

ORIGINAL

IN THE SUPREME COURT OF OHIO

LISA MCQUEEN, et al.,	:	Case No. 2013- 1192
Appellants,	:	
and	:	On Appeal from the Hamilton County
	:	Court of Appeals,
	:	First Appellate District
vs.	:	
MILTON R. DOHONEY, JR., et al.,	:	Court of Appeals
Appellees.	:	Case No. C-1300196

APPELLEES' MEMORANDUM IN OPPOSITION TO JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS
NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case involves the meaning of the particular language of Cincinnati's Charter. The First District Court of Appeals' decision does not reach beyond Cincinnati's borders, and it does not break new ground. It is consistent with how this Court has read substantially identical language in the Ohio Constitution, the Ohio Revised Code, and various municipal charters for nearly 100 years. The case also is moot because the contract that Appellants seek to undo has been executed. The Court should decline jurisdiction.

Article II, Section 3 of the Charter states that Cincinnatians retain the power of referendum over non-emergency legislation, which they can exercise according to state law. It also states the process by which Cincinnati City Council enacts emergency legislation that is not subject to referendum. All that is at issue here is the section's first sentence, which has been in Cincinnati's Charter since its adoption by Cincinnati voters in 1926. In 1994, Cincinnati voters enacted a Charter amendment that kept the first sentence identical while modifying the procedure for passing emergency ordinances. The First District correctly reaffirmed the meaning that Cincinnatians and the courts have given Article II, Section 3 for nearly 90 years. And the First District's decision is entirely consistent with this Court's case law. There is no public or great general interest in overturning the common and accepted understanding of Cincinnati's Charter or this Court's precedent. And there is no public interest in taking away the ability of the City to be able to respond quickly to emergencies or other urgent situations.

Emergency ordinances are vital tools that give Council the ability to quickly respond to a variety of situations. Without emergency ordinances that are immediately effective, all ordinances passed by Council would go into effect 30 days later if not subject to referendum. Waiting 30 days for each ordinance to become effective cripples Council's ability to aid citizens

and surrounding communities in the event of a natural or commercial disaster. Moreover, if all ordinances are subject to referendum, the City would be in the untenable position of having its annual budget appropriation ordinance, required under state law, subject to referendum. And, the ability to pass emergency ordinances that are immediately effective provides area businesses with the speed and certainty that they require in order to continue their successful investment and development in Cincinnati.¹

Appellants' Propositions of Law Demonstrate the Weakness of Their Case.

Appellants ask the Court to use this case not only to reinterpret the Charter, but also to create new rules of statutory interpretation. They ask the Court to find that if a court uses statutory construction rules in order to understand the plain meaning of a statute, that statute is *ipso facto* ambiguous. See Pl. Memo in Support of Jurisdiction, Propositions of Law 1-2. Neither the majority of the First District, nor the dissent, nor the trial judge agrees with Appellants' notion, which is contrary to long-established Ohio law.

Appellants' propositions of law are either inaccurate or inapplicable to this case, demonstrating the weakness of their request for jurisdiction. The Court already has unanimously rejected Appellants' first proposition of law. *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 11. *Porterfield* noted that "no clear standard has evolved to determine the level of lucidity necessary for a writing to be unambiguous." *Id.* But some courts had previously reasoned, incorrectly, that when multiple readings of "contracts, ballot initiatives, statutes, or even constitutional provisions" are possible, the provisions are by definition

¹ This point was emphasized in the brief filed in the First District by *amici curiae* Cincinnati USA Regional Chamber, Cincinnati Center City Development Corp., Port of Greater Cincinnati Development Authority, Uptown Consortium, Inc., Al Neyer, Associated Builders & Contractors, Flaherty & Collins Properties, JDL Warm Construction LLC, Messer Construction Co., Miller-Valentine Group, Northpointe Group, Oswald Company, and Towne Properties.

ambiguous. *Id.* *Porterfield* rejected that problematic approach. *Id.* The Court explained that when confronted with “allegations of ambiguity a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning.” *Id.* This makes sense because “[a]mbiguity is a creature not of definitional possibilities but of statutory context.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Courts examine the text by (1) reading the text as a whole, (2) using the common or acquired meaning of words, (3) avoiding adding to or subtracting from the text, and (4) giving the words the technical or particular meaning they have obtained by legislative definition or otherwise. *Porterfield* at ¶ 11; R.C. 1.42. Ambiguity exists “[o]nly when a definitive meaning proves elusive. Otherwise allegations of ambiguity become self-fulfilling.” *Id.*

