferred to the transferee but before the party obliged to pay the note received notification of the transfer.[28]

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[25] R.C. 4112.02 and 4112.024.

[26] R.C. 1303.67(A).

[27] R.C. 1303.67(B) and (C).

[28] R.C. 1303.67(D).

The act defines "signed," with respect to a record that is not a writing, as including the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.[29]

No discharge of obligation to pay

The act expands on continuing law by providing that the following circumstances in which the obligation of a party to pay the instrument is not discharged apply to a payment made under the act:[30]

- A claim to the instrument under applicable law is enforceable against the party receiving payment and either payment is made with knowledge by the payor that payment is prohibited by court injunction or similar process; or if the instrument is other than a cashier's, teller's, or certified check, the party making payment accepted from the person with a claim to the instrument indemnity against loss from refusal to pay the person entitled to enforce the instrument.

- The person making payment knows that the instrument is stolen and pays a person it knows is in wrongful possession of it.

Unsigned, telephonically authorized checks

The act defines a new term, "remotely created consumer item," for purposes of modifying specified provisions of the UCC laws on commercial paper and bank deposits and collections as described below. "Remotely created consumer item" is an item drawn on a "consumer account," which is not created by the payor bank and does not bear a handwritten signature purporting to be the drawer's signature. "Consumer account" means an account established by an individual primarily for personal, family, or household purposes.[31]

Transfer and presentment warranties

With respect to a remotely created consumer item, the act expands the warranties that the following persons warrant to include that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn:

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[29] R.C. 1303.67(F).

[30] R.C. 1303.67(E).

[31] R.C. 1303.01(A)(2) and (17) and 1304.01(C)(11).

- A person who transfers an instrument for consideration, to a transferee and to a subsequent transferee if the transfer is by indorsement, or a customer or collecting bank that transfers an item for consideration, to the transferee and any subsequent collecting bank.[32]

- If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, to the drawee making payment or acceptance in good faith.[33]

Defenses and claims in recoupment

The act expands the defenses and claims of the obligor to which the right to enforce the obligation of a party to pay an instrument is subject.[34] It provides that in a "consumer transaction," a transaction in which an individual incurs an obligation primarily for personal, family, or household purposes, if any law other than the Commercial Paper Law requires an instrument to include a statement that the rights of a holder or transferee are subject to a claim or defense that the issuer could assert against the original payee, and the instrument does not include such a statement, all of the following apply:[35]

- The instrument has the same effect as if it included such a statement.

- The issuer may assert against the holder or transferee all claims and defenses that would have been available if the instrument included such a statement.

- The extent to which claims may be asserted against the holder or transferee is determined as if the instrument included such a statement.

The defenses and claims regarding recoupment, both under the act and continuing law, are subject to any law, other than the Commercial Paper Law, that establishes a different rule for consumer transactions.[36]

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[32] R.C. 1303.56(A)(6) and 1304.17(A)(6).

[33] R.C. 1303.57(A)(4) and 1304.18(A)(4).

[34] R.C. 1303.35.

[35] R.C. 1303.01(A)(3) and 1303.35(E).

[36] R.C. 1303.35(F).

Electronic records and signatures

Under continuing law, the general definitions for the UCC define "record" as information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form.[37] The act changes the reference in the following provisions in the UCC laws on commercial paper and bank deposits and collections from "writing" or "written" to "record":

- A promise or order generally is unconditional unless it states that it is governed by another record or the rights or obligations regarding the promise or order are stated in another record. A reference to another record does not of itself make the promise or order conditional.[38]

- A promise or order is not made conditional by reference to another record for a statement of rights regarding collateral, prepayment, or acceleration or because payment is limited to a particular fund or source.[39]

- In an action for breach of an obligation for which a third person is answerable, the defendant may give the third person notice of the litigation in a record.[40]

- "Declaration of loss," for purposes of the provisions on lost, destroyed, or stolen cashier's, teller's, or certified checks, means a statement, made in a record to the effect that all of the circumstances specified in continuing law are true.[41]

- A person entitled to enforce an instrument may discharge the obligation of a party to pay the instrument by renouncing rights against the party by a signed record. See definition of "signed" above under "**No obligation for double payment**."[42]

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[37] R.C. 1301.201(B)(31), not in the act.

[38] R.C. 1303.05(A)(2) and (3).

[39] R.C. 1303.05(B).

[40] R.C. 1303.18.

[41] R.C. 1303.401(A)(3).

[42] R.C. 1303.69(A)(2) and (C).

- Unless otherwise instructed, a collecting bank may present an item not payable by or at a bank by sending to the party to accept or pay a record providing notice that the bank holds the item for acceptance or payment.[43]

- If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke and recover the settlement if, before it has made final payment and before its midnight deadline, it does any of the following: returns the item (continuing law); returns an image of the item if agreed to by the party to which the return is made; or sends a record providing notice of dishonor or nonpayment if the item is unavailable for return.[44]

- A stop payment order is effective for six months, but it lapses after 14 days if the original order was oral and not confirmed in a record within that period. A stop payment order may be renewed for additional six-month periods by a record given to the bank during a period in which the stop payment order is effective.[45]

Modernized suretyship and guaranty rules

The act outright repeals the provisions on the discharge of indorsers and accommodation parties and replaces them with the following provisions relating to guarantors and secondarily liable parties as signatories to negotiable instruments. For purposes of the new provisions, the act defines "principal obligor" as the "accommodated party" or any other party to the instrument against whom a secondary obligor has recourse. "Secondary obligor" means: an "indorser" or an "accommodation party" (defined in continuing law and described below); a drawer having the same obligation of an indorser, if a draft is accepted and the acceptor is not a bank, to pay the draft if it is dishonored by the acceptor; or any other party to the instrument that has recourse against another party to the instrument pursuant to continuing law which entitles a party having joint and several liability who pays the instrument to receive from any party having the same joint and several liability contribution in accordance with applicable law.[46]

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[43] R.C. 1304.22(A).

[44] R.C. 1304.27(A).

[45] R.C. 1304.32(B).

[46] R.C. 1303.01(A)(13) and (18).

Under continuing law, "indorser" means a person who makes a signature, other than that of a signer as maker, drawer, or acceptor, on an instrument to negotiate the instrument, to restrict payment of the instrument, or to incur the indorser's liability on the instrument.[47] "Accommodated party" means a party to an instrument for the benefit of which the instrument is issued for value. "Accommodation party" means any other party to an instrument.[48]

Release of principal obligor's obligation

Under the act, if a person entitled to enforce an instrument releases the obligation of a principal obligor in whole or in part, and another party to the instrument is a secondary obligor with respect to the principal obligor's obligation, the following rules apply:[49]

- The principal obligor's obligations to the secondary obligor regarding any previous payment by the secondary obligor are not affected. Unless the terms of the release preserve the secondary obligor's recourse, the principal obligor is discharged, to the extent of the release, from any other duties to the secondary obligor under the Commercial Paper Law.

- Unless the terms of the release provide that the person entitled to enforce the instrument retains such right against the secondary obligor, the secondary obligor is discharged to the same extent as the principal obligor from any unperformed part of its obligation on the instrument. If the instrument is a check and the secondary obligor's obligation is based on an indorsement of the check, the secondary obligor is discharged without regard to the language or circumstances of the discharge or other release.

- If the secondary obligor is not discharged under the preceding dot point, the secondary obligor is discharged to the extent of the value of the consideration for the release, and to the extent that the release would otherwise cause the secondary obligor a loss.

Prior law provided that the discharge of a party's obligation to pay an instrument by surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation of the party's signature, the addition of words to the instrument indicating discharge, or any other intentional voluntary act, or by

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[47] R.C. 1303.24, not in the act.

[48] R.C. 1303.01(B)(2) and 1303.59(G).

[49] R.C. 1303.70(A).

renouncing rights against the party by a signed writing, did not discharge the obligation of an "indorser" or "accommodation party" (defined above) having a right of recourse against the discharged party.[50]

Extension of time for payments by principal obligor

Under the act, if a person entitled to enforce an instrument grants a principal obligor an extension of the time at which one or more payments are due on the instrument and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:[51]

- The principal obligor's obligations to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the extension preserve the secondary obligor's recourse, the extension extends the time for performance of any other duties owed to the secondary obligor by the principal obligor under the Commercial Paper Law.

- The secondary obligor is discharged to the extent that the extension would otherwise cause the secondary obligor a loss.

- To the extent that the secondary obligor is not discharged under the preceding dot point, the secondary obligor may perform its obligations to a person entitled to enforce the instrument as if the time for payment had not been extended or, unless the terms of the extension provide that the person entitled to enforce the instrument retains the right to enforce it against the secondary obligor as if the time for payment had not been extended, treat the time for performance of its obligations as having been extended correspondingly.

Under prior law, if a person entitled to enforce an instrument agreed to an extension of the due date of the obligation of a party to pay the instrument, the extension discharged an indorser or accommodation party having a right of recourse against the party whose obligation was extended to the extent the indorser or accommodation party proved that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.[52]

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[50] Former R.C. 1303.70(A) and (B), repealed by the act; R.C. 1303.69, and R.C. 1303.54(D), not in the act.

[51] R.C. 1303.70(B).

[52] Former R.C. 1303.70(C), repealed by the act.

Modification of principal obligor's obligation

If a person entitled to enforce an instrument agrees to a modification of the principal obligor's obligation other than a complete or partial release or an extension of the due date and another party to the instrument is a secondary obligor with respect to the principal obligor's obligation, the act imposes the following rules:[53]

- The principal obligor's obligations to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. The modification modifies any other duties owed to the secondary obligor by the principal obligor under the Commercial Paper Law.

- The secondary obligor is discharged from any unperformed portion of its obligation to the extent that the modification would otherwise cause the secondary obligor a loss.

- To the extent that the secondary obligor is not discharged under the preceding dot point, the secondary obligor may satisfy its obligation on the instrument as if the modification had not occurred, or treat its obligation as having been modified correspondingly.

Prior law provided that if a person entitled to enforce an instrument agreed to a material modification of a party's obligation other than an extension of the due date, the modification discharged the obligation of an indorser or accommodation party having a right of recourse against the person whose obligation was modified to the extent the modification caused loss to the indorser or accommodation party with respect to the right of recourse. The loss suffered by the indorser or accommodation party was equal to the amount of the right of recourse unless the person enforcing the instrument proved that no loss was caused by the modification or that the loss was an amount less than the amount of the right of recourse.[54]

Impairment of collateral securing obligation of principal obligor

Under the act, if a principal obligor's obligation is secured by an interest in collateral, another party to the instrument is a secondary obligor with respect to that obligation, and a person entitled to enforce the instrument impairs the value of such interest, the obligation of the secondary obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent the value is reduced to less than the amount of the recourse of the secondary obligor, or the

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[53] R.C. 1303.70(C).

