IN THE SUPREME COURT OF OHIO

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

BRIEF OF AFFILIATED CONSTRUCTION TRADES OHIO FOUNDATION, THE OHIO CHAMBER OF COMMERCE, THE OHIO OIL AND GAS ASSOCIATION, THE OHIO CHEMISTRY TECHNOLOGY COUNCIL, AND THE AMERICAN PETROLEUM INSTITUTE, *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION

Once again, as it has done on numerous occasions in recent election cycles, this Court is called upon to determine whether a County Board of Elections properly rejected a so-called "Bill of Rights" proposed for placement on the ballot. This particular case involves a "Lake Erie Bill of Rights" (hereinafter "LEBOR") proposed for the November ballot, to amend the municipal charter of the City of Toledo. And once again, a Pennsylvania-based organization[1] seeks to clutter the ballot in our State with an initiative that is patently beyond the constitutional right of initiative. The needless resulting diversion of electoral and judicial resources is regrettable at a time when this Court has other pressing obligations to address before the approaching election, and many other decisions to release before the end of the current term.

Amici curiae are compelled to participate, as several of them have done in other recent cases, because their many individual and corporate members cannot operate

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[1] Relators' initiative is the brainchild of the Community Environmental Legal Defense Fund ("CELDF"), which assisted Toledo residents in drafting the initiative. *See* CELDF Press Release (Aug. 28, 2018), available at: https://celdf.org/2018/08/press-release-lake-erie-bill-of-rights-blocked-from-november-ballot/ (last visited Sept. 5, 2018). *See also* Jackie Stewart, *Lifting the Curtain on the Pennsylvania Group behind Ohio's 'Local' Anti-Fracking Campaigns*, Energy in Depth (July 21, 2015), available at: https://www.energyindepth.org/lifting-the-curtain-on-the-pennsylvania-group-behind-ohios-local-anti-fracking-campaigns/ (last visited Sept. 7, 2018.)

A federal judge in Pennsylvania recently sanctioned other CELDF attorneys and referred them to disciplinary counsel for frivolously defending another Community Bill of Rights. *Pennsylvania Gen. Energy Co., LLC v. Grant Twp.*, No. 14-209ERIE, 2018 U.S. Dist. LEXIS 2069 (W.D.Pa. Jan. 5, 2018).

their businesses efficiently, predictably, and economically in a State where any proposal to fundamentally upend existing law in a municipality can reach the ballot, even under circumstances when the petition circulators do not have the legal right to legislate. The Lucas County Board of Elections acted properly here, in a manner consistent with this Court's recent precedent, when it denied ballot access to the LEBOR. For the following reasons, and for those expressed by the Respondents, *amici curiae* respectfully urge this Court to deny the requested writ.

INTERESTS OF *AMICI CURIAE*

Amicus curiae Affiliated Construction Trades Ohio Foundation ("ACT Ohio") was created by the Ohio State Building & Construction Trades Council to facilitate economic and industrial development and promote industry best practices for Ohio's public and private construction. ACT Ohio works on behalf of fourteen regional councils, one hundred and thirty-seven local affiliates, and over 94,000 of the most highly skilled, highly trained construction workers in this State. Over 14,000 contractors are signatories with ACT Ohio's affiliates, and roughly 83% of Ohio's 10,500 construction apprentices are registered in apprenticeship training programs jointly administered by ACT Ohio's affiliates and their signatory contractor organizations. ACT Ohio is funded by member contributions in an effort to protect and expand the State's construction industry and the many working families it supports.

Amicus curiae the Ohio Chamber of Commerce ("Ohio Chamber"), founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Ohio Chamber works to promote and protect the interests of its nearly 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy and economic development arenas. Through its member-driven standing committees and the Ohio Small Business Council, the Ohio Chamber formulates policy positions on issues as diverse as energy, environmental regulations, education funding, taxation, public finance, health care and workers' compensation. The advocacy efforts of the Ohio Chamber are dedicated to the creation of a strong, pro-jobs environment – an Ohio business climate responsive to expansion and growth.

Amicus curiae The Ohio Oil and Gas Association (the "OOGA") is a trade organization whose members participate in oil and gas activities throughout the State of Ohio. The OOGA's more than 2,000 members engage in all aspects of the exploration, production, and development of oil and natural gas resources within the State of Ohio. The OOGA exists to protect, promote, foster, and advance the common interest of its members and those engaged in all aspects of the oil and natural gas industry.