This case does not present a matter of public or great general interest because the First District adhered to this Court’s guidelines for reading a law. The First District read the Charter as a whole, giving effect to all the words and not inserting words. *McQueen v. Dohoney*, 1st Dist. No. C-130196, 2013-Ohio-2424, ¶¶ 42, 85, 106. The First District recognized that the Charter does not provide comprehensive provisions regarding initiative and referendum. It instead incorporates Ohio law. *Id.* at ¶¶ 38, 46. It found that state law provisions on referendum are to be followed, except where the Charter specifically conflicts with state law. *Id.* at ¶¶ 52, 86. Accordingly, emergency ordinances are not subject to referendum. *Id.* at ¶¶ 52, 85; R.C. 731.30. To read the section otherwise would require the court “to ignore swaths of the city Charter.” *McQueen* at ¶ 85.

The First District’s Decision Is Correct.

The result of this application of the law is also in line with nearly 100 years of Ohio court precedent. The first sentence of Article II, Section 3 of the Charter is nearly identical to Article II, Section 1f of the Ohio Constitution.

Ohio Constitution, Article II Section 1f – Powers of Municipalities	Cincinnati Charter, Article II Section 3, first sentence
The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.	The initiative and referendum powers are reserved to the people of the city on all questions which the council is authorized to control by legislative action; such powers shall be exercised in the manner provided by the laws of the state of Ohio.

Interpreting the words of the Constitution in the time immediately following its adoption, this Court found the “clear and unmistakable” meaning of the phrase “such powers shall be exercised in the manner now or hereafter provided by law” includes all of the laws relating to referendum, not just procedural items. *Shryock v. Zanesville*, 92 Ohio St. 375, 384, 110 N.E. 937 (1915). And it has reaffirmed that view time and again. *See, e.g., State ex rel. Bramlette v. Yorby*, 24 Ohio St.2d 147, 149, 265 N.E.2d 273 (1970) (stating “[a] superficial examination of [the same language] might lead to the conclusion that referendum may not be denied as to any municipal legislative action. . . . Such a conclusion, however, uniformly has been rejected by this court.”); *Taylor v. City of London*, 88 Ohio St.3d, 137, 143, 723 N.E.2d 1089 (2000) (reading the nearly identical language of Article II, Section 1f to include the limitations set forth in R.C. 731.29 and R.C. 731.30).

The First District’s opinion recognized that the words of the Charter should be given the same meaning as the nearly identical words used in the Constitution. *McQueen* at ¶ 47, 81. The first sentence of Article II, Section 3 has acquired a particular meaning, which is that the Charter

incorporates the state law that exempts emergency ordinances from referendum. *Id.* at ¶¶ 47, 84; R.C. 1.42. Hamilton County courts have recognized this fact for the history of the Charter. *McQueen* at ¶¶ 54-56, 79-84, 89.

The Charter Expresses Cincinnatians' View of the Proper Balance Between Popular Democracy and Representative Democracy.

The Appellants have characterized this matter as an election-related case, but their focus on the referendum issue is misplaced.² While the right of referendum is important, so too is the function of representative democracy. The voters of Cincinnati struck the balance between the right of referendum and the representative function of the legislature in their Charter in 1926 and reaffirmed it in 1994. And they did it in the same way that Ohioans did for the General Assembly. *See McQueen* at ¶ 88.

Neither Ohio nor Cincinnati subjects every action of the legislature to referendum. The Ohio Constitution does not provide for referendum for emergency statutes or administrative acts of a municipal legislature or the General Assembly. Ohio Constitution, Article II, Section 1f; Ohio Constitution, Article II, Section 1d. Ohio law exempts municipal appropriations, street improvement assessments, and emergency ordinances from referendum. R.C. 731.30. And though Cincinnatians could have chosen to subject any number of legislative actions to referendum, they did not. Ohio Constitution, Article XVIII, Section 7. Instead, the electorate incorporated Ohio law rather than providing different, comprehensive provisions on initiative and referendum. Cincinnati Charter, Article II, Sections 1, 3.

² Appellants claim that this case needs the Court's urgent attention to protect voters' rights. But that claim is belied by the fact that they waited the full 45 days before presenting this case to the Court. "It is well established that in election-related matters, extreme diligence and promptness are required." *State ex rel. Carberry v. City of Ashtabula*, 93 Ohio St.3d 522, 523, 757 N.E.2d 307 (2001).

