

PHILLIP HARTMANN (0059413)
YAZAN ASHWARI (0089565)
JOHN GOTHERMAN (0000504)
Frost Brown Todd
10 W. Broad Street, Suite 2300
Columbus, OH 43215-3484

*Council for Amicus Curiae
The Ohio Municipal League*

KRISTEN SOURS (0082212)
17 S. High Street, Suite 700
Columbus, OH 43215

*Council for Amicus Curiae The
Building Industry Association of
Columbus and The Ohio
Homebuilders Association*

BRUCE L. INGRAM (0018008)
JOSEPH R. MILLER (00688463)
CHRISTOPHER L. INGRAM (0086325)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43216
T: (614) 464-6400
F: (614) 4664-6350
blingram@vorys.com
jrmiller@vorys.com
clingram@vorys.com

*Counsel for Intervening Respondent
The Center at Powell Crossing LLC*

MOTION

Pursuant to S.Ct.Prac.R. 12.08 and 18.02, Relators hereby move this Court to reconsider its decision in *State ex rel. Ebersole v. Powell*, Slip Opinion No. 2014-Ohio-4078 and grant Relators the requested writ. Relators are the organizers of an initiative petition for a proposed charter amendment to the Powell City Charter directing Powell City Council (“Council”) to legislatively create a new comprehensive plan for land use and development in Powell.¹ This case arose when Council unlawfully refused to submit the charter amendment question to Powell electors solely due to an alleged defect with the substantive content of the proposed amendment. Specifically, Council alleged that the proposed charter amendment constitutes an unconstitutional delegation of legislative authority.

The writ should be granted because reviewing the substantive content of the petition prior to voter approval directly conflicts with over a century of uniform Ohio Supreme Court precedent. At least twenty-one of this Court’s decisions uniformly hold that reviewing the content of the proposed charter amendment must wait until after the election; only the form, not content, of initiative petitions may be reviewed prior to voter approval at the ballot box. *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14; *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, ¶ 12; *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶ 24; *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-

¹ Additionally, Relators organized two other petitions at issue in a companion case, *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, Case No. 2014-1520. At issue in that case are a referendum petition on Powell City Ordinance 2014-10 and an initiative petition to repeal Ordinance 2014-10. Through Ordinance 2014-10, Powell City Council on June 17, 2014 approved a development plan for a high-density apartment project fundamentally altering the landscape of Downtown Powell.

Ohio-5379, ¶ 43; *State ex rel. Lewis v. Rolston*, 115 Ohio St.3d 293, 2007-Ohio-5139, ¶ 28; *Mason City School Dist. v. Warren Cty. Bd. of Elections*, 107 Ohio St.3d 373, 2005-Ohio-5363, ¶ 21; *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 38; *State ex rel. Commt. For the Charter Amendment v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶ 43 n. 3; *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 (1983); *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 17 (1977); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, syllabus (1941); *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 571 (1922); *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921); *Weinland v. Fulton*, 99 Ohio St. 10 (1918); *Pfeifer v. Graves*, 88 Ohio St. 473 (1913).

Due to Council's review of the content of the proposed charter amendment, Relators filed the present action in mandamus to protect their clear legal rights and compel Council to perform its clear legal duty under Ohio Const. Art. XVIII §§ 8, 9 to submit the charter amendment question to Powell electors. This Court denied the writ, but in doing so failed to address Relators' arguments or recognize this Court's uniform body of controlling decisional law dating back to 1913 and the origins of the initiative and referendum in Ohio.

This Court may reconsider its opinions to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383 (1995). Reconsideration is particularly appropriate where an issue was not

“fully considered” or this Court fails to cite authority for abandoning prior precedent. *Id.*; *Oberlin Manor, Ltd. v. Lorain Cty. Board of Revision*, 69 Ohio St.3d 1, 2-3 (1994), citing *Matthews v. Matthews*, 5 Ohio App.3d 140 (1981). In this case, this Court should consider and address Relators’ arguments that were raised in briefing but unaddressed in this Court’s opinion. Specifically, this Court should consider at least four or Relators’ previously raised arguments that independently lead to the inescapable conclusion that Relators are entitled to the writ sought.