[54] Former R.C. 1303.70(D), repealed by the act.

reduction in value of the interest increases the amount by which the amount of the recourse exceeds the value of the interest.[55] This provision retains prior law, except that the provision refers to "the obligation of a principal obligor" instead of "the obligation of a party to pay the instrument" and to "the obligation of the secondary obligor" instead of "the obligation of an indorser or accommodation party" under prior law.[56]

The act largely retains prior law specifying the following circumstances of impairing the value of an interest in collateral:[57]

- The failure to obtain or maintain perfection or recordation of the interest in collateral;
- The release of collateral without substitution of collateral of equal value or equivalent reduction of the underlying obligation;
- The failure to perform a duty to preserve the value of collateral owed under the Secured Transactions Law or other law to a debtor or other person secondarily liable;
- The failure to comply with applicable law in disposing of or otherwise enforcing the interest in collateral.

The act eliminates the provision stating that if a party's obligation was secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impaired the value of that interest, the obligation of any party who was jointly and severally liable with respect to the secured obligation was discharged to the extent the impairment caused the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge was an accommodation party not entitled to discharge under the above provision, the party was deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment was on the party asserting discharge.[58]

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[55] R.C. 1303.70(D).

[56] Former R.C. 1303.70(E) and (G), repealed by the act.

[57] R.C. 1303.70(D).

[58] Former R.C. 1303.70(F), repealed by the act.

No discharge of secondary obligor

Under the act, a secondary obligor is not discharged under any of the above circumstances, except for the circumstances described in the first two dot points under "**Release of principal obligor's obligation**," above unless the person entitled to enforce the instrument knows that the person is a secondary obligor or has notice under continuing law that the instrument was signed for accommodation.[59]

Under prior law, an accommodation party was not discharged under the prior provisions described above, except the provisions under "**Release of principal obligor's obligation**" and regarding the obligation of any party who is jointly and severally liable with respect to the secured obligation, unless the person entitled to enforce the instrument knew of the accommodation or had notice that the instrument was signed for accommodation.[60]

The act essentially retains the prior law provision that a secondary obligor (instead of "a party" under prior law) is not discharged if the secondary obligor consents to the event or conduct that is the basis of the discharge, or the instrument or a separate agreement of the party provides for a waiver of discharge specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral. The act additionally provides that unless the circumstances indicate otherwise, consent by the principal obligor to an act that would lead to a discharge constitutes consent to that act by the secondary obligor if the secondary obligor controls the principal obligor or deals with the person entitled to enforce the instrument on behalf of the principal obligor.[61]

Secondary obligor's recourse

The act provides that a release or extension preserves a secondary obligor's recourse if its terms provide both that the person entitled to enforce the instrument retains the right to enforce it against the secondary obligor and the recourse of the secondary obligor continues as if the release or extension had not been granted.[62]

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[59] R.C. 1303.70(E).

[60] Former R.C. 1303.70(H), repealed by the act.

[61] R.C. 1303.70(F).

[62] R.C. 1303.70(G).

Secondary obligor's burden of persuasion

Generally, a secondary obligor asserting a discharge has the burden of persuasion both with respect to the occurrence of the acts alleged to harm the secondary obligor and loss or prejudice caused by those acts.[63] However, if the secondary obligor demonstrates prejudice caused by an impairment of its recourse, and the circumstances indicate that the amount of loss is not reasonably susceptible of calculation or requires proof of facts that are not ascertainable, it is presumed that the act impairing recourse caused a loss or impairment equal to the liability of the secondary obligor on the instrument. In that case, the burden of persuasion as to any lesser amount of the loss is on the person entitled to enforce the instrument.[64]

Prior law provided that the burden of proving impairment of the value of collateral was on the party asserting discharge.[65]

Joint and several liability – contribution

Continuing law provides that, generally, if a party having joint and several liability pays the instrument, that party is entitled to receive from any other party having the same joint and several liability contribution in accordance with applicable law.[66] The act eliminates the provision that the discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the above right of a party having the same joint and several liability to receive contribution from the party discharged.[67]

Instruments signed for accommodation

The act provides that if a party's signature to an instrument is accompanied by words indicating that the party guarantees payment or the signer signs the instrument as an accommodation party in some other manner that does not unambiguously indicate an intention to guarantee collection rather than payment, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce it in the same

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[63] R.C. 1303.70(H).

[64] R.C. 1303.70(I).

[65] Former R.C. 1303.70 (E) and (F), repealed by the act.

[66] R.C. 1303.14(B).

[67] R.C. 1303.14(C).

circumstances as the accommodated party would be obliged, without prior resort to the accommodated party by the person entitled to enforce the instrument.[68]

Continuing law provides that an accommodation party who pays an instrument is entitled to reimbursement from the accommodated party and may enforce the instrument against the accommodated party. The act specifies that in proper circumstances, an accommodation party may obtain relief that requires the accommodated party to perform its obligations on the instrument.[69]

The act clarifies that the definitions of "accommodated party" and "accommodation party" (see above under "**Modernized suretyship and guaranty rules**") apply in all of the law on commercial paper, rather than only the provision pertaining to instruments signed for accommodation.[70]

Property tax exemptions

The act makes four changes relative to certain partial property tax exemptions and procedures. Specifically, it extends the maximum term of a Community Reinvestment Area (CRA) property tax exemption for remodeled property and changes or clarifies how exempt value is calculated for purposes of the CRA remodeling exemption and the separate brownfield exemption. Additionally, the act explicitly authorizes complaints to be filed with a county auditor challenging the assessed value of partially exempt property.

Community reinvestment area

Maximum term for remodeled property

Ohio's CRA Law authorizes counties and municipalities to designate certain areas to encourage new construction or remodeling of existing structures. Under continuing law, new construction is tax-exempt for up to 15 years. Under prior law, a remodeled one- or two-family dwelling was tax-exempt for up to ten years if the cost of remodeling exceeded $2,500. Other remodeled structures were tax-exempt up to 12 years if the cost of remodeling exceeded $5,000. Historically or architecturally significant remodeled structures may be exempt for an additional ten years under continuing law.

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[68] R.C. 1303.59(E).

[69] R.C. 1303.59(F).

[70] R.C. 1303.59(G).

The act extends the maximum CRA exemption term for remodeled property to 15 years for all structures — the same term available to new construction. However, the act continues to require that, in order to qualify for CRA tax exemption, the cost of remodeling must exceed $2,500 in the case of one- or two-family dwellings and $5,000 in the case of all other structures.[71]

Calculation of CRA remodeling exempt value

The act changes the basis for determining the maximum tax-exempt value of remodeled structures. Under prior law, the tax-exempt value equaled "the amount by which the remodeling increased the assessed value of the structure," implying a cause and effect relationship between the remodeling and the increased value.

Under the act, the tax-exempt value would instead be determined on the basis of the structure's increased value after remodeling activities begin. This change effectively exempts all increases in the structure's value from the tax year when the remodeling begins for the term of the exemption, regardless of whether the increase is a result of the remodeling.[72]

Application of CRA changes

The act's CRA changes apply to pending exemption applications and those filed after the act's effective date.[73]

Brownfield remediation

Continuing law grants partial property tax exemption for sites contaminated with hazardous substances or petroleum that undergo certain measures to address the contamination. The measures are undertaken privately by what is known as a "voluntary action." Voluntary actions may include one or more of the following: (1) assessing the property to determine the source of contamination or its level relative to applicable environmental standards, (2) limiting how the property is used to uses allowed for the level of contamination present, and (3) "remediation" of the property to bring it to a state that it meets standards applicable to its intended use (e.g., industrial, commercial, or residential).

If a voluntary action is undertaken successfully, the property owner is released from civil liability that would entail the owner having to take further actions to address

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[71] R.C. 3735.67(D)(1).

[72] R.C. 3735.67 and 3735.671.

[73] Section 3(A).

the contamination. The release from liability is evidenced by a "covenant not to sue." Once the covenant is issued by Ohio EPA, the Tax Commissioner issues a tax exemption order for the property.

Under prior law, the tax exemption applied to the increase in the value of the land itself, and the increase in the value of any buildings or other improvements on the land when the Tax Commissioner issued the tax exemption order. The exemption lasted for ten years beginning with the year the order is issued. However, prior law did not clearly state the beginning point for measuring the increased value that was to be tax-exempt. Nor did prior law clearly prescribe how to determine the increase in value that qualified for exemption for any tax year within the ten-year exemption period.

The act addresses both of these ambiguities. First, the act specifies the beginning point for measuring the increase in value: the exemption applies to any increase in value from the beginning of the year in which environmental remedial activities begin. Second, the act specifies how to determine the increase in value that qualifies for the exemption: the increase is to be measured between the year remedial activities began and each of the ten years during which the property is exempted, which effectively exempts any increase in value occurring after remediation begins.[74] Both of these changes apply to exemption orders issued on or after the act's effective date.[75]

To illustrate how the exemption operates with the act's changes, suppose remedial activities begin in 2016 on land that is valued at $1 million for tax year 2016, and buildings on the land are valued at $2 million for that year. A covenant not to sue and the tax exemption order are issued in 2018. Suppose further that, for tax year 2018, the land is valued at $1.5 million and the buildings are valued at $3 million. The land's tax-exempt value for 2018 therefore equals $500,000 and the buildings' tax-exempt value is $1 million. The exemption would last for ten years, from 2018 through 2027. Any value of that land or those buildings in excess of the property's 2016 value would be exempt from taxation for each tax year during that period.

Coverage of autism services and insurance mandates

The act requires that any health insurance plan issued by a health plan issuer provide coverage for the screening, diagnosis, and treatment of autism spectrum disorder. "Autism spectrum disorder" means any of the pervasive developmental disorders or autism spectrum disorder as defined by the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American

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[74] R.C. 5709.87.

[75] Section 3(B).

Psychiatric Association available at the time an individual is first evaluated for suspected developmental delay.

The autism coverage provisions apply to health insuring corporations, sickness and accident insurers, and multiple employer welfare arrangements and apply to health insurance plans that are delivered, issued for delivery, or renewed on or after January 1, 2018.

The act does not apply to nongrandfathered plans in the individual and small group markets, Medicare supplement, accident-only, specified disease, hospital indemnity, disability income, long-term care, or other limited benefit hospital insurance policies.