Cincinnati's Charter contains the commonly accepted super-majority requirement that, as this Court has consistently explained, sufficiently protects the people's right to referendum. Article II, Section 3; *State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, 874 N.E.2d 1145, ¶ 26. Moreover, "[i]f there was in fact no emergency or if the reasons given for such necessity are not valid reasons, the voters have an opportunity to take appropriate action in the subsequent election of their representatives." *State ex rel. Fostoria v. King*, 154 Ohio St. 213, 220-21, 94 N.E.2d 697 (1950).

The First District is experienced in interpreting the Cincinnati Charter. In a thoughtful and thorough decision that has no effects outside of Cincinnati, the appellate court correctly followed this Court's guidance on matters of statutory interpretation to exempt Ordinance 56-2013 from referendum. Its decision is entirely consistent with the precedents of this Court and Hamilton County courts. This appeal does not present a question of public or great general interest. The City respectfully requests that the Court decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

Governor Kasich's biennial budget bill, enacted in September 2011, amended R.C. 737.022 to clarify that Ohio municipalities can franchise their parking meter systems in order to find new revenue streams. In October 2012, the City issued a request for proposals for such a parking agreement. The City Manager explained to Council and the public that franchising and leasing the parking system could benefit the City and its citizens by permitting a third party to increase efficiency and invest in new technologies; placing upon a third party the costs of maintenance and upgrading facilities; and allowing the City to focus its limited staff and resources on the core functions of municipal government. In February 2013, the City administration recommended the Parking Long-Term Lease and Modernization Agreement

("Parking Agreement") with the Port of Greater Cincinnati Development Authority ("Port Authority"), creating a public-to-public partnership for operation of the parking system.

On March 6, 2013, Cincinnati City Council passed Ordinance 56-2013, which authorizes the City Manager to enter into the Parking Agreement. Consistent with Article II, Section 3, five members of Council voted for the ordinance, and six members voted for the emergency declaration. In the Ordinance, Council stated that the Ordinance was an emergency measure necessary for the immediate need to implement budgetary measures in order to avoid significant personnel layoffs and budget cuts which would lead to a reduction in City services to Cincinnati residents. Appellants do not challenge the sufficiency of the emergency declaration.

Within minutes after Ordinance 56-2013 passed, Appellants filed, argued, and obtained an ex parte Temporary Restraining Order. The City removed the case to federal court, but it was remanded when Appellants dropped their federal voting rights claim. On March 12, Appellants filed a Motion for Declaratory Judgment and Permanent Injunction, arguing for the first time that every ordinance is subject to referendum. On March 14, the City answered and filed an opposing memorandum. The trial court heard the case the next day. On March 28, it issued an Order and Entry Granting Motion for Declaratory Judgment and Permanent Injunction, holding that all City ordinances are subject to referendum under Article II, Section 3 of the Charter.

The City appealed to the First District, which reversed the trial court's decision subjecting all Cincinnati ordinances to referendum. The Appellants sought a stay on June 12. The First District overruled the motion on June 17, and the injunction was dissolved. The Appellants did not seek a stay from this Court. The City and the Port Authority executed the agreement on June 21, 2013. Appellants waited 45 days to seek jurisdiction here.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

As a preliminary matter, this Court should decline jurisdiction because the case now is moot. After the injunction was lifted, when Appellants did not seek a stay in this Court or move quickly to file their appeal, the City and the Port Authority executed the Parking Agreement. It is now a binding contract. Appellants and the courts below agree that any legislation – Council-initiated or citizen-initiated – that seeks to undo a contract violates Article I, Section 10 of the United States Constitution and therefore is void.

Relying on *Middletown v. Ferguson*, 25 Ohio St.3d 71, 76, 495 N.E.2d 380 (1986), Appellants have consistently argued that they needed immediate, *ex parte* relief from the trial court because “the signing of the [Parking Agreement] would destroy any meaningful relief by means of a referendum.” *McQueen v. Dohoney*, Hamilton C.P. No. A1301595 (Mar. 28, 2013), at 9 -10. The trial court agreed: “Had Plaintiffs/Relators not obtained a temporary restraining order in this matter, this case would likely be at an end.” *Id.* at 10. On that basis, the trial court found that the Appellants had declaratory judgment standing. *Id.* The court of appeals affirmed the trial court’s reasoning. *McQueen* at ¶¶ 15, 17.