Amicus curiae Ohio Chemistry Technology Council ("OCTC") represents the second largest manufacturing industry in Ohio, whose members directly employ more

than 43,000 people and indirectly contribute more than 130,000 jobs to the economy. For every chemistry industry job in Ohio, nearly three additional jobs are created within the State, along with nearly 60,000 jobs generated in the plastics and rubber products industry. OCTC's members employ Ohio citizens at an average wage nearly 40% higher than the average manufacturing wage and these jobs generate more than $3 billion in earnings, and more than $1 billion in federal, state, and local taxes. OCTC and its members have a strong interest in making Ohio a commerce-friendly state where municipal ordinances are enacted and applied fairly and lawfully to ensure the predictability essential to economic growth.

Amicus curiae American Petroleum Institute ("API"), doing business in Ohio through its Columbus offices as API-Ohio, is the primary national trade association of America's technology-driven oil and natural gas industry. The over 625 API members are involved in all segments of the industry, including the exploration, production, refining, shipping, and transportation of crude oil and natural gas. In Ohio alone, over 250,000 jobs are supported by the industry, which also provides more than $12 billion in labor income and more than $28 billion in value added to the State's economy. According to the Bureau of Labor Statistics, over 13,000 energy-related businesses call Ohio home. API-Ohio members have invested billions of dollars in Ohio's oil and natural gas industry. Together with its member companies, API-Ohio is committed to ensuring a strong, viable oil and natural gas industry capable of meeting the energy

needs of our Nation and Ohio in a safe and environmentally responsible manner. API-Ohio members include multiple corporate entities who operate refineries and other businesses that would be directly impacted by the proposal at issue here.

These *amici curiae* share profound concerns about the LEBOR at issue here. Section 1 of the LEBOR, for example, purports to endow Lake Erie, the Lake Erie watershed, and the "Lake Erie Ecosystem" with rights enforceable in courts. Section 2 purports to invalidate duly issued federal and state permits within the City's municipal boundaries and would thus bar a range of lawful activities engaged in by *amici curiae*'s many members. Section 3 establishes criminal liability for violations of "any provision" of the LEBOR, and purports to create new causes of action maintainable by the City or any resident, including an action in the name of the Lake Erie ecosystem. Section 4 turns municipal home rule upside down, declaring that "all laws adopted by the [General Assembly] 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 4 also purports to prevent corporations (including *amici curiae*'s members) from bringing a post-election legal challenge to the LEBOR that is based on federal or state-law preemption. Section 7 would repeal "[a]ll inconsistent provisions of prior laws adopted by the City of Toledo *** [.]"

These and other objectionable provisions in the LEBOR, if permitted to be enacted by electors of the City of Toledo in the November election, would have

immediate and substantial effects on *amici curiae* and their respective memberships. For the following reasons, no writ should issue to undo the BOE's appropriate and unanimous rejection of the proposal.

ARGUMENT

Proposition of Law No. 1: Relators are not entitled to a writ to compel placement of the LEBOR on the November ballot.

Let there be no mistake regarding Relators' position in their Merits Brief and their agenda in this litigation. Their position is that there can never be any pre-election review of the subject matter of a municipal charter or charter amendment proposed by initiative petition, by any executive, judicial, or legislative body or office, to determine whether it is within the actual power granted to petitioners. This position is anarchical on its face because it posits a right to act without regard to legal limits on the authority to do so, and moreover is diametrically opposite the repeated holdings of this Court. Relators' position is consistent with the agenda of the out-of-state advocacy organization that is backing their efforts. *See generally* Jackie Stewart, *Lifting the Curtain on the Pennsylvania Group behind Ohio's 'Local' Anti-Fracking Campaigns*, Energy in Depth (July 21, 2015), *available at*: https://www.energyindepth.org/lifting-the-curtain-on-the-pennsylvania-group-behind-ohios-local-anti-fracking-campaigns/ (last visited Sept. 7, 2018.)

This is not a case about whether the proposed charter amendment would be unconstitutional, unlawful, or conflict with federal or state law if it is adopted by the

voters. This case is about whether there is legal authority to submit the Proposed Amendment to the voters at an election via the initiative process, regardless of its merits or ultimate validity.

In order to be entitled to a writ of mandamus, Relators have the burden of demonstrating that they have a clear legal right to have their Proposed Amendment placed on the ballot. *State ex rel. Steele v. Morrisey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 17. Relators argue they have met that burden simply because no one, including a board of elections or this Court, is permitted to review prior to the election whether they are acting within the scope of the power granted under the Ohio Constitution. Consequently, they never argue that the Proposed Amendment is within the scope of the right granted, and have not met their burden to demonstrate a clear legal right to have the Proposed Amendment on the ballot. The writ should therefore be denied.

A. Relators do not have an unqualified legal right to place upon the ballot by initiative any proposed charter amendment of their choosing regardless of subject matter.