Under the act, a health plan issuer is prohibited from terminating an individual's coverage, or from refusing to deliver, execute, issue, amend, adjust, or renew coverage to an individual solely because the individual is diagnosed with or has received treatment for an autism spectrum disorder. The health insurance plan, however, must stipulate that coverage be contingent upon both of the following:

- The covered individual receiving prior authorization for the services in question;
- The services in question being prescribed or ordered by either a developmental pediatrician or a psychologist trained in autism.[76]

Coverage minimums

The act imposes the following coverage minimums:

- For speech and language therapy or occupational therapy for a covered individual under the age of 14 that is performed by a licensed therapist, 20 visits per year for each service;
- For clinical therapeutic intervention for a covered individual under the age of 14 that is provided by or under the supervision of a professional who is licensed, certified, or registered by an appropriate Ohio agency to perform such services in accordance with a health treatment plan, 20 hours per week;
- For mental or behavioral health outpatient services for a covered individual under the age of 14 that are performed by a licensed

[76] R.C. 1739.05, 1751.84(A) and (C)(2), 3923.84(A) and (C)(2) and Section 5.

psychologist, psychiatrist, or physician providing consultation, assessment, development, or oversight of treatment plans, 30 visits per year.[77]

Autism spectrum disorder coverage cannot be subject to dollar limits, deductibles, or coinsurance provisions that are less favorable than those that apply to substantially all the medical and surgical benefits under the health insurance plan. Also, the act's provisions are not to be construed as limiting coverage that is otherwise available under the health insurance plan.[78]

Review of treatment plan

A health plan issuer may review a covered individual's treatment plan with regard to outpatient services on an annual basis. The health plan issuer may conduct the review more frequently if the covered individual's physician agrees that more frequent reviews are necessary. If an agreement for more frequent reviews occurs, the agreement applies only to the specific covered individual for whom it was created and not to all individuals being treated for autism spectrum disorder by a physician or psychologist. The health plan issuer must cover the cost of obtaining any review or treatment plan.[79]

Construction

The act specifies that its autism coverage provisions are not to be construed as affecting any obligation to provide services to an enrollee under an individualized family service plan, an individualized education program, or an individualized service plan.[80]

Severability

The act specifies that if the act's autism coverage provisions, or their application, are for any reason held to be invalid, the remainder of the provisions and their application are not affected.[81]

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[77] R.C. 1739.05, 1751.84(B), and 3923.84(B).

[78] R.C. 1739.05, 1751.84(A) and (C)(1), and 3923.84(A) and (C)(1).

[79] R.C. 1739.05, 1751.84(D), and 3923.84(D).

[80] R.C. 1739.05, 1751.84(E), and 3923.84(E).

[81] R.C. 1739.05, 1751.84(G), and 3923.84(G).

Exemption from review by the Superintendent of Insurance

The requirements of the autism coverage portions of the act may be considered mandated health benefits. Under R.C. 3901.71, no mandated health benefits legislation enacted by the General Assembly may be applied to any policy, contract, plan, or other arrangement providing sickness and accident or other health benefits until the Superintendent of Insurance determines, pursuant to a hearing conducted in accordance with the Administrative Procedure Act, that the provision can be applied fully and equally in all respects to (1) employee benefit plans subject to regulation by the federal Employee Retirement Income Security Act of 1974 (ERISA) and (2) employee benefit plans established or modified by the state or any political subdivision of the state, or by any agency or instrumentality of the state or any political subdivision of the state. The act includes provisions that exempt its requirements from this restriction.[82]

Insurance mandates

The act requires the Superintendent of Insurance to conduct an actuarial study on the costs of all health care mandates under Ohio law that apply to individual and group health insurance plans that are not subject to the Employee Retirement Income Security Act of 1974 (ERISA). The Superintendent must deliver this study electronically to the Governor, the Senate President, and the Speaker of the House of Representatives not later than two years after the act's effective date.[83]

The act states that it is the intent of the General Assembly to implement a two-year moratorium on any new health care mandates impacting individual and group health insurance plans that are not subject to ERISA. Further, it is the intent of the General Assembly to develop potential tax credits that offset additional employer costs associated with health care mandates.[84]

Child Abuse and Child Neglect Regional Prevention Council members

The act provides that Child Abuse and Child Neglect Prevention Regional Council members are to be reimbursed for all actual and necessary expenses incurred in the performance of official duties. Under continuing law, members must still serve without compensation.[85]

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[82] R.C. 1751.84(A) and 3923.84(A).

[83] R.C. 3901.88.

[84] Section 6.

[85] R.C. 3109.172(F).

The act prohibits members from participating in Council matters involving their own interests, including funding applications by a member or any public or private entity for which the member serves as a board member or employee.[86]

Local initiative petitions

The act requires a board of elections, when it receives a municipal initiative petition, to determine whether the petition falls within the scope of a municipality's authority to enact via initiative, including, if applicable, the limitations placed by Ohio Constitution, Article XVIII, Sections 3 and 7 on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws. The petition is invalid if any portion of the petition is not within the initiative power.

For a county charter petition, the act requires the board to determine whether the petition falls within the scope of a county's authority to enact via initiative, including whether the petition conforms to the requirements in Ohio Constitution, Article X, Section 3, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county officers by law. If the board's finding is challenged, the board must forward the protest to the Secretary of State to make that determination. The petition is invalid if any portion of the petition is not within the initiative power.

While it is not clear precisely how a reviewing court would interpret the act's language, it appears that the act would, for example, prevent an initiated city ordinance from appearing on the ballot if the board of elections determined that the proposed ordinance would be unenforceable because of a conflict with state law. Or, the act might prevent a county charter proposal from appearing on the ballot if the board determined that the substance of the proposed charter would be unconstitutional.

The act also requires the board of elections to determine whether a local initiative petition satisfies the statutory prerequisites to place the issue on the ballot. After making its determinations, the board must notify the petitioners and the political subdivision and must promptly transmit a copy of the petition and a notice of the determination to the Secretary of State. If multiple substantially similar initiative petitions are submitted to multiple boards of elections and the boards' determinations differ, the act requires the Secretary of State to make a single determination that applies to each petition.[87]

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[86] R.C. 3109.172(J).

[87] R.C. 307.95, 3501.11, 3501.38, and 3501.39.

The act also changes the deadline to file a county charter petition with the board of county commissioners from 110 to 115 days before the day of the general election at which the proposal is to appear on the ballot.[88]

Recall of municipal officials

The act makes two changes to the statutory procedure for the recall of an elected municipal official. First, it specifies that a recall petition is not valid after 90 days from the date of the first signature. Under prior law, no time limit applied to the collection of signatures on a recall petition, although the signer of an election petition still had to be registered to vote at the address indicated on the petition at the time the petition was validated.

Second, under the act, a recall election must be held at the next primary or general election occurring more than 90 days from the date the petition is certified as sufficient. Former law required the recall election to be held between 30 and 40 days after the petition was verified.[89]

While continuing law might appear to authorize and prescribe procedures for the recall of officers in any municipality, in reality, the statute applies only to a municipality whose charter specifies that recall elections must be conducted in accordance with the Revised Code.

The Ohio Constitution does not permit the recall of officers, and as a result, the Ohio Supreme Court has ruled that statutes providing for recall are unenforceable. However, the Court has held that a municipality may adopt a charter that provides for recall elections, and the charter may require those elections to be conducted according to the Revised Code's procedures.[90] As a result, the act changes the recall procedure only in a municipality whose charter specifies that recall elections must be held according to state law.

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[88] R.C. 307.94.

[89] R.C. 705.92.

[90] *State ex rel. Lockhart v. Boberek*, 45 Ohio St. 2d 292 (1976) and *State ex rel. Burnett v. Ducy*, 36 Ohio L. Abs. 467, 44 N.E.2d 803 (2d Dist. Ct. App. 1942). *See* Ohio Const., art II, sec 38.

HISTORY

ACTION	DATE
Introduced	02-16-16
Reported, H. Financial Institutions, Housing & Urban Development	04-27-16
Passed House (95-1)	05-11-16
Reported, S. Civil Justice	12-08-16
Passed Senate (26-5)	12-08-16
House concurred in Senate amendments (72-21)	12-08-16

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Exhibit C

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel* Bryan Twitchell, et al.,	)	
	)	Case No. 2018-1238
Relators,	)	
-vs-	)	**Expedited Election Case Pursuant to S.Ct.Prac.R. 12.08**
Lucas Cty. Bd. of Elections, et al.,	)	
Respondents.		

RELATORS' REPLY BRIEF

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I. INTRODUCTION

Now come Relators, by and through counsel, and reply herein to the Merit Brief of Respondents Lucas County BOE and its members, and to the two *Amicus Curiae* briefs. Relators do not concede arguments raised in those briefs that are not addressed below.

Prompted by scientific research and the actual experience of being without drinkable water for 3 days in 2014, the residents of Toledo have tried multiple means to protect not only their water source, Lake Erie, but also their own health, safety and welfare. (See Tap Water Ban for Toledo Residents, dated Aug. 3, 2014, available at https://www.nytimes.com/2014/08/04/us/toledo-faces-second-day-of-water-ban.html, visited Sept. 10, 2018). They have appealed to regulatory bodies, the state legislature, the governor and even the courts to help them as they watch Lake Erie get sicker and sicker each year. For over three decades, knowing that the Lake is in peril, the government has taken almost no action to correct the problems and protect the people and environment, except for "voluntary" steps by the very industries polluting the lake. See Massive Algae Bloom on Lake Erie Predicted, dated July 30, 2015, available at https://www.outdoornews.com/2015/07/30/massive-algae-bloom-on-erie-predicted/, visited Sept. 10, 2018. In 1968, when the Cuyohoga River, that runs into Lake Erie, caught on fire it sparked a new era in environmental regulation, including the Clean Water Act. Unfortunately, those regulations are not working. Lake Erie's toxic algae blooms are at the forefront of the next era in the effort to rehabilitate destroyed ecosystems. The judiciary should not become complicit in the BOE and industry group's attempt to stop it. How long are the People supposed to wait?

The LEBOR offers a solution that local elected leaders refuse to take on. Other courts in other places are affirming the rights of nature in places such as Ecuador, New Zealand, and Colombia. But here in Ohio, such public decision making has been difficult to achieve because

of entrenched economic and political interests, and a misunderstanding of our constitutional system.

The Lucas County Board of Elections' brief is written as though Ohio Const. Art. I, § 2 (the people's inherent right to alter or abolish their government), and Art. II, § 1 (the initiative right) did not exist. The BOE brief contains zero citations and no discussion of the former, and mentions the latter in passing solely to point out that initiatives are limited to the municipal legislative power. The BOE has no answer to the overwhelming caselaw interpretations since 1918 that affirm, over and over, that the people have a right to vote on initiatives without election officials' arbitrary rejections of the measures from the ballot.