As the Appellants concede, under *Middletown* this case is over. *See also State ex rel. Perona v. Arceci*, 129 Ohio App.3d 15, 19, 716 N.E.2d 1181 (9th Dist. 1998) (refusing to grant a writ of mandamus ordering the city to transfer petitions to the board of elections when the referendum sought would unconstitutionally impair a binding contract). Voter approval of a referendum repealing Ordinance 56-2013 would unconstitutionally impair a binding contract. Therefore, the Court should decline jurisdiction. But if the Court accepts jurisdiction, it now must address this complex legal question in the accelerated timeframe forced by Appellants.

Appellants' Proposition of Law No. I: Where the language of a charter is reasonably subject to two or more reasonable interpretations, then such language is, by definition, ambiguous.

Appellants' Proposition of Law No. II: Courts may resort to rules of statutory construction only if the terms of the statute or charter provision are ambiguous or in doubt.

Appellants ask for an approach to reading legislation that is contrary to precedent and the Ohio Revised Code; an approach that was not supported by any of the judges in this case. They argue that Article II, Section 3 is ambiguous because the First District “acknowledged the necessity to apply rules of statutory construction and to resort to other means of interpretation.” Pl. Memo. at 9. In Appellants’ view, even referring to the rules of statutory construction means that the text by definition is ambiguous. Their approach means that as soon as a court considers the entirety of the text or recognizes that certain phrases have acquired a particular meaning over time that the text is ambiguous. This is not the case. *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 12 (reading the statute as a whole using the common or acquired meaning of the words before deciding whether an ambiguity exists). Appellants confuse the approaches courts take in initially examining statutory language with the canons of statutory construction that courts apply *after* determining an ambiguity exists.

As this Court has instructed over and over again, the first step to understanding any statute is to “begin with its text, reading words and phrases in context and construing them according to the rules of grammar and common usage.” *State v. Willan*, Slip Opinion No. 2013-Ohio-2405, ¶ 5. If the words or phrases have acquired a technical or particular meaning, courts will construe them accordingly. *Id.*; R.C. 1.42. Courts will give effect to every word and not change the words that are present. *Willan*, at ¶ 5; *Boley v. Goodyear Tire & Rubber Co.*, 125

Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21; *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324, ¶16.

In essence, “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.” *Robinson v. Shell*, 519 U.S. 337, 341 (1997). To determine whether a text is ambiguous, “a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 11. “Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise allegations of ambiguity become self-fulfilling.” *Id.*

Ohio Courts have consistently applied this two-step approach. First, examine the text as a whole either to apply the plain meaning or to determine that an ambiguity exists. *See, e.g., Gates v. Ohio Sav. Assn.*, 11th Dist. No. 2009-G-2881, 2009-Ohio-6230, ¶ 27 (“When the Note in this case is viewed as a whole, it becomes apparent there is no ambiguity.”); *Haver v. Accountancy Bd.*, 10th Dist. No. 05AP-280, 2006-Ohio-1162, ¶ 18; *State v. Cunningham*, 178 Ohio App.3d 558, 2008-Ohio-5164, 899 N.E.2d 171, ¶ 14 (2nd Dist.). Second, apply the appropriate canons of statutory construction only if the text is ambiguous. *State ex rel. Potts v. Comm. on Continuing Legal Educ.*, 93 Ohio St.3d 452, 456, 755 N.E.2d 886 (2001).

The First District correctly held that Article II, Section 3 of the Cincinnati Charter unambiguously excludes emergency ordinances from referendum. *McQueen* at ¶ 52. It correctly disregarded Appellants’ self-fulfilling allegations of ambiguity, instead choosing to examine the text as a whole, to determine its plain meaning, and to apply this plain meaning to exempt Ordinance 56-2013 from referendum. *Id.* at ¶¶ 36-56, 76-92.

As a final note, Appellants and the dissent are correct in pointing out that the Cincinnati Charter could specifically state that emergency ordinances are not subject to referendum. It does not. Instead, the authors of the Charter chose to accomplish the same thing by incorporating Ohio law. Rather than listing types of ordinances that are exempt from referendum, they incorporated Ohio law, which lists types of ordinances that are exempt from referendum. The fact that there are different methods for accomplishing the same objective does not mean that either method is ambiguous. They are equally unambiguous.

