SLIP OPINION NO. 2026-OHIO-3663

THE STATE EX REL. KIDD ET AL. *v.* CLINTON COUNTY BOARD OF ELECTIONS ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Kidd v. Clinton Cty. Bd. of Elections*, Slip Opinion No. 2026-Ohio-3663.]

Elections—Mandamus—Writ sought to compel board of elections to certify sufficiency and validity of initiative petition for placement of proposed city ordinance on November 3, 2026 general-election ballot—Proposed ordinance purports to create new cause of action and therefore is not within the municipality's power to enact—Writ denied.

(No. 2026-1165—Submitted September 14, 2026—Decided September 18, 2026.)

IN MANDAMUS.

The per curiam opinion below was joined by KENNEDY, C.J., and DEWINE, BRUNNER, DETERS, HAWKINS, and SHANAHAN, JJ. BRUNNER, J., concurred, noting that because boards of elections act in a quasi-judicial capacity in hearing protests of candidacies and ballot issues and because this court should recognize that there is public expense for elections that will ultimately be invalidated, she joins the majority's opinion, understands the valid points made by the dissent, and recognizes that this court remains constitutionally empowered to check the authority of boards of elections if they overstep their authority. FISCHER, J., dissented, with an opinion.

Per Curiam.

{¶ 1} Relators, Quintin Koger Kidd and Susan Croutwater, filed with city officials for the City of Wilmington an initiative petition setting forth a proposed ordinance that would add a new chapter to the Wilmington Zoning Code. The proposed ordinance would regulate data centers and data-center campuses by establishing certain standards for noise, lighting, airborne emissions, generator-testing frequency, water use and discharge, and heat generation, among other things. It would further make noncompliance with any of those standards a violation of the new chapter and confer on persons living within certain distances a "private right of action" against the data-center owner or operator to enforce compliance with the new chapter.

{¶ 2} Respondents, the Clinton County Board of Elections and its individual members[1] (collectively, "the board"), declined to certify the initiative for placement on the November 3, 2026 general-election ballot, determining that the proposed ordinance purported to create a private cause of action and that the initiative was therefore not within the municipality's power to enact.

{¶ 3} Relators seek a writ of mandamus compelling the board to certify the sufficiency and validity of the initiative petition and submit the proposed ordinance

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1. The Clinton County Board of Elections members are Chairman Steve Fricke, Jay Peterson, Terri Thobaben, and Barbara Saville.

to the electors at the November 3 general election. For the reasons explained below, we deny the writ.

I. FACTS AND PROCEDURAL HISTORY

A. The proposed ordinance

{¶ 4} On July 13, 2026, relators filed with Wilmington city officials an initiative petition setting forth a proposed ordinance that would add a new chapter, Ch. 1161, to Wilmington's zoning code.[2] The stated intent of the proposed ordinance is to "regulate data centers and data center campuses in a manner that fully protects public health, safety, and welfare by preventing adverse impacts." And it would do so in part by establishing enforceable standards for noise, lighting, airborne emissions, generator-testing frequency, water use and discharge, and heat generation, among other things.

{¶ 5} The proposed ordinance provides that "[e]ach of the following is an automatic, independently enforceable violation" of Ch. 1161: (1) any measured exceedance of specified noise limits; (2) any exceedance of national or state air-quality standards attributable to "facility sources"; (3) "any unauthorized generator operation"; (4) "any generator testing event exceeding frequency, duration, or time-of-day limits without required documentation"; (5) "any failure to submit required reports within deadlines"; (6) "any verified persistent complaint not addressed within the required timeframe"; (7) "any discharge of an undisclosed or unapproved chemical" or "any direct discharge without a required . . . permit"; and (8) "any material deviation from the approved Campus Master Plan without amendment approval."