On at least 25 occasions since 1918, the Supreme Court has barred election officials from rejecting from the ballot otherwise-qualified initiative petitions based on considerations of the substance of the initaitives.[1] The BOE remained noticeably silent in its brief about this

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1 *See, e.g., Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 15 (2015); *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223, 2017 WL 4701143 (2017); *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d, 437, 2005-Ohio-5009, ¶ 38 (2005); *State ex rel. Lange v. King*, 2015-Ohio-3440, 2015-1281, ¶ 11 (2015); *State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, ¶¶ 6, 7 (2014); *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14 (2012); *State ex rel. Kilby v. Summit Cty. Bd of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, ¶ 12 (2012); *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶ 24 (2010); *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. Of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, ¶ 43 (2007); *State ex rel. Lewis v. Rolston*, 115 Ohio St.3d 293, 2007-Ohio-5139, ¶ 28 (2007); *Mason City School Dist. v. Warren Cty. Bd of Elections*, 107 Ohio St.3d 373, 2005-Ohio-5363, ¶ 21 (2005); *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 38 (2005); *State ex rel. Commt. For the Charter Amendment v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶ 43 n. 3 (2002); *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999); *State ex rel. Hazel v. Cuyahoga Cty. Bd of Elections*, 80 Ohio St.3d 165, 169 (1997); *State ex rel. Thurn v. Cuyahoga Cty. Bd of Elections*, 72 Ohio St.3d 289, 293 (1995); *State ex rel. Williams v. Iannucci*, 39 Ohio St.3d 292, 294 (1988); *Jurcisin v. Cuyahoga Cty. Bd. of' Elections*, 35 Ohio St.3d 137, 146 (1988); *State ex rel. Walter v. Edgar*, 13 Ohio St.3d 1, 2 (1984); *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5, 6, 7 OBR 317, 318 (1983); *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 17-18 (1977); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, syll. (1941); *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 138 N.E. 881, syll. (1922); *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, syll. ¶ 2 (1921); *Weinland v. Fulton*, 99 Ohio St. 10, syll. (1918).

significant body of precedent.

Instead, the BOE response focuses on the claimed invalidity of the Lake Erie Bill of Rights ("LEBOR") for creating a supposedly impermissible new legal remedy without the approval of the Ohio General Assembly, in the hopes of spotting a defect in one part of the initiative that would mandatorily topple the whole thing by operation of statute. The "poison pill" provision of HB 463 requires that "The petition shall be invalid if any portion of the petition is not within the initiative power." O.R.C. § 3501.38(M)(1)(a).

The statutory scheme of pretend election courts is perverse, inconsistent, produces uneven results and is facially, as well as in practice, grossly unconstitutional in its effects.

II. ARGUMENT

As explained below, the "gotcha" mechanism codified into HB 463 does not provide a lawful basis for ruling LEBOR off the ballot. Both the scope of authority as well as the statutory veto-take-all clause involve substantive scrutiny of the LEBOR that must be overruled and curtailed once and for all.

1. The People stand on a par with the General Assembly respecting their right to legislate.

The People of Ohio enshrined the local initiative process in the Ohio Constitution to guarantee their reserved popular lawmaking power when needed to legislate independent of their representatives.

In 1915, the Ohio Supreme Court said, of the then-new initiative and referendum powers:

> Now, the people's right to the use of the initiative and referendum is one of the most essential safeguards to representative government. * * * The potential virtue of the 'I. & R.' does not reside in the good statutes and good constitutional amendments initiated, nor in the bad statutes and bad proposed constitutional amendments that are killed. Rather, the greatest efficiency of the 'I. and R.' rests in the wholesome restraint imposed automatically upon the general assembly and the governor and the possibilities of that latent power when called into action by the voters.

State ex rel. Nolan v. ClenDening, 93 Ohio St. 264, 277–278, 112 N.E. 1029 (1915), quoted in *State ex rel. LetOhioVote.org v. Brunner* , 2009-Ohio-4900, ¶¶ 19-20, 123 Ohio St. 3d 322, 328, 916 N.E.2d 462, 470.

The People, in their legislative capacity, act as a co-equal legislative body to the General Assembly, and have in the past legislated judicial remedies for inclusion in the Ohio Constitution. Classically, Ohio Const., Art. II, § 34a, Ohio's Minimum Wage Amendment (partially reproduced in the margin[2]), was the product of popular petitioning to establish

2 Ohio Const. Art. II, § 34a, "Minimum Wage" states, in part:

> Except as provided in this section, every employer shall pay their employees a wage rate of not less than six dollars and eighty-five cents per hour beginning January 1, 2007. On the thirtieth day of each September, beginning in 2007, this state minimum wage rate shall be increased effective the first day of the following January by the rate of inflation for the twelve month period prior to that September according to the consumer price index or its successor index for all urban wage earners and clerical workers for all items as calculated by the federal government rounded to the nearest five cents. . . . .
>
> As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that "employer" shall also include the state and every political subdivision and "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.
>
> An employer shall at the time of hire provide an employee the employer's name, address, telephone number, and other contact information and update such information when it changes. . . . . An employee, person acting on behalf of one or more employees and/or any other interested party may file a complaint with the state for a violation of any provision of this section or any law or regulation implementing its provisions. Such complaint shall be promptly investigated and resolved by the state. The employee's name shall be kept confidential unless disclosure is necessary to resolution of a complaint and the employee consents to disclosure. The state may on its own initiative investigate an employer's compliance with this section and any law or regulation implementing its provisions. The employer shall make available to the state any records related to such investigation and other information required for enforcement of this section or any law or regulation implementing its provisions. No employer shall discharge or in any other manner discriminate or retaliate against an employee for exercising any right under this section or any law or regulation implementing its provisions or against any person for providing assistance to an

minimum wage practices and create new causes of legal action.

The historic and continuing power struggle involving reserved rights between the People and their government is now entering a stage where the state legislature is seeking to preempt the people's rights on many issues, including minimum wage and the right to initiative. This Court must articulate and enforce clearer constitutional standards governing the initiative's role in Ohio's legislative scheme. The People's reserved right to legislate is quite literally at stake.

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employee or information regarding the same.

An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of this section or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. There shall be no exhaustion requirement, no procedural, pleading or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal.

This section shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same.

If any part of this section is held invalid, the remainder of the section shall not be affected by such holding and shall continue in full force and effect.

(Adopted Nov. 7, 2006; Proposed by Initiative Petition)

2. Respondents' and Amici's efforts to limit the people's right to initiative blatantly defy constitutional prohibitions.

The heart of the BOE argument is that Art. I, § 16 predominates over Art. I, § 2 and Art. II, § 1. (BOE br. 8). Assertion of this argument at this pre-election, ministerial stage abrogates the bright-line prohibition of *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, ¶ 15 (2015) (the "authority to determine whether a ballot measure falls within the scope of the constitutional power of referendum (or initiative) does not permit election officials to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms"). Haggling over which constitutional provision should prevail also contradicts the Court's determination in *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, syll. (1941): "The courts will not interfere with the submission to the electors of a proposed amendment to a city charter, upon a claim that the amendment, if adopted, will contravene the Constitution of Ohio. Such a claim is prematurely asserted."

As constitutional rights, Article I, § 2, and Art. II, § 1 are on a par with Art. I, § 16, the right-to-a-remedy provision of the Constitution.[3] Since the primary controversy at issue here involves the People as possessors of cognizable legislative powers, the constitutional right-to-a-remedy provision must yield to the people's right-to-legislate via initiative. Instead, the BOE argues that right-to-a-remedy supersedes the other companion rights and terminates the doctrine of severability, which exists only in post-election judicial treatment of enacted initiatives, discussed below.

3. The BOE's attempt to adjudicate the constitutionality of the rights of nature is an additional improper pre-election constitutional challenge to the initiative.

The BOE would have the Court adjudicate the legality and constitutionality of "rights of

3 Art. I, §16 states pertinently that "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

nature" as part of its mandamus determination. BOE br. at 8-9. The Board of Elections asserts (Br. at 8) that "the proposed initiative establishes a new private cause of action not merely for City of Toledo residents but on behalf of a body of water and its ecosystem--something no Ohio General Assembly has ever sanctioned nor has any Ohio Court ever permitted." Respondents constructively admit that there is no Ohio statutory authority and no Ohio common law at all on which to claim that Toledo's municipal legislative authority is in any way curtailed from enacting protections of the rights of nature. The BOE mentions for the first time, in a *post hoc* rationalization post-hearing, two animal rights decisions arising from two other states as the sole basis for the Court to declare the rights of nature unconstitutional (and to disqualify the entire initiative along with it).

The BOE's argument (BOE Br. at 8) illustrates the dangers of allowing the BOE to make the constitutional determination of whether an initiative creates a new cause of action, and based on that consideration, to deny Petitioners ballot access and deny voters their right to vote on proposed measures. As discussed above, whether the Lake Erie Bill of Rights creates a new cause of action requires impermissible review of the initiative's substance and contents.

Remarkably, the BOE not only defends its decision to keep the LEBOR off the ballot on the grounds that it creates a new cause of action, but also because, in its view, the type of new cause of action created is not allowed. (BOE Br. at 8). The BOE argues, "Indeed, the proposed initiative establishes a new private cause of action not merely for City of Toledo residents but on behalf of a body of water and its ecosystem--something no Ohio General Assembly has ever sanctioned nor has any Ohio Court ever permitted." (*Id.*). In other words, the BOE – which conducted no discussion or inquiry at the meeting where LEBOR was excluded from the ballots– and has only raised the issue in its briefing-- only now opines about whether animals or ecosystems have standing to appear in court or whether they may bring particular causes of

action.

The BOE's conclusory argument that there is simply no authority for ecosystem standing is both blatantly wrong and superbly illustrative of how pre-election substantive review by the BOE unconstitutionally interferes with the people's lawmaking authority and hinders the advancement and development of the law.[4] The BOE cites two cases -- *SouthBark Inc. v. Mobile County Commission*, 974 F. Supp.2d 1372, 1379 (S.D. Ala. 2013) and *Naruto v. Slater*, 888 F.3d 418, 432 (9th Cir. 2018) -- in support of its simplistic conclusion that neither animals nor ecosystems can bring claims in court. (BOE Brief at 8-9). Neither case stands for this broad proposition. Both cases considered whether there were federal statutes or other laws authorizing suits by animals in particular instances. In *SouthBark Inc.*, the court concluded that the animals did not have standing because there was no law authorizing the animals to sue based on the causes of action at issue. *See SouthBark Inc.*, 974 F. Supp.2d at 1379 (citing *Cetacean Community v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (quoting *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F.Supp. 45, 49 (D.Mass.1993)) (("'[i]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.' In the absence of any such statement in the [Endangered Species Act], the [Marine Mammal Protection Act], or [National Environmental Policy Act], or the [Administrative Procedure Act], we conclude that the Cetaceans do not have statutory standing to sue")).