Appellants' Proposition of Law No. III: It is the duty of the courts to liberally construe municipal referendum provisions in favor of the power reserved to the people to permit rather than to preclude the exercise of the power and to promote rather than to prevent or obstruct the object sought to be attained.

Appellants correctly restate this Court's instruction that when charter language truly is ambiguous, courts may resort to construing municipal referendum provisions in favor of permitting rather than prohibiting a referendum vote. For the reasons explained in depth above, Article II, Section 3 of the Cincinnati Charter is unambiguous. There is no need to liberally construe a charter provision where the provision's meaning is clear. *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 476, 764 N.E.2d 971 (2002). The Court should decline jurisdiction over this proposition of law because it merely restates established law.

Appellants' Proposition of Law No. IV: "All" means all.

Appellants' fourth proposition of law presumes that the Court finds for it on the first three. Appellants claim that once the Court reaches the conclusion that the Charter is ambiguous (propositions of law one and two), it should construe that ambiguity in favor of referendum (proposition of law three), and do so by declaring simplistically that "all means all," regardless of the words that follow it (proposition of law four). *See* Pl. Mem. at 12 (explaining the fourth proposition of law in the context of "liberally construing" the Charter). This argument in support

of “all means all” is also inconsistent with what Appellants argued in the court below regarding the exact same words. Regardless, Appellants’ main argument below has become an afterthought here, because the First District so thoroughly disposed of the illogic of it. Even the dissent did not rest its view on “all means all.”

Here, Appellants not only want the Court to examine one half of one sentence in isolation, but one word in isolation. By isolating a single word, Appellants attempt to lead this Court to an absurd result. “Parsing individual words is useful only within a context. ... [A] document[] is designed to be understood as a whole.” *State v. Porterfield*, 2005-Ohio-3095, ¶ 12. This is because “words in a statute do not exist in a vacuum,” and courts must presume that the legislature intended for “the entire statute to be effective.” *D.A.B.E. Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 19. Charters are treated no differently. *State ex rel. Comm. for the Charter Amendment v. City of Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, 776 N.E.2d 1041, ¶ 28. “All” means “all” unless the complete phrase dictates otherwise by adding or incorporating exceptions – exactly what the Cincinnati Charter does.

The entirety of the first sentence of Article II, Section 3 demonstrates that the plain language unambiguously incorporates Ohio law when it says “such powers shall be exercised in the manner provided by the laws of the state of Ohio.” No one has contested that Ohio law exempts emergency ordinances from referendum. R.C. 731.30. And Ohio courts have applied this language or nearly identical language in this same way. *See, e.g., State ex rel. Lemaitre v. City of Clyde*, 6 Ohio St.3d 344, 344, 453 N.E.2d 644 (1983), fn. 2; *Sentinel Police Assn. v. Cincinnati*, 1st Dist. No. C-940610, 1996 Ohio App. LEXIS 1512, *12 (Apr. 17, 1996); *State ex rel. Emrick v. Wasson*, 62 Ohio App.3d 498, 503, 576 N.E.2d 814 (2nd Dist. 1990); *Cincinnati*

ex rel. Newberry v. Brush, 1st Dist. No. C-830674, 1984 Ohio App. LEXIS 8835, *5 (Jan. 11, 1984); *Walsh v. Cincinnati City Council*, 54 Ohio App.2d 107, 108-09, 375 N.E.2d 811 (1st Dist. 1977); *Schultz v. Cincinnati*, 13 Ohio Op. 186, 28 Ohio Law Abs. 29, 1938 Ohio Misc. LEXIS 906, *7 (C.P. 1938). The overly simplistic approach of “all means all” completely ignores all the words in the sentence that come after the semi-colon. Those words expressly incorporate Ohio law on the subject. The First District correctly disregarded this argument when it found that Ordinance 56-2013 is not subject to referendum.

CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest. Rather, this case involves the interpretation of one sentence of the Cincinnati City Charter. The City requests that the Court decline to accept jurisdiction in this case.

Respectfully submitted,

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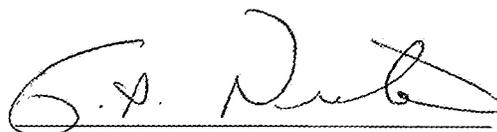
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail on August 13,

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A handwritten signature in black ink, appearing to read "T. A. Nestor", written over a horizontal line.

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