Relators argue that boards of elections and courts, including this Court, are constitutionally prohibited from reviewing the subject matter of initiated ordinances to determine whether they satisfy the legal prerequisites to appear on the ballot. Relators' position is clear and unbending, as demonstrated by the following passages from their Complaint and Merit Brief:

- 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. (Compl. ¶ 29) (emphasis added).

- "It is unconstitutional to determine, pre-election, whether a proposed measure involves a subject which a municipality is authorized to control by legislative action." (Rel. Merit Br. at 23).

- "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 inferences by the Executive or Judicial Branches." (Rel. Merit Br. at 10).

- "No Ohio court has the power, before an election, to stop election balloting on an initiated measure." (Rel. Merit Br. at 8).

Relators' position is incorrect as a general proposition of law and it is wrong with respect to the specific Proposed Charter Amendment at issue here.

1. Pre-election review to determine whether ballot access requirements have been satisfied is constitutionally permissible whether it is conducted by a board of elections or by a court.

In order for a candidate for public office or a local ballot measure such as an initiated ordinance to appear on an election ballot, the candidate or ballot measure must first satisfy the legal prerequisites to appear on the ballot. These legal requirements are both technical, such as petition form and a minimum number of required signatures, and substantive.

By definition, the laws concerning ballot access must be enforced prior to the election. Otherwise they would be useless. Therefore, there must be some public entity

with the duty and authority to review whether ballot access requirements have been met.

Relators' position with regard to the review conducted by Respondent Board of Elections is incompatible with enforcing ballot-access requirements. Under Relators' argument, boards of elections would not have the authority to make all the necessary determinations as to whether a candidate or initiated ordinance was eligible to appear on the ballot, and every candidate and ballot measure would therefore appear on the ballot regardless of whether they had met the substantive legal prerequisites to do so.

The practice of ensuring that all ballot-access petitions meet basic legal prerequisites before appearing on the ballot is a routine and basic function of election administration, not a usurpation of legislative power as Relators' argue.

2. Boards of elections have the specific duty to review ballot access requirements, including initiated ordinances, and the decisions of boards of elections are reviewable by the judiciary.

As this Court has held, boards of elections "are the local authorities best equipped to gauge compliance with election laws," *State ex rel. Sinay v. Sodder*s, 80 Ohio St.3d 224, 231, 685 N.E.2d 754 (1997). This Court has recognized that the boards have the authority to act as "gatekeepers" of local ballot measures, to "determine whether a ballot measure satisfies statutory prerequisites to be a ballot measure." *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, ¶¶ 13-14. This "gatekeeper" function of the boards with respect to the subject matter requirements of ballot

measures is part of an important general duty to determine whether laws granting ballot access have been satisfied. It is not, as Relators argue, a violation of the separation of powers for boards of elections to determine whether ballot access requirements have been satisfied, including substantive statutory and constitutional requirements; this is, in fact, a quintessential and indispensable function of the boards. For example, boards of elections routinely review whether candidates meet the subject matter and substantive requirements to be candidates for public offices. Candidates for judicial offices must have been engaged in the practice of law for six years prior to seeking judicial office. R.C. 2301.01. County sheriffs must hold a high school diploma and possess law enforcement training and experience. R.C. 311.01(B). Prosecuting attorneys must be licensed to practice law. R.C. 309.02. County engineers must be registered and licensed as an engineer and surveyor. R.C. 315.02. County coroners must have been licensed physicians for at least two years immediately preceding their election. R.C. 313.02.

Boards of elections also routinely review whether length-of-residency requirements that apply to candidates for various offices have been met. *See, e.g.,* R.C. 731.02 (one-year residency requirement for city council members). Boards also review whether candidates reside where they are registered to vote. These matters all require substantive review and interpretations of law.

Just as each board of elections must determine that candidates have satisfied the applicable substantive ballot-access requirements, the boards must also determine that ballot measures have satisfied ballot-access requirements before they are permitted to appear on the ballot. For example, as this Court has held, the right of municipal initiative is limited to proposing measures that are legislative and may not be used to propose administrative measures. *State ex rel. Comm. for the Referendum of Ordinance No. 3844-02 v. Norris*, 99 Ohio St. 3d 336, 2003-Ohio-3887; *State ex rel. Norwood v. Hamilton County Bd. of Elections*, 148 Ohio St.3d 176, 2016-Ohio-5919. To determine whether a ballot measure is legislative or administrative, a board of elections (or a reviewing court) must inquire into "whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence." *Donnelly v. Fairview Park*, 13 Ohio St.2d 1, 233 N.E.2d 500 (1968), paragraph two of the syllabus. The answer to this question demands a substantive inquiry into the subject matter of the proposed measure.