In *Naruto*, the Ninth Circuit Court of Appeals similarly looked to the law at issue, the federal Copyright Act, to determine that animals, since they are non-human, did not have statutory standing under that law. *Naruto*, 888 F.3d at 426. Apparently as it focused on the court's

4 The courts, likewise, cannot determine, pre-enactment, whether there is standing or a cause of action. To do so would result in the quintessential advisory opinion in which the court would be advising on a law not yet enacted. The Ohio Constitution does not confer on BOEs greater powers than the courts.

discussion of statutory standing, the BOE ignored the appellate court's holding that animals may have standing, in their own right, under Article III: "[I]t is possible for animals, like humans, to demonstrate the kind of case or controversy required to establish Article III standing." *Naruto*, 888 F.3d at 437 n. 6; *Id.* at 424 ("Here, the complaint alleges that Naruto is the author and owner of the Monkey Selfies. The complaint further alleges that Naruto has suffered concrete and particularized economic harms as a result of the infringing conduct by the Appellees, harms that can be redressed by a judgment declaring Naruto as the author and owner of the Monkey Selfies. Under *Cetacean*, the complaint includes facts sufficient to establish Article III standing."). In undertaking its analysis, the *Naruto* court also recognized that an animal can sue, not through a next friend, but in her own name. *Id.* at 423 ("We thus hold that Naruto's Article III standing under *Cetacean* is not dependent on PETA's sufficiency as a guardian or "next friend," and we proceed to our Article III standing analysis").

What these cases illustrate is that whether the courts recognize animals or ecosystems as having rights depends upon the facts and circumstances of a particular case. In the present matter, the LEBOR expressly provides for ecosystem standing. As such, the courts' reasoning in cases such as *SouthBark* and *Naruto*, as applied to facts here, actually supports an argument favoring recognition of the Lake Erie ecosystem's standing.[5]

Moreover, the BOE (perhaps intentionally) ignores the growing body of case law recognizing that nature has enforceable rights. In 2008, the country of Ecuador amended its national constitution to establish the rights of ecosystems within the country to exist, regenerate, evolve, and be restored. Those constitutional provisions have triggered several enforcement cases protecting the rights of rivers and other ecosystems in the country. On July 27, 2014, Te Urewera, an 821-square mile area of New Zealand, was designated as a legal entity with "[A]ll

5 Of course, other arguments, perhaps of first impression, may also be made post-enactment to support animal or ecosystem standing.

the rights, powers, duties and liabilities of a legal person." Section 11(1), Te Erewera Act of 2014. Te Urewera can now bring causes of action on its own behalf without having to prove direct injury to human beings. In November of 2016, Columbia's Constitutional Court found that the Atrato River, including its tributaries and watershed, is "an entity subject to rights to protection, conservation, maintenance and restoration." In addition, the Court decreed that the Colombian State shall "exercise legal guardianship and representation of the rights of the river in conjunction with the ethnic communities that inhabit the Atrato river basin." In its ruling, the court explained

> that human populations are those that are interdependent on the natural world –not the other way around--and that they must assume the consequences of their actions and omissions in relation to nature. It's about understanding this new socio-political reality with the aim of achieving a respectful transformation with the natural world and its environment, just as has happened before with civil and political rights…economic, social and cultural rights…and environmental rights...Now is the time to start taking the first steps towards effectively protecting the planet and its resources before it is too late or the damage is irreversible, not only for future generations but for the entire human species.

Const. Ct. of Colombia, Judgment T-622 DE 2016.

On March 20, 2017, the High Court of Uttarakhand at Nainital, in the State of Uttarakhand in northern India, issued a ruling declaring that the Ganges and Yumana Rivers are "legal persons/living persons." This comes after numerous rulings by the court which found that while the rivers are "central to the existence to half of Indian population and their health and well being," they are severely polluted, with their very existence in question. The court declared that throughout India's history, it has been necessary to declare that certain "entities, living inanimate, objects or things" be declared as "juristic person[s]." In the case of the Ganga and Yumana, the court explained that the time has come to recognize them as legal persons "in order to preserve and conserve" the rivers. (Writ Petition (PIL) No.126 of 2014).

The sensationalistic ridicule that often attaches to animal rights cases ("Monkeys have the

rights of people!") ignores the fact that in the United States, there is a long, evolving history wherein courts have conferred personhood rights on nonhuman entities. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886) (Corporations are persons within the intent of the clause in §1 of the Fourteenth Amendment); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010) (Limiting independent expenditures on political campaigns by corporations, labor unions, or other collective entities violates the First Amendment because limitations constitute a prior restraint on speech).

4. Surviving post-enactment review is sheer legal speculation that underscores the separation-of-powers problem.

Regardless of whether or not Ohio has recognized ecosystem rights, the People may press for a change in the law, and attorneys may argue in good faith to support it--but the act of legal dissection by election officials is not a valid pre-election exercise of governmental power. Despite this axiomatic proposition, both the BOE and *amici* cite to the *PGE v. Grant Township* case in an improper attempt to persuade the Court to deny ballot access on the grounds that the Lake Erie Bill of Rights would be indefensible even if enacted (BOE Brief at p. 15-16; Affiliated Construction Trades Ohio Foundation *et al.* Brief at p. 1, n. 1). First, whether or not a proposed measure would survive post-enactment review is irrelevant to the issue of whether it must be placed on the ballot. Second, *amici* ignore the fact that the federal district court in *PGE v. Grant Township* did *not* find the Bill of Rights contained in the ordinance at issue in that case to be invalid, but rather struck only certain provisions of the ordinance in light of particular arguments made by the plaintiff oil company in that case. *See Pennsylvania Gen. Energy Co., LLC v. Grant Twp.*, 139 F. Supp. 3d 706, 721 (W.D. Pa. 2015).

Amici's argument further highlights the separation-of-powers problem inherent in substantive pre-election review. Keeping a proposed measure off the ballot because the BOE has

decided it creates a private cause of action ignores the fundamental doctrine of severability. In reviewing the constitutionality or enforceability of enacted laws, courts will sever only those provisions found to be invalid, leaving remaining portions of the law intact wherever possible.[6] But the BOE's act of substantive pre-election review denies voters the right to vote on the entire Lake Erie Bill of Rights because a portion of it creates a cause of action which, purportedly, is not allowed.

BOE and *amicus* also conveniently forget to mention another case involving Grant Township. There is an ongoing case in Pennsylvania Commonwealth Court in which the Pennsylvania state Department of Environmental Protection has sued Grant Township over certain provisions of its Home Rule Charter. *See Commonwealth of Pennsylvania Department of Environmental Protection v. Grant Township of Indiana County and the Grant Township Board of Supervisors*, 126 MD 2017 (Pa. Commw. Ct.). The Charter contains a Bill of Rights that increases the rights of communities and ecosystems, and further prohibits certain activities that interfere with the enjoyment of those rights. That case has proceeded past the summary disposition stage. One issue that will be before the court post-discovery is whether Grant Township residents have the right to increase protections for their health, safety, welfare and environment, particularly where the state has neglected to adequately enact or enforce such

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6 As far back as 1880, the Ohio Supreme Court of Ohio has found that city ordinances may be severable. *Piqua v. Zimmerlin*, 35 Ohio St. 507, 511-12 (1880) ("The same rule applies to a by-law, or ordinance, that applies to a statute; . . . where the statute consists of severable and independent parts, having no general influence over one another, and a part is valid and a part is void, the part which is valid is operative, and will be carried into effect"). Standing alone, legal effect can be given to the parts which are constitutional and that the legislature intended to be severable. *Middletown v. Ferguson*, 12th Dist. No. CA84-04-049 (April 29, 1985). Presence of a severability clause in a piece of legislation evidences intent for it to be severable, but the converse is not necessarily true. "Unless it is evident the legislative body would not have enacted those provisions which it is empowered to do, independent of those provisions which is has no power to enact, the invalid part may be severed and dropped if what remains is fully operative as a law." *Id.*, citing *I.N.S. v. Chadha*, 462 U.S. 919, 934, 103 S.Ct. 2764, 2775, (1983).

protections.

This is all to say that the complexities of whether a law is ultimately valid are not suited to pre-election review. For instance, had Grant Township's Charter been kept off the ballot for allegedly expanding rights beyond what is constitutionally permissible, the people would not now be enjoying the opportunity to defend it, much less use it to prevent significant environmental harm. Given the dire state of Lake Erie's environmental health, the viability of a similar post-enactment defense is logical, if not likely.

5. Toledo has the authority to enact and implement LEBOR as an act of local self-government under the Home Rule Amendment.

The Board of Elections ruled that LEBOR fell outside the scope of Toledo's legislative power as being beyond the reach of the Home Rule Amendment without analyzing the facts. Ohio's Home Rule Amendment, Const. Article XVIII, § 3, provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The Amendment provides independent authority to Ohio's municipalities with regard to local police regulations. *W. Jefferson v. Robinson*, 1 Ohio St.2d 113, 115, 205 N.E.2d 382 (1965).

The BOE concluded that LEBOR fell outside the scope of the legislative power without analyzing the facts. Perhaps the BOE engaged in this cursory review to avoid the appearance of impermissible content based constitutional review. Yet, it is impossible to determine whether LEBOR is within Toledo's, and the people of Toledo's, "scope of authority" without engaging in a complex substantive analysis of LEBOR's language in light of various constitutional provisions and case law. Indeed, the complexity of this question might take months or years to resolve in the courts post-enactment. That is not, as opponents argue, a reason to keep LEBOR off the ballot.

To the contrary, it is the very reason why the BOE cannot engage in pre-election "scope of authority" review without violating petitioners' and voters' constitutional rights.