{¶ 6} Although the proposed ordinance contemplates that the city would have "primary" responsibility for the enforcement of these standards, it also "confers" in Section 1161.25 a "private right of action on affected residents." That

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2. Wilmington has not adopted a municipal charter.

section further states that this private right of action is an "exercise of the City's authority under R.C. Chapter 713"[3] and the city's "home-rule and police powers" and is "modeled on the citizen-suit provisions of the federal Clean Water Act[, 33 U.S.C. 1251 et seq.] . . . and Clean Air Act[, 42 U.S.C. 7401 et seq.]." Under the proposed ordinance, any person who owns, or any elector who owns or occupies, real property within stated "separation distances" may "bring a civil action to enforce . . . Chapter [1161] against a data center operator, owner, or applicant alleged to be in violation [thereof]."[4]

{¶ 7} Section 1161.25 of the proposed ordinance further provides that in such an action, a court could grant declaratory relief, issue a temporary injunction, or issue a permanent injunction ordering suspension of operations or mitigation. A court could also issue fines of $5,000 or $10,000 per day (payable to the city under proposed Section 1161.23), suspend the data center's certificate of occupancy, and revoke the conditional use of the land for data-center operation. Finally, a court could "award a prevailing or substantially prevailing plaintiff reasonable attorney's fees, expert fees, and costs." The proposed ordinance provides that this private right of action would be "in addition to, and [would] not limit, the City's enforcement authority . . . or any other remedy available under law," and would not limit "any right a person may have to bring an action under Ohio common law or other statute."

B. The city's and board's actions on the petition

{¶ 8} Relators transmitted the petition papers to the board on July 13, 2026. On July 28, the board determined that the petition contained 425 valid signatures

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3. R.C. Ch. 713 generally authorizes a municipal legislative authority to establish a planning commission for the purpose of adopting and administering zoning regulations. *See Schomaeker v. First Natl. Bank of Ottawa*, 66 Ohio St.2d 304, 306 (1981); R.C. 713.01.

4. The "separation distances" are, broadly speaking, between 1,000 and 2,000 feet, measured from the data-center structure to existing residences, residential-zoning boundaries, sensitive receptors, or public-water-supply intakes.

and communicated that determination to the Wilmington city auditor. Two days later, Wilmington Law Director Desmond Cullimore sent a letter asking the board to determine whether the proposed ordinance was within the city's authority to enact by initiative. Cullimore, citing our decision in *State ex rel. Bolzenius v. Preisse*, 2018-Ohio-3708, expressed the view that the proposed ordinance was not within the city's initiative power because proposed Section 1161.25 purported to "confer a private right of action on affected residents."

{¶ 9} On August 4, the city auditor certified the sufficiency and validity of the petition and transmitted the petition papers and related materials to the board. In her certification letter, the auditor disclaimed making any determination "regarding whether the proposed measure falls within the municipal initiative power."

{¶ 10} On August 12, the board held a special meeting regarding the initiative petition to enact Ch. 1161 of the Wilmington Zoning Code. The board noted that Section 1161.25 of the proposed ordinance would do the following: "[give] designated residents and property owners the right to sue data-center applicants, owners, and operators; establish[] pre-suit notice requirements; create[] limitation and repose periods; authorize[] declaratory and injunctive relief, operational suspension, mitigation orders, and civil penalties; and permit[] attorney and expert-witness fees." In view of what Section 1161.25 would do and in reliance on the advice of outside legal counsel, the board concluded that "the Initiative . . . creates a new private civil cause of action that Wilmington lacks legislative authority to enact." The board voted unanimously to not certify the initiative petition for placement of the proposed ordinance on the November 3 general-election ballot.

{¶ 11} Kidd requested that the board hold a hearing to reconsider its determination, and, on August 26, the board held a hearing at which Kidd presented evidence and argument in support of his position that the initiative petition should be certified. However, the board ultimately reaffirmed its determination and declined to certify the initiative petition for placement of the proposed ordinance on the November 3 general-election ballot.