In *State ex rel. Norwood v. Hamilton County Bd. of Elections*, *supra*, this Court upheld the decision of a board of elections to invalidate a municipal ordinance petition on the grounds that it was administrative rather than legislative in nature. The ballot measure at issue was a proposed ordinance relating to marijuana criminalization and municipal enforcement of portions of the Revised Code relating to marijuana. The board of elections invalidated the petition in part because it found that these enforcement

provisions were administrative. The petition committee sought a writ of mandamus from this Court and argued that the provisions at issue were purely enforcement measures for the other changes to marijuana law enacted in the proposed ordinance. *Id*. at ¶¶ 2-5. The Court conducted an analysis of the substantive provisions of the proposed ordinance and determined that the board of elections was correct. In its decision, after discussing the language of the relevant provisions, the Court held that "the language reaches far beyond the enforcement of the proposed ordinance and attempts to prohibit the enforcement of existing state and federal controlled-substance laws. These provisions are clearly administrative." *Id*. at ¶¶ 13-19.

As another example, petitions proposing a county charter must be found to satisfy the requirement to provide the form of government of the county in order to appear on the ballot. Ohio Constitution, Art. X, § 3; *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749. As this Court has explained, this involves a highly substantive review of the measure's subject matter. The board of elections has a duty to reject a county charter petition if the references to the powers and duties of county officials are "overly general." *State ex rel. McGinn v. Walker*, 151 Ohio St.3d 199, 2017-Ohio-7714, ¶ 15. This requires election officials to analyze the words in the proposed charter, compare them to the duties of county officials, and determine whether the proposed charter is sufficiently specific in describing the required official duties. This is

a substantive review that must be conducted in order to determine whether the charter petition satisfies the constitutional prerequisites to appear on the ballot.

County sales tax levy proposals also require a substantive review. These measures are initiated by resolutions of boards of county commissioners, which are then transmitted to boards of elections to be placed on the election ballot to be approved or rejected by county electors. R.C. 5731.026. In order to satisfy the statutory requirements to appear on the ballot, the resolution from the commissioners must "state the purposes for which [the tax] is to be levied," R.C. 5731.026(D)(1), which is limited by statute to certain specified uses. Therefore, the board of elections must conduct a substantive examination of the subject matter to determine that the resolution states a purpose of the tax, and that this purpose aligns with one of the statutorily limited purposes of a county sales tax. This is a review of the substance of the resolution which must be conducted before the resolution may appear on the ballot.

There are also substantive requirements that township zoning referendum petitions must satisfy in order to qualify for the ballot. Each part-petition must contain the "number and the full and correct title, if any" of the zoning resolution, the "name by which the [zoning] amendment is known," and a "brief summary of its contents." R.C. 519.12(H). If these requirements are not met, then the petition is invalid and the referendum may not appear on the ballot. The responsible board of elections, therefore, has a duty to conduct a substantive review of both the petition and the attached zoning

resolution to determine that the substantive elements of the petition satisfy the statutory pre-requisites to appear on the ballot, in particular the summary of the content of the zoning resolution.

The authority of boards of elections to conduct pre-election substantive reviews of ballot measures and prospective candidates, and the subsequent authority of Ohio courts to hear legal claims stemming from board reviews, is illustrated in literally hundreds of this Court's decisions.

As the above cases demonstrate, Ohio's judiciary has the authority to resolve disputes arising from boards of elections' rulings on ballot-access matters. It is not enough that initiative petitions contain the required number of signatures and requirements as to form; the petitions must also satisfy substantive requirements to appear on the ballot. Relator's assertions to the contrary are anathema to the enforcement of Ohio's election laws and to the function of courts under Ohio law.

3. This Court may review the subjects of the Proposed Charter Amendment prior to the election in order to determine whether the Petitioners have a lawful right to submit it via the initiative process.

Relators assert that this Court lacks the authority before an election to rule on the ballot access qualifications of any ballot measure, and that any ruling to keep even a facially unqualified measure from appearing on the ballot would constitute a violation of Separation of Powers. This flies in the face of the text of the Ohio Constitution and an avalanche of precedent which would be overturned if Relators' position is accepted.

The right to initiate municipal charter amendments is granted to citizens of Ohio municipalities by Article XVIII, Section 9, which reads:

> 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.

However, Article XVIII, Sections 3 and 7 limit the scope of this right to proposing charter amendments that are within the powers of local self-government. Article XVIII, Section 7 provides:

> 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.

Article XVIII, Section 3 provides:

> 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.

As is clear, Article XVIII, Section 9, adopted by the people of Ohio, is limited to subject matter that municipalities are within the powers of local self-government and are not in conflict with general laws. There is no right to propose a municipal charter amendment outside of Article XVIII, and, therefore, any attempt to exercise that right outside the bounds of Article XVIII is invalid. In other words, there is no authority to conduct an election for a petition that is outside the bounds of Article XVIII.