With regard to the merits, the BOE's substantive determination that Toledo does not have the authority to enact LEBOR under Ohio's Home Rule Amendment is wrong. The Lake Erie Bill of Rights is an exercise of local police power pursuant to the self-governance under the Home Rule Amendment. There is no General Assembly enactment which contradicts the aspirational content and implementation provisions of the LEBOR, including the purported creation of a new cause of action, thus there is no general law with which LEBOR is potentially in conflict. Indeed, if there is a conflict between LEBOR and a state statute, there must be additional constitutional analysis. In matters of local self-government, if a portion of a municipal charter expressly conflicts with parallel state law, then the charter will prevail. *State ex rel. Minor v. Eschen*, 74 Ohio St.3d 134, 138, 1995 Ohio 264, 656 N.E.2d 940 (1995); *State ex rel. Ebersole v. Delaware County Board of Elections*, 140 Ohio St.3d 487, 20 N.E.3d 678, 2014-Ohio-4077 (2014).

This again heightens the inherent weakness of having a system of 88 pretend election censorship courts: the Lucas County Board of Elections is tasked with determining, before the election, on short notice, with essentially on-the-fly legal assistance from a busy general practice county prosecutor's office, whether it is authoritatively true and accurate that the local initiative conflicts in some way, or not, with real (or imagined) state law. Under the circumstances, the legal advisor to the BOE becomes a more powerful juridical figure than the Chief Justice of the Ohio Supreme Court, subject to review under an abuse-of-discretion standard.

6. The scope-of-authority cases cited by the BOE add little to Respondents' position.

The BOE's recitation of *State ex rel. Sensible Norwood v. Hamilton County Board of Elections*, 148 Ohio St.3d 176, 69 N.E.3d 696 (2016), *State ex rel. Hazel v. Cuyahoga County*

Board of Elections, 80 Ohio St.3d 165, 168, 685 N.E.2d 224 (1997), and *State ex rel. Rhodes v. Board of Elections*, 12 Ohio St. 2d 4, 230 N.E.2d 347 (1967) to argue that "for over 50 years" county boards of elections have had ample statutory authority to deny ballot access to a municipality's ordinance/initiative that exceeds the municipality's authority to enact (BOE Br. 10, 13) doesn't stand up. *Sensible Norwood* and *Hazel* focus on the "administrative" versus "legislative" distinction, *viz.*, if the measure is legislative, it is within the scope of a municipality's authority to enact. Relators urge that the LEBOR is unmistakably "legislative," along the lines of ¶ 12, fn. 1 in *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223 (2017), which notes that in *Sensible Norwood,* the Supreme Court upheld the decision of a board of elections refusing to place a measure on the ballot "[b]ecause a significant portion of the proposed ordinance [was] administrative." *Id.* at ¶ 20. The *Espen* court observed, "Unlike the ordinance at issue in *Sensible Norwood,* the current proposal cannot fairly be characterized as administrative when considered in its totality." LEBOR similarly cannot be called "administrative." Finally, the 1967 Rhodes decision, in which an initiative sought to legislate an admonition to Congress to end the Vietnam war, is indisputably beyond the scope of authority of an Ohio municipality to enact, while the provisions of the LEBOR arguably fall well within that scope.

7. Art. I, § 16 right-to-a-remedy power is shared by the People and the General Assembly.

The right-to-a-remedy power is shared by the People with the legislature. There is no language in the Ohio Constitution that prohibits Toledo or the people of Toledo from securing the rights of the Lake Erie ecosystem or from creating new causes of action to enforce those rights. Any delegation of right-to-a-remedy power exclusively to the General Assembly is the result of court decisions. Arguably, under Art. 1, § 20, right-to-a-remedy is a power reserved to the

people. Art. I, § 20 states: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people." This also means that arguably, the right to clean water is reserved to the People by Art. I, § 20. In any event, the entities possessing power over the right-to-a-remedy is a question of constitutional magnitude which, per *Walker*, must be confided to the courts only after an initiative election is held and the initiative is enacted. Put another way, the question of whether LEBOR is a valid means of securing rights for the Lake Erie ecosystem, and the related question of how those rights may be remedied can only be considered post-enactment.

8. The BOE's accusation that LEBOR purports to restrict the actions of the federal government and Lucas County Commissioners evidences another constitutional objection, pre-election.

The Board of Elections also claims that LEBOR "exceeds the scope of the authority granted to the City of Toledo or its voters by purporting to direct or restrict the actions of the federal government or of the Lucas County Board of Commissioners." BOE Br. at 11. Relators dispute this characterization, but the essential points are (1) the BOE neither mentioned this as a ground for ruling LEBOR off the ballot before taking its vote and raises it here for the first time as a *post hoc* rationale for that vote,[7] and (2) once again, the BOE relies on a constitutional argument expressed in 2009 *Ohio Op. Atty Gen.* No. 12 for pre-election veto of the initiative from the ballot. This is yet another contradiction by the BOE of the bright line standard of *State ex. rel. Walker v. Husted.*

III. CONCLUSION

This Court disfavors the use of harried election mandamus proceedings for resolving complex constitutional questions. *State ex rel. Coover v. Husted*, 148 Ohio St.3d 332, 70 N.E.3d

7 As the D.C. Circuit Court of Appeals has cautioned, this Court should "not give an agency the benefit of a *post hoc* rationale of counsel. . . ." *Louisiana Ass'n of Independent Producers and Royalty Owners v. F.E.R.C.*, 958 F.2d 1101 fn. 12 (D.C. Cir. 1992).

587, 2016-Ohio-5794 (2016).[8] Repeatedly (and mostly long after the meeting where the adverse BOE vote was taken), the Board of Elections has raised pre-election constitutional and other legal objections, honoring the *Walker* prohibition on such substantive inquiries into initiative proposals only in the breach. The initiative is not legislation until it is legislated by means of a public vote to enact it. Apart from the fig leaf of legitimacy conferred on the BOE's pretend court process by HB 463, there is no justification for the creation of 88 separate pretend election courts with veto power over the exercise of the constitutional initiative right. There are no articulated standards for BOEs to follow, and consequently, there are no constraints on the subjective nature of the resulting decisions. And then, there is the whole matter of separation-of-powers.

The Court has unfortunately maintained two lines of cases in this area of law. If the Court wants to let the initiative on the ballot, it will agree with *Espen*, *Youngstown*, and earlier cases. If the Court decides to veto the initiative from appearing on the ballot, it will do so based on *Flak*, *Sensible Norwood*, and earlier cases. It is the People's legislative power that is at stake and which is at risk of being gutted into a quaint constitutional museum piece a century after adoption via a plebiscite. The results orientation of the present conflicting lines of precedent on initiative balloting threatens to destroy a core constitutional right which the people agitated and voted for in 1912.

The most important place for bright-line rules is in maintaining separation of powers. This Court must enunciate a bright-line rule that can be easily and consistently followed by all 88 of Ohio's boards of elections and is consistent with our system of justice that respects political rights, justiciability principles, and separation of powers. That judicial utterance should begin

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8 "Relators further contend that the secretary of state and the boards of elections violated another fundamental right—an asserted right to local self government—by imposing requirements on a county charter petition. However, we are reluctant to consider the broader application of Article X, Section 3 in the context of this expedited mandamus case, which seeks to place specific proposals on the ballot." *Id.* at ¶ 12.

with the reversal of the Lucas County Board of Elections' adverse decision on LEBOR and an order requiring placement the Lake Erie Bill of Rights initiative on the November 6, 2018 ballot.

WHEREFORE, Relators pray the Court reverse the August 28, 2018 decision of the Lucas County Board of Elections to reject the proposed Lake Erie Bill of Rights from appearing on the ballot, and that it order the measure to be placed on the ballot for a vote on November 6, 2018.

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Exhibit D

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel* Bryan Twitchell, *et al.*,	)	
	)	Case No. 2018-1238
Relators,	)	
-vs-	)	**Expedited Election Case Pursuant to S.Ct.Prac.R. 12.08**
Dr. Bruce Saferin, *et al.*,	)	
Respondents.	)	

RELATORS' MOTION FOR RECONSIDERATION

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Now come Relators, Bryan Twitchell, Julian C. Mack and Sean M. Nestor, by and through counsel and, pursuant to S.Ct.Prac.R. 12.08(B) and S.Ct.Prac.R. 18.02, hereby move for reconsideration of the Court's September 21, 2018 decision in this matter, found at *State ex rel. Twitchell v. Saferin,* Slip Opinion No. 2018-Ohio-3829, on the grounds specified in the attached Memorandum in Support.

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MEMORANDUM IN SUPPORT

This case involves an original action in mandamus whereby Relators seek issuance of a writ or alternate writ compelling the Lucas County Board of Elections ("BOE") to place an initiated ordinance, the "Lake Erie Bill of Rights," on the ballot within the City of Toledo for the November 6, 2018 general election.

On September 21, 2018, the Court ruled (in a three-justice opinion) as follows:

> Because Twitchell, Mack, and Nestor have not demonstrated that the board of elections abused its discretion when it relied on Flak to deny the request to place the LEBOR charter amendments on the ballot, we deny the writ.

State ex rel. Twitchell v. Saferin, Slip Opinion No. 2018-Ohio-3829, ¶ 9 (Sept. 21, 2018).

Relators object to this ruling and request the Court to reconsider its decision on the following grounds:

1) The BOE explicitly rejected the petition from the ballot based on the statutory constraints of House Bill 463 ("HB 463"). The constitutionality of the statutory scheme was thus before the Court, but the Court improperly avoided the constitutional issue and affirmed the

Board of Elections' decision under pre-HB 463 case law, on less-than-constitutional grounds, in the manner of a declaration instead of a mandamus ruling, as explained below.

2) The U.S. District Court for the Southern District of Ohio in a recent ruling, has found pre-election content-based censorship of local initiatives by boards of elections to violate the First Amendment of the U.S. Constitution and Article 1, §§ 3 and 11 of the Ohio Constitution.

A. The Central Issue Before The Court, The Claimed Unconstitutionality of House Bill 463, Remains Undecided

The Lucas County Board of Elections indisputably relied for its ruling on HB 463, not pre-HB 463 case law. BOE member Karmol stated, "the Supreme Court has said that we are required to determine whether the proposed Charter Amendment goes beyond the authority of the Charter. That's the issue here. That's the only issue, not the constitutionality of what's being proposed. We're not dealing with the - - the subject matter. We're dealing with the -- the scope of the Charter of the City of Toledo." Oral motion to reject LEBOR, Transcript ("Tr.") 22.