C. This mandamus action

{¶ 12} Relators filed this action on August 31, 2026, seeking a writ of mandamus compelling the board to certify the sufficiency and validity of the initiative petition and submit the proposed ordinance to the electors at the November 3 general election. As directed by this court's scheduling order, *see* 2026-Ohio-3407, the board filed an answer, both parties submitted evidence and merit briefs, and relators filed a reply brief. In addition, Pickaway Informed Voters timely submitted a brief and reply brief as amicus curiae in support of relators.

II. ANALYSIS

{¶ 13} To be entitled to a writ of mandamus, relators must establish by clear and convincing evidence that (1) they have a clear legal right to the requested relief, (2) the board has a clear legal duty to provide that relief, and (3) they lack an adequate remedy in the ordinary course of the law. *State ex rel. Strbich v. Montgomery Cty. Bd. of Elections*, 2024-Ohio-4933, ¶ 11. Relators seek a writ ordering the board to submit the proposed ordinance to Wilmington electors at the November 3, 2026 general election. Because that election will occur in less than 50 days, relators lack an adequate remedy in the ordinary course of the law. *See State ex rel. Imposters, Ltd. v. Cuyahoga Cty. Bd. of Elections*, 2024-Ohio-4588, ¶ 19; *State ex rel. Lambert v. Medina Cty. Bd. of Elections*, 2023-Ohio-3351, ¶ 12. The board does not argue otherwise.

{¶ 14} To determine whether relators have established their clear legal right to the requested relief and respondents' corresponding clear legal duty to provide that relief, we consider whether the board "engaged in fraud, corruption, or abuse of discretion or acted in clear disregard of applicable law." *State ex rel. Tjaden v. Geauga Cty. Bd. of Elections*, 2024-Ohio-3396, ¶ 23. Because relators do not allege any fraud or corruption, they must show that the board abused its discretion or acted in clear disregard of applicable law by failing to certify the initiative petition for placement of the proposed ordinance on the November 3 general-election ballot. *See id.*

{¶ 15} The power to enact ordinances by initiative is "reserved to the people of each municipality" by Article II, Section 1f of the Ohio Constitution. However, this initiative power may be exercised only as to questions that municipalities are "authorized by law to control by legislative action." *Id.* Here, the board cited R.C. 3501.11(K)(2) for the proposition that it had "a responsibility to review the initiative [for] whether it falls within the scope of the city's authority to enact legislation."

{¶ 16} R.C. 3501.11(K)(2), enacted by the General Assembly in 2016 Sub.H.B. No. 463 ("H.B. 463"), states that a board of elections "shall . . . [e]xamine 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 [R.C. 3501.38(M)]." R.C. 3501.38(M), which was also enacted by the General Assembly in H.B. 463, provides that

> the board of elections shall examine the petition to determine . . . [w]hether 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.

R.C. 3501.38(M)(1)(a). H.B. 463 similarly amended R.C. 3501.39(A) to incorporate the requirements of R.C. 3501.38(M)(1)(a). *See* R.C. 3501.39(A)(3) (providing that a board of elections "shall accept any petition described in [R.C.] 3501.38 . . . *unless*" the petition does not meet certain requirements, including those described in R.C. 3501.38(M) [emphasis added]). R.C. 3501.11(K)(2), R.C. 3501.38(M)(1)(a), and R.C. 3501.39(A)(3) each state that a petition is "invalid if any portion of the petition is not within the initiative power."

{¶ 17} Relators argue that they have a clear legal right to have their proposed ordinance placed on the ballot because the statutes authorizing boards of elections to determine whether a proposed ordinance is beyond a municipality's initiative power are unconstitutional on separation-of-powers and freedom-of-speech grounds. Relators argue in the alternative that the board abused its discretion in determining that the proposed ordinance at issue here was outside the municipal initiative power, because the proposed ordinance does not, contrary to the board's determination, create a new cause of action.

A. The board properly determined that the proposed ordinance is outside the municipal initiative power

{¶ 18} Before the enactment of H.B. 463, we interpreted former R.C. 3501.11(K) (now R.C. 3501.11(K)(1))—which grants boards of elections the power to "[r]eview, examine, and certify the sufficiency and validity of petitions"—as authorizing boards to "determine whether a ballot measure falls within the scope of the constitutional power of . . . initiative," *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761, ¶ 9. We reaffirmed this interpretation a year later, holding that a board of elections "properly rejected" an initiative petition because some of its provisions were "beyond the scope of a municipality's authority to enact." *State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elections*, 2016-Ohio-5919, ¶ 22.

{¶ 19} In *Bolzenius*, a post-H.B. 463 case, we denied mandamus relief against members of a board of elections in circumstances very similar to those presented here. 2018-Ohio-3708 at ¶ 9-11. In doing so, we relied on our pre-H.B. 463 caselaw interpreting former R.C. 3501.11(K) (now R.C. 3501.11(K)(1)) and concluded that the board members in that case acted consistently with R.C. 3501.11(K)(1) when they excluded a proposed ordinance from the ballot. *Bolzenius* at ¶ 11-14. We consequently did not reach the relators' argument that the provisions of H.B. 463 were unconstitutional on separation-of-powers grounds. *Id.* at ¶ 14. We take the same approach here, particularly given the expedited nature of this action, the limited briefing, and the lack of participation by the State. *See State ex rel. Flak v. Betras*, 2017-Ohio-8109, ¶ 17, abrogated in part on other grounds by *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035.

{¶ 20} *Bolzenius* concerned a proposed municipal ordinance that would have (1) prohibited "most hydrocarbon-extraction activities within the [City of Columbus]," (2) imposed "strict liability" on certain violators, and (3) permitted "'any resident'" of the city to "'enforce the rights and prohibitions'" provided therein. *Bolzenius* at ¶ 2-3. We concluded that the respondent board members did not act improperly in excluding the proposed ordinance from the ballot, because the proposed ordinance "would create a new cause of action" and we had held just the year before that "municipalities lack the power" to create a new cause of action. *Id.* at ¶ 13, citing *Flak* at ¶ 15.

{¶ 21} Like the proposed ordinance in *Bolzenius*, here, Section 1161.25 of the proposed ordinance purports to "confer a private right of action on affected residents." Despite that explicit language, relators nevertheless argue that Section 1161.25 does *not* purport to create a new cause of action; instead, they say, it merely incorporates actions for injunctive relief authorized under R.C. 713.13 and Wilmington Cod.Ord. 1135.14(a)(2). R.C. 713.13 provides:

> No person shall erect, construct, alter, repair, or maintain any building or structure or use any land in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation.

Wilmington Cod.Ord. 1135.14(a)(2) is nearly identical, providing that "any adjacent or neighboring property owner who would be specially damaged" by a violation of Wilmington's zoning code may "at their own cost and expense . . . institute an action . . . to prevent, enjoin, abate, or remove" that violation.

{¶ 22} Contrary to relators' argument, the cause of action contemplated by Section 1161.25 of the proposed ordinance does more than merely restate R.C. 713.13 or Wilmington Cod.Ord. 1135.14(a)(2). Most notably, it would dispense with the requirement that a property owner show that he or she would be especially damaged by the alleged violation. *See Murray Energy Corp. v. Pepper Pike*, 2008-Ohio-2818, ¶ 15 (8th Dist.) ("a plaintiff seeking an injunction under R.C. 713.13 has the burden of showing that he would not be merely damaged, but 'especially damaged,' by a 'zoning violation'"). It would also enlarge the available remedies. Whereas R.C. 713.13 authorizes "a suit for injunction to prevent or terminate [a] violation," Section 1161.25(E) purports to authorize a court to order, among other things, "any civil penalty authorized by [Section] 1161.23," including fines payable to the city of up to $10,000 per day per violation. *See Flak*, 2017-Ohio-8109, at ¶ 15, quoting *Groch v. Gen. Motors Corp.*, 2008-Ohio-546, ¶ 150 ("'state law . . .

determines what injuries are recognized and what remedies are available'" [ellipsis in original]).

{¶ 23} Relators similarly argue that Section 1161.25 of the proposed ordinance merely reflects the "already-existing nuisance related causes of action provided for" in R.C. 3767.03 and Wilmington Cod.Ord. 1135.14(b). This argument fails for similar reasons. "[A] nuisance abatement action pursuant to [R.C. 3767.03] is an equitable action arising from the state's police power." *State ex rel. Miller v. Anthony*, 1995-Ohio-39, ¶ 13. R.C. 3767.03 permits the attorney general, a municipal legal officer, or a citizen of the county in which a nuisance exists to bring an action *in the name of the state* to abate and enjoin the nuisance. It does not authorize a private party to file suit in his or her own name to enjoin an alleged violation of a municipal zoning code. *See State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 2018-Ohio-1602, ¶ 7, quoting *Black's Law Dictionary* (10th Ed. 2014) (defining a "private right of action" as an "'individual's right to sue in a personal capacity to enforce a legal claim'"). And while R.C. 715.44(A) provides "municipal corporation[s]" independent power to "[a]bate any nuisance and prosecute" any person responsible therefor, it does not authorize a municipal corporation to essentially delegate that power to its citizens by way of a civil action.

{¶ 24} The proposed ordinance at issue here purports to create a new cause of action and therefore is not within the municipality's power to enact; consequently, relators have not established a clear legal right to compel the board to certify relators' proposed ordinance for placement on the November 3, 2026 general-election ballot. *See Bolzenius*, 2018-Ohio-3708, at ¶ 13; *Sensible Norwood*, 2016-Ohio-5919, at ¶ 9 (explaining that mandamus will not lie against a board of elections if the proposed ordinance does not involve a subject within the municipal initiative power).

B. Relators' free-speech argument fails

{¶ 25} Relators separately argue that R.C. 3501.11(K)(1), which incorporates the language of former R.C. 3501.11(K), violates the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution because, relators claim, it is a "substantial prior restraint" on political speech—i.e., relators' petitioning activity—and is not sufficiently narrowly tailored.[5] *See State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St.3d 354, 357 (1992) ("If [a] statute represents a substantial prior restraint on free speech, then it may not be enforced against anyone unless it is narrowly tailored to prohibit only unprotected activity.").

{¶ 26} As the board correctly notes in its merit brief, the United States Court of Appeals for the Sixth Circuit has held that Ohio's "ballot-initiative laws," including R.C. 3501.11(K), "do not directly restrict core expressive conduct" and therefore "do not involve the same risk of censorship inherent in prior-restraint cases," *Schmitt v. LaRose*, 933 F.3d 628, 638 (6th Cir. 2019). As a result, these laws need not satisfy "the heightened procedural requirements imposed on systems of prior restraint." *Id.* at 638-639. Instead, applying the balancing test laid out by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Sixth Circuit concluded that the ballot-initiative laws at issue passed First Amendment muster. While the Sixth Circuit found that the burden on speech imposed by the ballot-initiative laws was "not so minimal as to warrant rational-basis review," *Schmitt* at 641, it nevertheless found the burden on speech was not unreasonable given the significance of the interests [Ohio] has in regulating elections," *id*. at 642.

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5. Relators challenge R.C. 3501.11(K)(2) and R.C. 3501.39(A)(3) on the same grounds. However, because our resolution of this case does not implicate those statutory provisions, we do not reach that challenge.

{¶ 27} In reply, relators claim that their "position" is "distinguishable" from the First Amendment arguments rejected in *Schmitt*. However, they fail to explain the distinction and instead posit no more than a disagreement—that is, despite the Sixth Circuit's conclusion that Ohio's ballot-initiative laws do not directly restrict core expressive conduct, *see Schmitt* at 638, relators insist that they do. This is not enough. Relators have failed to establish that R.C. 3501.11(K)(1) violates the First Amendment. And although the Ohio Constitution is not coextensive with the federal Constitution on all fronts, *see State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, ¶ 19-20, relators do not argue that Article I, Section 11 of the Ohio Constitution should be interpreted differently or more broadly than the First Amendment here. Indeed, they cite *Eastwood Mall, Inc. v. Slanco*, 1994-Ohio-433, ¶ 8, for the proposition that "the First Amendment is the proper basis for [the] interpretation of Section 11, Article I of the Ohio Constitution." Thus, relators' state constitutional claim must also fail. *See In re Rev. of the Power-Purchase-Agreement Rider of Ohio Power Co. for 2018 and 2019*, 2026-Ohio-1485, ¶ 37 ("since appellants do not ask us to interpret the state Constitution's Due Course of Law Clause differently from the federal Constitution's Due Process Clause, we are constrained to review their argument under the federal clause").

III. CONCLUSION

{¶ 28} For the foregoing reasons, we deny relators' request for a writ of mandamus compelling the board to certify the sufficiency and validity of the initiative petition and submit the proposed ordinance to the electors at the November 3, 2026 general election.

Writ denied.

FISCHER, J., dissenting.

{¶ 29} Relators, Quintin Koger Kidd and Susan Croutwater, challenge the decision of respondents, the Clinton County Board of Elections and its individual members (collectively, "the board"), refusing to certify relators' initiative petition, which sets forth a proposed ordinance that would add a new chapter to the Wilmington Zoning Code, for placement on the November 3, 2026 general-election ballot. The board reasoned that the initiative petition could not be certified, because the proposed ordinance purports to create a new, private cause of action, which the board concluded is not within the power of the municipality—the City of Wilmington—to enact. Relators argue, however, that the board's decision was unlawful and that R.C. 3501.11(K)(2), 3501.38(M)(1), and 3501.39(A)(3), which authorize the board to make this type of determination, are unconstitutional because they violate the separation-of-powers doctrine.

{¶ 30} In denying relators' request for a writ of mandamus, this court continues its pattern of sidestepping constitutional arguments challenging the statutory provisions enacted by the General Assembly in 2016 Sub.H.B. No. 463 ("H.B. 463") by erroneously relying on our pre-H.B. 463 decisions interpreting former R.C. 3501.11(K).[6] *See* majority opinion, ¶ 18-21; *see*, *e.g.*, *State ex rel. Bolzenius v. Preisse*, 2018-Ohio-3708, ¶ 22 (Fischer, J., dissenting); *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 2018-Ohio-1602, ¶ 12 (Fischer, J., concurring in judgment only); *State ex rel. Flak v. Betras*, 2017-Ohio-8109, ¶ 19 (Fischer, J., dissenting). As I explained in my separate opinion in *Khumprakob* and reemphasized in my separate opinion in *Bolzenius*, our pre-H.B. 463 interpretation of former R.C. 3501.11(K) was inconsistent with the separation-of-powers doctrine. *Khumprakob* at ¶ 12 (Fischer, J., concurring in judgment only); *Bolzenius* at ¶ 22 (Fischer, J., dissenting). As a result, I believe that our pre-H.B. 463 case law—*State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 2015-Ohio-3761 and *State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elections*, 2016-Ohio-5919—and those post-H.B. 463 cases relying on it, *see*, *e.g.*, *Flak*, were wrongly

6. Former R.C. 3501.11(K) is now found under R.C. 3501.11(K)(1). *See* H.B. 463; 2022 Sub.H.B. No. 458.

decided at the time and do not survive the test set forth in *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, paragraph one of the syllabus. *See Khumprakob* at ¶ 16-43 (Fischer, J., concurring in judgment only). Those cases should therefore be overruled. *See id.*