Ohio law demands that ballot access litigation be heard and decided prior to the election. The question involved in ballot access litigation is whether or not there is legal authority to hold an election on the candidacy or ballot measure at issue. As the question involved is whether a particular proposal may be voted upon at an election, the logical time to rule on such a question is *before* the election, not after, just as it is the only sensible time to rule on the ballot-access qualification of a candidate.

If questions of ballot access are not permitted to be resolved until after the election as Relators argue, an inevitable result will be to void the results of elections.

As the United States Supreme Court has observed, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974). This case should prompt the Court to consider the chaos that would be unleashed upon Ohio's system of election administration if Relator's radical legal propositions are accepted.

Relators claim that there can be no pre-election review—by a board of elections or by a court—to determine whether the petition meets the substantive legal requirements to appear on the ballot. Therefore, ballot measures which could not validly be enacted into law via initiative would be put before the voters, and those ballot measure which the voters approved would be struck down after the election as ineligible to be enacted via initiative. This would lead to a significant burden on

election officials, who would have to administer more special elections and process longer ballots, and the judiciary, which would hear the challenges to these invalid measures. It would also result in a waste of taxpayer funds, given that the cost of holding local ballot-issue elections is borne by the counties and political subdivisions.

A second, more corrosive result would be a diminished faith in Ohio's system of direct democracy. A great many ballot measures which are not within municipal initiative power would be approved by voters, only to be struck down by courts. While this would be the correct result under the Ohio Constitution, voters would feel that that their "rights" had been violated by the courts (rights that did not exist), or that they had been deceived by petition circulators into supporting an invalid measure. A gradual (or precipitous) erosion of confidence in the ballot measure system would inevitably result from Relators' legal proposition.

The time to determine whether a ballot measure is legally permitted to appear on the ballot is before it is placed on the ballot, not after. For this Court to hold otherwise would be to severely compromise the integrity of Ohio's system of direct democracy.

B. The Proposed Charter Amendment is not within the scope of municipal power and it is in conflict with general laws. Therefore, Relators have no clear legal right to a writ of mandamus.

1. Relators made no effort to demonstrate that the Proposed Charter Amendment is within the scope of municipal power and not in conflict with any general laws.

Relators' Complaint and Merit Brief are devoid of any effort to demonstrate that the Proposed Charter Amendment is within the scope of municipal power, and not in conflict with general laws, as set forth in Article XVIII, Sections 3 and 7 of the Ohio Constitution. As a result, Relators have failed to establish a clear legal right warranting mandamus relief.

In their Complaint, Relators contend that "the petition falls within the scope of a municipal political subdivision's authority to enact via initiative." (Compl. ¶ 26). But, as is made clear by a subsequent paragraph in the Complaint, Relators' actual contention is not that the Proposed Charter Amendment is within the scope of municipal power under the Ohio Constitution. Instead, and as explained *supra*, Relators circularly contend that any municipal initiative is inherently within the scope of municipal power because any initiative may be placed on the ballot. This contention is found in paragraph 29 of Relators' Complaint, which states, in relevant part:

> 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.

(Compl. ¶ 29) (emphasis added).

In their Merit Brief, Relators made no effort to demonstrate whether the Proposed Charter Amendment is actually within the scope of municipal power under the Ohio Constitution. Given Relators' complete silence on this essential inquiry,

Relators have, therefore, failed to establish that they have a clear legal right to the requested mandamus relief.

2. Substantial portions of the Proposed Charter Amendment are clearly outside the power of any municipality.

Substantial portions of the proposed charter amendment are clearly outside the power of any municipality. The bulk of the Proposed Charter Amendment is devoted to creating new private causes of action, which the Court recently held is beyond the scope of municipal power in *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 2017-Ohio-8109, 95 N.E.3d 329, ¶ 15 (2017). In *Flak*, the Court held two proposed municipal charter amendments off the ballot because they created new causes of action for the citizens of the municipality. More specifically, one of the charter amendments would have given the municipality's residents and the "'ecosystems and natural communities within the city'" the right to "'clean water, air, and soil'" and to be free from certain fossil-fuel drilling and extraction activities. *See, Flak*, ¶ 4. Critically, it also would have allowed the private citizens of the municipality to enforce these rights through the filing of legal actions. *Id*. The Court concluded that "a municipality is not authorized to create new causes of action," and, therefore, affirmed the county board's decision to not place the proposed charter amendment on the ballot. *Flak*, ¶ 15.

The Proposed Charter Amendment here is indistinguishable from the proposed charter amendment in *Flak* in that it would create new private causes of action. It gives the "Lake Erie Ecosystem" the right to "exist, flourish, and naturally evolve" (Section

1(a) of the Proposed Charter Amendment), and it gives the "people of the City of Toledo" the "right to a clean and healthy environment" which would include "the right to a clean and healthy Lake Erie and Lake Erie Ecosystem" (Section 1(b) of the Proposed Charter Amendment). It then provides that violations of these rights constitute offenses. (See, Sections 2(a), 3(a), (3)(c), 5 of the Proposed Charter Amendment). It provides further that any such alleged offenses can be prosecuted by the private citizens of the City of Toledo, including actions brought on behalf of the "Lake Erie Ecosystem," in the Lucas County Court of Common Pleas. (See, Sections 3(b), 3(d) of the Proposed Charter Amendment). Finally, it provides specific penalties for such offenses. (See, Sections 2(b), 3(a)-(d), 4(a) of the Proposed Amendment). Thus, given that the bulk of the Proposed Charter Amendment is devoted to creating new private causes of action, under *Flak*, the Proposed Charter Amendment is beyond the scope of municipal power.

Related to creating the new private causes of action, the Proposed Charter Amendment contains several other provisions asserting jurisdiction over geographic areas, corporate and governmental entities, and activities that are clearly outside the power of any municipality. In several instances, the Proposed Charter Amendment purports to grant jurisdiction over the entirety of Lake Erie—a body of water shared by two countries, four states, one Canadian province, and numerous domestic and foreign political subdivisions—to the City of Toledo and its residents. (See, Sections 1(b), 2(a), 3(b), 3(d) of the Proposed Charter Amendment). In another instance, the Proposed

Charter Amendment would "deem invalid" any permit, license, privilege, charter, or other authorization issued by "any" state or federal entity to a corporation that would violate the proposed charter amendment. (Section 2(b)). In another instance, the Proposed Charter Amendment would remove the rights of corporations that violate its provisions (Section 4(a)), even though state law is the fundamental source of corporate law (see, R.C. Chapters 1701-1703).

Also related to creating the new private causes of action, the Proposed Charter Amendment would expand the jurisdiction of and create standing for actions in the Lucas County Court of Common Pleas. (See, Sections 4(b), 4(d) of the Proposed Charter Amendment). This is clearly beyond the power of municipalities as the courts of common pleas are creatures of state law. (See, Title 23 of the Ohio Revised Code).

Given the extent to which the Proposed Charter Amendment creates and delineates these new, private causes of action, the proposal is, under *Flak*, unquestionably outside the scope of municipal power. Again, Relators have not attempted to argue otherwise, effectively conceding this point. Thus, for these reasons, the Court should deny the requested mandamus relief.

Proposition of Law No. 2: Respondents' refusal to certify the LEBOR did not unconstitutionally infringe upon Relators' First Amendment Rights.

Relators' Proposition of Law No. 2 focuses on a First Amendment challenge that Relators only mentioned in passing in their Complaint, in connection with their First Cause of Action. (Compl., ¶ 23.) Relying on *Meyer v. Grant*, 486 U.S. 414, 421, 108 S.Ct.

886, 100 L.Ed.2d 425 (1988), Relators contend that Respondents cannot keep their proposal from the ballot without unduly restricting Relators' ability to engage in core political speech. For the following reasons, however, Relators' First Amendment challenge fails.

It is well-established that content-neutral restrictions on the right to legislate by initiative petitions are constitutional and enforceable. *See Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, 6th Cir. No. 17-3888, 2018 U.S. App. LEXIS 6905, *6-7 (March 20, 2018) (holding that content-neutral state requirements that initiative petition contain only a single subject and authorizing elections boards to separate multiple subjects into separate petitions did not violate First Amendment rights); *State ex rel. Ethics First-You Decide Ohio PAC v. Dewine*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 369, ¶ 22-23 (same). *See also Taxpayers United for Assessment Cuts*, 994 F.2d 291, 297 (6th Cir. 1993) ("Because the right to initiate legislation is a wholly state-created right, we believe that the state may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation.")

The test applied to determine if a state statute is content-based is the same under federal law and Ohio law.

> "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). Statutes that are not content based on their face may still be

> considered content based if they "cannot be justified without reference to the content of the regulated speech" or "were adopted by the government because of disagreement with the message the speech conveys." *Id*. (internal quotation marks, citation, and alteration omitted).

Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd., 2018 U.S. App. LEXIS 6905, *6; *State ex rel. Ethics First-You Decide Ohio PAC*, at ¶ 23 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.") (internal citation omitted).