Board member Hughes elaborated, claiming that the BOE was not conducting judicial review:

> We're not [sitting as judges.] What we are doing, however, is exercising the duties, not the – you know, what we're choosing to do, a duty imposed upon us by Ohio Revised Code Section 3501.11. It's Board duties.
>
> [Board member Hughes then paraphrases O.R.C. 3501.11(K)(2), which states in full "Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power."]
>
> [Board member Hughes then quotes O.R.C. 3501.38(M)(1)(a), which states in full that "the board of elections shall examine the petition to determine: (a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the

> issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power; or . . . ."]
>
> The United – the Ohio Supreme Court in *Flak* – in *State ex rel. Flak v. Betras* – the cite for you, Mr. Lodge, is 152 Ohio St. 3d 244. It's not a very long decision, so I'm sure you'll be able to find the – the cite. It says, A municipality is not authorized to create new causes of action, only the General Assembly may do so. That's Section 3, Article XVIII of the Ohio Constitution, and they're quoting, again, the Ohio Supreme Court, where they said, State law determines what injuries are recognized and what remedies are available.

Tr. 23-25.

In reaching its decision here, the Court abandoned the question of constitutionality of HB 463 brought before it by the vote of the Lucas County BOE, and retreated to pre-HB 463 case law: "Twitchell, Mack, and Nestor also argue that the authority granted to elections boards in R.C. 3501.11(K)(2), adopted in 2016 Sub.H.B. No. 463 ("H.B. 463") is unconstitutional because it violates either the doctrine of separation of powers or the single-subject rule. But as we have observed in other recent decisions, we need not reach these issues because we can decide this case under pre-H.B. 463 caselaw." *State ex rel. Twitchell v. Saferin*, 2018-Ohio-3829, ¶ 8.

The mission of the Court in mandamus actions is to review decisions of board of elections for abuse of discretion or action in clear disregard of applicable legal provisions. *State ex rel. Jacquemin v. Union Cty. Bd. of Elections*, 147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759, ¶ 9. Mandamus affords only this narrow review. And in the course of mandamus review, as Justice O'Connor noted in her concurrence in *Twitchell,* "**[I]t is not generally the proper role of this court to develop a party's arguments.**" *In re Columbus Southern Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 19, cited in *State ex rel. Twitchell v. Saferin,* 2018-Ohio-3829, 2018-1238 at ¶ 11. But the justices in the lead opinion did just that: they developed the BOE's argument, steering it away from the constitutional controversy over HB 463 caused by the BOE, and instead applying *Sensible Norwood* precedent predating HB 463, even though the BOE expressly relied on HB 463 in reaching its conclusion.

The Lucas County BOE rejected LEBOR based expressly on the statutory constraints of HB 463 and also on the decision of *Flak v. Betras*, which addressed a Mahoning County BOE rejection of an initiative in light of HB 463. Instead of dealing with the constitutional challenge to HB 463 triggered by the Lucas County BOE, the Court transmogrified the unconstitutional rejection of LEBOR into a rejection based on the *Sensible Norwood* line of decisions. This is improper in mandamus.

The Supreme Court has effectively created a closed decision loop whereby the constitutionality of HB 463 can never be challenged in mandamus, merely by switching off to pre-HB 463 case law and retrospectively creating an entirely different basis for the BOE's ruling. The Court's unwillingness to confront the constitutional question continues to frustrate the efforts of thousands of voters who have repeatedly attempted in recent years to exercise their undisputed right to legislate, only to have a board of elections issue a judgment on the substantive constitutionality of the proposed measure to prevent it from going to the people on the ballot. The Court is repeatedly following its divergent case law to affirm a statute. Boards of Elections continue to turn back initiatives based on the suspect provisions of that statute. And each time it does so, the Court signifies that it has conceded all responsibility to boards of elections as the sole authority to make rulings about the constitutionality of initiative proposals in Ohio.

It is clear beyond cavil that the constitutionality of a statute may, be challenged by mandamus. *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 133, 568 N.E.2d 1206, 1209 (1991); see, also, *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166, 545 N.E.2d 1256 (1989); *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 1997-Ohio-278, 77 Ohio St. 3d 338, 341 (1997). And because election matters may present extraordinary circumstances, declaratory judgment might not provide an adequate remedy in the ordinary

course of law because it is not sufficiently complete. In general, if declaratory judgment would not be a complete remedy unless coupled with extraordinary ancillary relief in the nature of a mandatory injunction, the availability of declaratory judgment does not preclude a writ of mandamus. *State ex rel. Arnett v. Winemiller*, 80 Ohio St.3d 255, 259, 685 N.E.2d 1219, 1222 (1997); *see, also, State ex rel. Huntington Ins. Agency, Inc. v. Duryee*, 73 Ohio St.3d 530, 537, 653 N.E.2d 349, 355 (1995); *State ex rel. Mill Creek Metro. Park Dist. Bd. of Commrs. v. Tablack*, 86 Ohio St.3d 293, 297, 714 N.E.2d 917, 1999-Ohio-103 (1999); *State ex rel. Fenske v. McGovern*, 11 Ohio St.3d 129, 464 N.E.2d 525 (1984): "[W]here declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled." *Id.*, syll. ¶ 5.

In sum, the Court's duty respecting mandamus actions is to rule on the issues raised by the acts of the governmental respondents, not to *sub silentio* convert them into declaratory judgment cases where sub-constitutional precedent can be invoked to supply an alternative basis to that of the respondents. *State ex rel. Gadell-Newton v. Husted*, 153 Ohio St.3d 225, 2018-Ohio-1854, 103 N.E.3d 809, ¶ 9 ("This court lacks jurisdiction over a mandamus claim if the true object of the claim is a declaratory judgment and a prohibitory injunction.").

B. Relators' First Amendment Rights Were Violated By Content-Based Analysis By The BOE, Pre-Election

Relators argued in their Merit Brief that they possess rights under the First Amendment of the U.S. Constitution and Ohio Const. Art. 1, §§ 3 and 11 that protect the ballot initiative process as political speech. They urged that when the BOE used HB 463 to undertake pre-election content review of the LEBOR, the BOE violated Relators' speech rights in violation of *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, ¶ 15 (2015) (the "authority to determine whether a ballot measure falls within the scope of the constitutional power of

referendum (or initiative) does not permit election officials to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms."); and also, *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.").

On September 19, 2018, the U.S. District Court for the Southern District of Ohio ruled that Ohio's local initiative scheme denied petitioners an adequate legal remedy for review of the Portage County Board of Elections' denial of ballot access for two municipal marijuana initiatives, and that the BOE's power to make substantive determinations violates petitioners' First Amendment right to seek redress from the government. *Schmitt v. Husted,* Case No. 2:18-cv-00966 (U.S.D.C.S.D. Ohio, September 19, 2018) (slip op.) (copy attached).

Likewise, the Lucas County BOE's inquiry into the content of the LEBOR and its subsequent veto of the initiative from the ballot left Relators without a timely means of recourse in the abbreviated time frame of an election. This is especially true since the Court has declined to reach the constitutionality of HB 463 in mandamus proceedings. Relators' First Amendment rights have been violated by the BOE's action, and the Court should reconsider and reverse its September 21 ruling on that basis.

C. Conclusion

"[R]eferring to the Ohio Constitution's reservation to the people of the right of municipal initiative, we have admonished that 'provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed.' *State ex rel. King v. Portsmouth*, 27 Ohio St.3d 1, 4, 497 N.E.2d 1126 (1986), quoting *State ex rel. Sharpe v. Hitt*, 155 Ohio St. 529, 535, 99 N.E.2d 659 (1951)."

State ex rel. Harris v. Rubino, 2018-Ohio-3609, 2018-1129, ¶ 19. It is the People's legislative power that is at stake and which is at risk of being gutted into a quaint constitutional museum piece a century after adoption of the right of initiative via plebiscite. The action of the Lucas County Board of Elections violated the principle of *Walker*, and should be stricken on that basis, or, alternatively and cumulatively, it also violated the principle of *Schmitt* and should be stricken for that reason.

WHEREFORE, Relators pray the Court reconsider and reverse its September 21, 2018 decision to uphold the Lucas County Board of Elections' striking the proposed Lake Erie Bill of Rights from the ballot and instead that it order the measure to be placed on the ballot for a vote on November 6, 2018 or the next election thereafter when it may properly be submitted to the voters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2018, I sent a copy of the foregoing "Relators' Motion for Reconsideration" via electronic mail to the following:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM SCHMITT, JR., et al.,

Plaintiffs,

Case No. 2:18-cv-966
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

v.

OHIO SECRETARY OF STATE JON HUSTED, et al.,

Defendants.

OPINION & ORDER

This matter is presently before the Court for consideration of Plaintiff's Application for a Temporary Restraining Order. (ECF No. 3.) For the reasons set forth herein, the motion is **GRANTED**.

I.

A. Undisputed Relevant Facts

The following facts are set forth for the limited purpose of addressing the immediate motion before the Court. Any findings of fact and conclusions of law made by a district court in addressing a request for injunctive relief, particularly in consideration of a temporary restraining order, are not binding at a trial on the merits. *University of Texas v. Camenish*, 451 U.S. 390, 395, 101 S.Ct 1830, 68 L.Ed.2d 175 (1981).

Plaintiffs William Schmitt and Chad Thompson drafted and circulated two ballot initiatives in two Ohio villages, Garretsville and Windham. (ECF No. 3.) Both initiatives proposed ordinances with identical language that essentially decriminalized marijuana possession. The initiative reduced criminal fines to $0, removed any consequences related to licenses, and reduced court costs to $0. (*Id.*) After acquiring the necessary signatures, Schmitt

and Thompson submitted the proposed ordinances to the Portage County Board of Elections, one of the defendants in this case.

The Portage County Board of Elections rejected the proposed initiative for two reasons. First, the Board determined that "the $0 fine and no license consequences are administrative in nature." (*Id.*) Second, the Board found that "[t]he $0 court costs is administrative in nature and is an impingement on the judicial function by a legislature." (*Id.*) On August 21, 2018, the Portage County Board of Elections notified Schmitt and Thompson that it would not certify the proposed initiatives for the ballot. (*Id.*)

On August 28, 2018, Plaintiffs filed their Complaint (ECF No. 1) and a Motion for Temporary Restraining Order and/or Preliminary Injunction. (ECF No. 3.) Defendants filed Responses in Opposition to Plaintiffs' Motion (ECF Nos. 17, 18) to which Plaintiffs answered with their Reply. (ECF No. 19.) On September 17, 2018, this Court held a hearing on Plaintiffs' requested injunctive relief.