{¶ 31} We should not continue to rely on precedent that allows a board of elections to make some substantive determinations on the legality of a proposed ordinance but not others, especially when doing so usurps the reviewing power of this court. *See id.* at ¶ 38 (Fischer, J., concurring); *Youngstown* at ¶ 11 ("The boards of elections . . . do *not* have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms." [Emphasis in original.]); *State ex rel. Walker v. Husted*, 2015-Ohio-3749, ¶ 15 (same); *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223, ¶ 15 (lead opinion) (determining that to grant review power to a board of elections is unconstitutional because it impedes the administration of justice by the judicial branch).

{¶ 32} As I discussed in my separate opinion in *Flak*, portions of H.B. 463, specifically those enacting R.C. 3501.11(K)(2) and 3501.38(M)(1), are unconstitutional to the extent that the statutory scheme requires boards of elections to make constitutional and other legal conclusions under R.C. 3501.38(M). *Flak* at ¶ 43-44 (Fischer, J., dissenting). And in *Espen*, two justices agreed with me regarding that determination: "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* at ¶ 15 (lead opinion). We must make it clear that boards of elections have no authority to invalidate an initiative petition based on a substantive evaluation of the legality of the proposed ordinance set forth in the petition. *See id.* at ¶ 16 (lead opinion).

{¶ 33} But that is exactly what happened here. The board determined that the proposed ordinance at issue would create a new, private cause of action and therefore is not within the municipality's power to enact. But such a determination required the board to perform a substantive evaluation of the legality of the proposed ordinance set forth in the initiative petition, and that constitutes a violation of the separation-of-powers doctrine.

{¶ 34} Even if the proposed ordinance is outside the municipality's authority to enact, that is a legal determination that must be made by the judiciary in the postenactment process. We have long held that courts lack the authority to judge the legality of *proposed* legislation. *See Pfeifer v. Graves*, 88 Ohio St. 473 (1913), paragraph five of the syllabus. "Just as we cannot stop the General Assembly from considering a proposed law, we cannot allow an elections board to interfere in the legislative process initiated by the people." *Khumprakob*, 2018-Ohio-1602, at ¶ 33 (Fischer, J., concurring in judgment only). The legislative power is *reserved* to the people but is *delegated* to the General Assembly and municipalities. Ohio Const., art. II, § 1 and 1f; Ohio Const., art. XVIII, § 3. "To be sure, this court has the ultimate authority of judicial review over the board's decision in this mandamus action. But that does not solve the separation-of-powers problem here: it only places this court in a position it should not be in—judging the legality of proposed legislation before it has been enacted." *Khumprakob* at ¶ 34 (Fischer, J., concurring in judgment only).

{¶ 35} Furthermore, allowing the board to make substantive, preenactment legal determinations raises questions about the proper standard of review. The majority explains that this case is being reviewed for an abuse of discretion. Majority opinion at ¶ 14. But what discretion does the board have to make a legal determination? We know that legal determinations are entitled to no deference on review. *See State ex rel. McCord v. Delaware Cty. Bd. of Elections*, 2005-Ohio-4758, ¶ 30, fn. 2 ("we need accord no deference to a board of elections' interpretation of state election law"); *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 38-39 (courts lack discretion to make errors of law and issues of law are reviewed de novo). By applying a deferential abuse-of-discretion standard in cases such as this one, we "are ultimately relinquishing some authority in favor of boards of elections and facilitating inconsistent results among various boards of elections." *Khumprakob* at ¶ 35 (Fischer, J., concurring in judgment only). Such a standard of review makes little sense.

{¶ 36} For these reasons and those stated in my separate opinions in *Khumprakob* and *Bolzenius*, I respectfully dissent and would grant the writ of mandamus.

Baurichter Law, L.L.C., and Austin Z. Baurichter, for relators.

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