R.C. 3501.38(M)(1)(a) easily passes constitutional muster under this test. The statute applies to an elections board's review of all initiative petitions, without regard to topic. The statute is justified by the State's legitimate interest in assuring that the initiative process is used only for the purpose prescribed in the Ohio Constitution and to allow the electorate to legislate only on matters that are the proper subject of action by initiative. The statute was not adopted by the General Assembly because of its disagreement with any particulate message at all; it is uniformly applied and non-discriminatory. Relators have no evidence to the contrary to support their First Amendment claims.

Relators rely primarily upon the U.S. Supreme Court's decision in *Meyer* for the proposition that a 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." (Relators' Merit Br. at 18, quoting *Meyer*, 486

U.S. at 423.) Relators utterly fail to explain how the BOE's rejection of their charter petition does either of these prohibited things.

The problematic state law invalidated in *Meyer* made it a felony to pay for circulation of initiative petitions, making it effectively impossible for proponents of amendments to obtain the required number of signatures within the allotted time period for doing so. *Id.* The Ohio law of which Relators complain here does nothing of the sort. R.C. 3501.38(M)(1)(a) does nothing at all to limit Relators' ability to circulate their proposed charter petitions or otherwise muzzle Relators' messages or opinions; it merely confirms the BOEs' authority to make precisely the sort of invalidity determinations concerning proposed county charters recognized as appropriate in this Court's recent precedent.

Here, there were no state-imposed restrictions precluding Relators from supporting their initiative, circulating it to electors in the City of Toledo, and making their case loudly and clearly for the changes they advocate. And *Meyer* does not preclude election officials from keeping fundamentally inappropriate material from the ballot, so long as petition circulators can exercise their First Amendment rights in the public square. *Accord*, *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002).

As the D.C. Circuit explained in *Marijuana Policy Project*, after the District of Columbia Board of Elections refused to certify a medical marijuana initiative for the

ballot, "although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.*, 304 F.3d at 85. The Board of Elections in *Marijuana Policy Project* cited the so-called Barr Amendment as the basis for its refusal to certify the medical marijuana initiative at issue. *Id.* at 84. The Barr Amendment was a rider to the District of Columbia appropriations act, which precluded the District from enacting any law reducing penalties associated with possession, use, or distribution of marijuana. *Id.* Although the circulators in *Marijuana Policy Project*, like the Relators here, relied on the Supreme Court's *Meyer* decision to seek to overturn and curtail the gatekeeping function of the Board of Elections, the D.C. Circuit found *Meyer* inapplicable:

> The MPP draws our attention to a line of cases holding that certain limitations connected with ballot initiatives impermissibly restrict private political speech. *E.g.*, *** *Meyer v. Grant*, 486 U.S. 414, 100 L. Ed. 2d 425, 108 S. Ct. 1886 (1988) (overturning prohibition on professional petition circulators). In none of these cases, however, did anyone question whether the ballot initiative at issue addressed a proper subject. The cases thus cast no light on the issue before us – whether a legislature can withdraw a subject from the initiative process altogether.

Id. at 86. The D.C. Circuit concluded that the Barr Amendment – a statute limiting the District of Columbia's legislative authority, including authority exercised via the initiative process – restricts no First Amendment right. *Id.* at 87. The same should be said here with respect to R.C. 3501.38(M)(1)(a), and Relators' reliance on *Meyer* and its progeny should be rejected.

Proposition of Law No. 3: Relators waived their one-subject challenge to H.B. 463, which should fail on the merits if the Court decides to consider it.

In their Third Proposition of Law, Relators challenge House Bill 463 (2016) under the one-subject rule of the Ohio Constitution. The Court should not reach this issue. Relators alleged two causes of action in their Verified Complaint, and not one of them was a single-subject challenge to H.B. 463. (*See generally* Compl.) Based on the Complaint, Respondents lacked proper notice of this constitutional challenge, and it would be unfair for the Court to reach its merits, particularly in this expedited context. If the Court decides to reach the merits of Relators' one-subject challenge, the Court should reject it.

The one-subject rule first became part of the Ohio Constitution in 1851. Five years later, this Court issued its first opinion on the rule, *Pim v. Nicholson*, 6 Ohio St. 176 (1856). In *Pim*, mindful of the vexing separation-of-powers issues that would arise if *courts* (instead of the General Assembly) enforced the one-subject rule—a rule, after all, addressing the internal procedures of a coordinate branch of government—this Court concluded that the rule was merely directory, not mandatory. In the mid-1980s, however, in the *State ex rel. Dix v. Celeste* decision cited by Relators, this Court deviated from *Pim*'s longstanding interpretation of the one-subject rule—what the *Dix* court conceded was a "long line of unbroken cases"—and opened the door, only slightly, to the prospect of some judicial enforcement of the single-subject rule. 11 Ohio St.3d 141, 464 N.E.2d 153 (1984). Even in doing so, however, this Court stressed just how limited