B. Ohio's Ballot Initiative Scheme

Ohio has created an initiative process for its citizens. Ohio Const. Art. II, Sec. 1. Relevant to this case, Ohio law requires petitioners for the initiation of legislation in a municipality to submit an initiative petition to a board of elections. O.R.C. § 3501.11(K)(1). The board of elections then reviews, examines, and certifies the sufficiency and validity of the petition. *Id.* The boards of elections are also required to "determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot." O.R.C. § 3501.11(K)(2). This is known as the "gatekeeper mechanism." *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015). The Supreme Court of Ohio has held that boards of elections have discretion when determining "which actions are administrative and which are legal." *Id.* Administrative actions

are not appropriate for the initiative process; legislative actions are. *See* O.R.C. §§ 3501.38(M)(1) and 3501.39(A)(3). While recognizing that this Court is without jurisdiction to decide whether the initiative petition contains legislative or administrative action, the parties dispute this issue, which would otherwise determine whether the matter should be placed on the ballot.

When a local elections board determines that an action is administrative (and therefore improper) or legislative (and therefore proper), Ohio law creates a fork in its procedural road. If the initiative petition is deemed valid, then citizens opposing the petition's validity—and in a practical sense, the board's decision—have an original cause of action for review of the board's decision in the Supreme Court of Ohio. Ohio Const. Art. II, Sec. 1g. On the other hand, if the board or secretary rejects a petitioner's submission for a substantive reason, as in the administrative versus legislative divide, *supra*,[1] neither the Ohio Constitution nor state laws provide a remedy. As a result, a party aggrieved by the rejection of an initiative petition has no right, by statute or otherwise, to review of an executive board's legal conclusion. An aggrieved petitioner may seek a writ of mandamus, which is wholly separate from an appeal of right.

Under Ohio law, to be entitled to a writ of mandamus, a petitioner must prove, by clear and convincing evidence: (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the board to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 2018-Ohio-1602 (citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13). Only

[1] *See State ex rel. Jones v. Husted*, 149 Ohio St.3d 110 (2016) ¶ 24 ("By its plain language, Section 1g creates a cause of action to challenge, that is, to *oppose* signatures and part-petitions. It does not create a broader cause of action only to challenge decisions by the secretary or the county boards to reject petitions. *That* cause of action still falls under this court's original mandamus jurisdiction.") In the instant case, Plaintiffs' fall under the latter scenario. That is, the Portage County Board rejected Plaintiffs' decision. Therefore, Plaintiffs' only state-court remedy exists in mandamus issued by either the Supreme Court of Ohio or the courts of appeals.

the Supreme Court of Ohio or the courts of appeals have original jurisdiction in mandamus. Ohio Const. Art. IV, Sec. 3; *State ex rel. Jones v. Husted* (Ohio, 2016) 149 Ohio St.3d 110, 73 N.E.3d 463, 2016-Ohio-5752. When the Ohio Supreme Court or courts of appeals reviews a decision by a county board of elections, such court may only issue the writ if the board "engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions." *Id.* ¶ 4 (citing *State ex rel. Jacquemin v. Union County Bd. of Elections*, 147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759, ¶ 9).

Applied to these narrow facts, Ohio's initiative scheme denies a rejected petitioner "an adequate remedy ... of law" for review of a local board of election's legal determination. Instead, the only recourse available is a petition for a writ of mandamus. A writ is an extraordinary remedy that is discretionary and "will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction." *State ex rel. Sparto v. Juvenile Court of Darke County* (1950), 153 Ohio St. 64, 65, 90 N.E.2d 598. In other words, rejected petitioners are stuck between a rock and a hard place. But is there any constitutional violation?

On that question, the parties disagree. Plaintiffs allege that by following Ohio law, Defendants violated their rights protected by the First and Fourteenth Amendments. Defendants argue that the gatekeeper mechanism and the possibility of a writ of mandamus are constitutionally sound. To remedy their alleged violations, Plaintiffs move this Court to order injunctive relief, pursuant to Federal Rule 65 of Civil Procedure.

II.

Federal Rule 65 of Civil Procedure allows a party to seek injunctive relief if the party believes that it will suffer irreparable harm or injury. Fed. R. Civ. P. 65. To determine whether

injunctive relief should be issued, the Court considers these four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether granting the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *McPherson v. Michigan High School Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc).

These factors are not prerequisites; each must be weighed against the others. *Id.* at 459. "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gozales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000). A district court is required to make specific findings concerning each of the factors unless fewer are dispositive of the issue. *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). The Court will now analyze each of the four factors below.

III.

A. Likelihood of Success

Plaintiffs argue that Ohio's ballot initiative procedure violates their rights guaranteed by the United States Constitution. In their Reply Brief (ECF No. 19), Plaintiffs make clear that they "do not challenge Ohio's ability to limit the subject matter of its initiatives. What Plaintiffs challenge is how Ohio has chosen to implement this otherwise lawful task." (*Id.*) At oral argument, however, Plaintiffs argued that the Ohio procedure for proposing initiatives violates constitutional due process protections.

At the same oral argument, Defendants responded that the mandamus relief is constitutionally sufficient. Defendants conceded that mandamus relief is only appropriate when there is no adequate remedy at law, and that the Supreme Court or courts of appeals must review local board of election's decision by a "clear disregard of law" standard.

The right to initiate legislation through the initiative process is not a federal constitutional right. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). Concomitantly, once the initiative or, if its counterpart, the referendum process, is made a part of state law, the process becomes a "democratic tool" to be regulated in a manner consistent with the First and Fourteenth Amendments. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 49 L.Ed.2d 132 (1976).

In *Meyer v. Grant*, the United States Supreme Court held that once a right of initiative is created, that state may nor place restrictions on the exercise of the initiative that unduly burden First Amendment rights. *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *see Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use ....") In *Meyer*, the United States Supreme Court struck down a Colorado provision criminalizing the payment of money to anyone circulating an initiation petition. *Id.* Since Ohio has created an initiative procedure, Ohio cannot restrict its use in violation of the federal Constitution.

The United States Supreme Court has articulated a standard for evaluating constitutional challenges to a state's election laws in *Anderson v. Celebrezze*, 460 U.S. 780, 788–89, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and in *Burdick v. Takushi*, 504 U.S. 438, 434, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992). The court must: (1) "consider the character and magnitude of" the plaintiffs' alleged injuries, (2) "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and (3) assess the "legitimacy and strength of each of those interests," as well as the "extent to which those interests make it necessary to

burden the plaintiff[s'] rights." *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564. This is known as the *Anderson-Burdick* standard.

"States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 191, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). The Court addresses these factors below.

The touchstone of *Anderson-Burdick* is flexibility when weighing competing interests. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016). Opposite this flexibility, the "rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

Plaintiffs argue that without the right to review an executive board's legal decision, Ohio's initiative procedure deprives Plaintiffs of their First Amendment rights related to voting upon valid initiative-generated legislation. Voting is "of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

In addition to voting, Plaintiffs' allege that their rights to due process are violated. The Due Process Clause of the Fourteenth Amendment extends to First Amendment rights. *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) ("It is by now well established that the concept of 'liberty' protected against state impairment by the Due Process Clause of the Fourteenth Amendment includes the freedoms of speech and association and the right to petition for redress of grievances.")) These protected rights may take the form of "simple association for mutual political or social benefits, including support of independent candidates or specific

policies." *Id.* (citing *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964)).

No doubt, Ohio has strong interests in ensuring its elections are run fairly and honestly. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). Ohio also has an interest in placing on the ballot only such proposed legislation as would be lawful as municipal legislation under Ohio Const. Art. XVIII, Sec. 3. Repeated votes on matters unlawful or unenforceable on their face could erode public confidence in the entire initiative or referendum process.

Recognizing such interests, the Court finds no legitimate state interests in preventing an adequate legal remedy for petitioners denied ballot access by a board of elections. While the availability of mandamus relief is essentially a judicially imposed remedy when the law does not otherwise provide one, the high burden on petitioners to prove entitlement to an extraordinary remedy is no substitute for *de novo* review of the denial of a First Amendment right. For those reasons, the Court finds that Plaintiffs' have a high likelihood of success on the merits.

B. Irreparable Harm

Plaintiffs argue that without a right of review of the board's legal decision, Ohio laws deprive Plaintiffs of their First Amendment rights. "Even a temporary deprivation of First Amendment rights constitutes irreparable harm in the context of a suit for an injunction." *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975) (citing *Schnell v. Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969). Without a right to appeal or review, Plaintiffs will suffer irreversible injuries which could not be remedied by law, absent injunctive relief.

3. Substantial Harm to Others; Public Interest

As the Supreme Court noted in *Storer v. Brown*, 415 U.S. 724, 730 (1974), election structures are critical "if some sort of order, rather than chaos, is to accompany the democratic processes." While election laws will "invariably impose some burden on individual voters," this Court must balance the equities to ensure the state's regulatory interests justify any harm to others. *Burdick*, 504 U.S. at 433. Given this is an election case, "harm to others" concerns only the public.

In the instant action, Plaintiffs argue Defendants will suffer no injury should this Court enjoin the enforcement of O.R.C. § 3503.06(C)(1)(a). (ECF No. 3.) Defendants contend preliminary relief would harm Ohio by undermining its interest in regulating the ballot process. (ECF No. 17) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986)). Defendants cite *Jones v. Markiewicz-Qualkinbush*, in which the Seventh Circuit stated that "states have a strong interest in simplifying the ballot." 892 F.3d 935, 938 (7th Cir 2018).

Plaintiffs' argument is well taken. Ohio's regulatory scheme unreasonably infringes on Plaintiffs' First Amendment rights by allowing an executive board to determine disputed legal and even constitutional issues, thereby potentially blocking initiatives from the ballot, and then denying rejected petitioners a right to review. *Burdick*, 504 U.S. at 438. No legitimate state interest is protected by a lack of appellate review. Similarly, Ohio voters are unlikely to suffer cognizable harm from Plaintiffs' access to the ballot.

Finally, in First Amendment cases, potential harm to others stemming from preliminary relief is "'dependent on a determination of the likelihood of success on the merits of the First Amendment challenge.'" *Committee*, 275 F.Supp.3d at 596 (quoting *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009)). For instance, if the "regulation in question is likely to be deemed

constitutional, the public interest will not be harmed by its enforcement." *Id.* Here, Plaintiffs have a high likelihood of success on the merits. Accordingly, the public is unlikely to suffer significant harm from the injunctive relief that Plaintiffs seek.

IV.

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Application for a TRO (ECF No. 10.) Given the fact that there is no possibility of financial harm to Defendant, the Court dispenses with the requirement of a bond. The Court hereby **DIRECTS** the Ohio Secretary of State and the Portage County Board of Elections to place both initiative petitions which are the subject of this case on the upcoming ballot for the election to be held on November 6, 2018. This Order shall remain in effect for fourteen (14) days.

IT IS SO ORDERED.

9-19-2018
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE