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

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

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

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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