the judiciary's enforcement role must be, in light of the concerns identified in its prior case law. Specifically, while allowing for the *possibility* of judicial enforcement (in *Dix* itself, this Court rejected the one-subject challenge), the Court held that only a "manifestly gross and fraudulent violation of this rule will cause an enactment to be invalidated." *Id.* at 145. The *Dix* court recognized that "there are rational and practical reasons for the combination of topics on certain subjects" and that the General Assembly may permissibly pursue such combinations "not *** for purposes of logrolling but for the purposes of bringing greater order and cohesion to the law or of coordinating an improvement of the law's substance." *Id.*

In a recent application of the one-subject rule, this Court confirmed its deferential approach to the rule, confirming that "[t]o accord appropriate deference to the General Assembly's law-making function, we must liberally construe the term 'subject' for purposes of the rule." *State ex rel. Ohio Civil Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, ¶ 16 ("*OCSEA*") In *OCSEA* the Court rejected a one-subject challenge to prison-privatization legislation buried within a massive biennial budget appropriations bill. The Court confirmed that "[o]nly when there is no practical, rational, or legitimate reason for combining provisions in one act will [the Court] find a one-subject rule violation." *Id.* at ¶ 17. The requirement that the judicial branch play only a limited role in enforcing the single-subject rule is also manifested in terms of the remedy that a court provides when it finds a violation. Specifically, when a court

determines that an act has more than one subject, it then "determine[s] which subject is primary and which is an unrelated add-on." *Id.* at ¶ 22. The court will then preserve the primary subject matter by severing the unrelated portions. *Id.*

Here, there has been no manifestly gross or fraudulent violation of the one-subject rule. The General Assembly had practical, rational, and legitimate reasons for combining H.B. 463's provisions (including the provisions of which Relators complain, pertaining to the scope of review by BOEs) into a single Act. As passed by the House, H.B. 463 was a foreclosure measure intended to reduce blight by cutting down the time it takes for abandoned and vacant homes to change hands. The House Bill accomplished this goal by addressing certain powers and duties of local officials involved in the foreclosure process—including numerous county officials such as the county sheriffs, county courts that would be conducting judicial sales, and counties that could enter into shared services agreements relating to a new sheriff-sale website enabled by the legislation. *Id.* *See also* Sub. H.B. No. 463, 131st General Assembly (As Passed by the House). Given that the House version of the legislation affected numerous powers and duties of various county officials, it was entirely practical, rational, and legitimate for the Senate to later propose that the same Bill also include amendments to Title 35, regarding the powers and duties of *other* county officials; that is, county boards of election. The House apparently did not interpret the Senate's election-related amendments to the House Bill as improper "logrolling" or as any

violation of the one-subject rule; instead, the House concurred in the Senate's amendments to H.B. 463 by a vote of 72-21.[2]

Acceptance of Relators' one-subject challenge would put an unreasonable and unnecessary straightjacket on the General Assembly's ability to pass comprehensive legislation affecting the powers and duties of county officials, and this Court's longstanding precedent on the single-subject rule dooms Relators' challenge. The Court's recent *OCSEA* opinion confirmed that the General Assembly could properly address the discrete topic of prison privatization within a massive, biennial appropriations bill impacting hundreds of other discrete topics and sections of the Revised Code. By the same token, the General Assembly can permissibly address the powers and duties of numerous county officials in a far shorter and more focused piece of legislation such as H.B. 463, without running afoul of the Ohio Constitution.

CONCLUSION

Amici curiae have a genuine and compelling interest in the LEBOR at issue in this case. Granting the writ sought here would encourage countless other petitioners to ignore binding municipal charter provisions and hijack the electoral process in order to enact sweeping substantive laws, or to block implementation of state laws with which they may happen to disagree, under the guise of municipal government reforms. *Amici curiae* Affiliated Construction Trades Ohio Foundation, the Ohio Chamber of

[2] *See* Bill History, HB 463, *available at*: https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA131-HB-463 (last accessed March 30, 2018).

Commerce, the Ohio Oil and Gas Association, the Ohio Chemistry Technology Council, and the American Petroleum Institute respectfully ask the Court to deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, pursuant to S.Ct.Prac.R. 3.11(C)(3), a copy of the foregoing Brief of *Amici Curiae* Affiliated Construction Trades Ohio Foundation, The Ohio Chamber of Commerce, The Ohio Oil and Gas Association, The Ohio Chemistry Technology Council, and The American Petroleum Institute was served via electronic mail upon the following counsel this 7th day of September, 2018:

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