First, this Court should address the uniform body of over one hundred years of controlling Ohio Supreme Court precedent that the Relators cited in briefing, but were ignored in this Court’s opinion and overruled *sub silencio*. Relators’ merit brief, at 29-33; Relators’ reply brief, at 6. By failing to address controlling precedent, this Court’s opinion invites non-judges sitting on city councils across the State to unconstitutionally engage in “judicial review.” City councils clearly sit as a non-judicial legislative body when reviewing charter amendment petitions pursuant to Ohio Const. Art. XVIII §§ 8, 9. Relators merit brief, at 18-22.

By its opinions in this case and the companion case *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, Slip Opinion No. 2014-Ohio-4077, this Court additionally contravenes the stated position of current Ohio Secretary of State Jon Husted in recent litigation. Merit Brief of Secretary of State, at 7 n.4, filed in *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14.²; *State ex rel. Cincinnati for Pension Reform v. Hamilton Cty. Bd. of Elections*, 2013-Ohio-4489, ¶ 85 (“CPR does not dispute Secretary Husted's contention that his only

² The merit brief of current Ohio Secretary of State Jon Husted filed in *State ex rel. Brecksville v. Husted* is available on the Ohio Supreme Court Clerk’s website here: http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=714444.pdf.

statutory responsibility is to review ballot language for form, not for content.”). Secretary of State Husted is not a party to the present action.

Second, if nevertheless addressing the premature constitutional issue, this Court should address Relators’ arguments that the text of the proposed charter amendment does not constitute an unconstitutional delegation of legislative authority. As the Relators explained in briefing, the proposed charter amendment vests legislative authority *only* in Powell City Council. Under the proposed amendment, Council is not required to follow the *non-binding* recommendations of the citizens’ *advisory* commission organized under the proposed charter amendment.

Third, if addressing the premature constitutional issue and deciding the issue against Relators, this Court should address Relators argument that remedy for an alleged constitutional defect in the proposed charter amendment is to sever offending language rather than strike the entire measure. As Relators explained in briefing, unlawful language may be severed from the Powell Charter pursuant to Section 12.02 of the Powell Charter and the longstanding law of *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927) and its progeny.

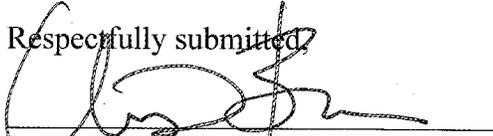
Fourth, this Court should address Relators’ arguments that the writ must be granted because Council unnecessarily delayed this action for two weeks and, in doing so, violated its clear legal duty under Ohio Const. Art. XVIII §§ 8, 9 to “forthwith,” or immediately, submit the charter amendment question to Powell electors. On the same day this Court issued its decision in this case, this Court granted a writ in another case for this very reason — the failure of a city council to act “forthwith.” *State ex rel. Commt. For Charter Amendment Petition v. Maple Hts.*, Slip Opinion No. 2014-Ohio-4097, ¶¶ 19-22. This Court should provide Relators with equal protection of the laws, and as this Court did in *Maple Hts.*, consider Relators’ compelling

arguments that Powell City Council failed to act “forthwith.” *See Bush v. Gore*, 531 U.S. 98, 104 (2000). Council’s delay in this case has prejudiced Relators by delaying the filing of this motion for reconsideration until after the deadline for sending absentee ballots to uniformed service members pursuant to the Uniformed and Overseas Citizens Absentee Voters Act.

Relators respectfully request that this Court consider and address their arguments raised in briefing, including the four independent bases for granting Relators the requested writ discussed in this motion. As explained through briefing, Relators have established a clear legal right, clear legal duty, and the lack of an adequate remedy in the ordinary course of law entitling them to a writ of mandamus. *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 440-41, 2005-Ohio-5009, ¶ 23.

The grounds for this motion are more fully explained in the accompanying memorandum.

Respectfully submitted,



CHRISTOPHER BURCH (0087852)

Counsel of Record

Callender Law Group

20 S. Third Street, Suite 261

Columbus, OH 43215

T: (614) 300-5300

F: (614) 324-3201

chris@callenderlawgroup.com

Counsel for Relators

Brian Ebersole, Sharon Valvona,

and Thomas Happensack

MEMORANDUM IN SUPPORT

I. INTRODUCTION

State ex rel. Ebersole v. Powell, Slip Opinion No. 2014-Ohio-4078, ignores nearly every argument, if not every argument, that Relators made through briefing (no oral argument was held). As background, Relators brought this action seeking a writ to compel Powell City Council to submit a charter amendment question proposed by petition to Powell electors. The proposed charter amendment directs Council to legislatively create a new comprehensive plan for land use and development in Powell, in the long-term interests of the City.

Through the opinion in this case, this Court initially denied Relators the requested writ and, in doing so, overruled over a century of its own uniform case law *sub silencio*. Now introduced into this case are several constitutional issues. More fundamentally, Relators were denied their constitutional right to amend the Powell charter by initiative petition. Upon further review, this Court should consider Relators' arguments, reconsider its opinion, and ultimately grant Relators the requested writ compelling Powell City Council to submit the proposed charter amendment to the Powell electorate.

II. ARGUMENT

A. Review on Motion for Reconsideration

This Court has invoked the reconsideration procedures under S.Ct.Prac.R. 12.08 and 18.02 in order to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383 (1995). At least three situations independently warrant reconsideration. *First*, where "an issue for consideration ... was either not considered at all or was **not fully considered** when it should have

been.” *Oberlin Manor, Ltd. v. Lorain Cty. Board of Revision*, 69 Ohio St.3d 1, 2-3 (1994) (emphasis added), citing *Matthews v. Matthews*, 5 Ohio App.3d 140 (1981). *Second*, where the “original opinion appears to be contrary to established precedent” and does not cite valid authority for its abandonment of prior precedent. *W. Jefferson Village Council*, 75 Ohio St.3d at 383. *Third*, where “the justification for denial of the writ” was not raised or discussed previously, nor fully briefed prior to this Court issuing its opinion. *Id.*

B. This Court should reconsider its opinion because it ignores Relators’ argument that issues with the content of the proposed constitutional amendment are prematurely raised prior to voter approval and that considering such issues overrules over a century of uniform Ohio Supreme Court precedent *sub silencio*.

1. The opinion overrules over a century of this Court’s precedent *sub silencio*.

Had this Court considered and adhered to the over one hundred years of controlling precedent cited by Relators in their briefing, there would be no question that Relators are entitled to a writ compelling Respondent Council to submit the proposed charter amendment to the Powell electorate. Relators’ merit brief, at 29-33; Relators’ reply brief, at 16.

As Relators discussed extensively through briefing, this Court’s precedent *uniformly* holds that the content of measures proposed by petition may not be reviewed prior to voter approval. In fact, at least twenty-one controlling Ohio Supreme Court cases so hold dating back to 1913, just one year after Ohioans adopted the power of popular initiative and referendum in 1912. *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14; *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, ¶ 12; *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶ 24; *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, ¶ 43; *State ex rel. Lewis v. Rolston*, 115 Ohio St.3d 293, 2007-Ohio-5139, ¶ 28;

Mason City School Dist. v. Warren Cty. Bd. of Elections, 107 Ohio St.3d 373, 2005-Ohio-5363, ¶ 21; *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 38; *State ex rel. Commt. For the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶ 43 n. 3; *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 (1983); *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 17 (1977); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, syllabus (1941); *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 571 (1922); *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921); *Weinland v. Fulton*, 99 Ohio St. 10 (1918); *Pfeifer v. Graves*, 88 Ohio St. 473 (1913).

The opinion reviewing the constitutionality of the proposed charter amendment in this case thus overrules more than a century of its own uniform precedent *sub silencio*. Further, the authority relied upon in the opinion actually *cuts against* prematurely addressing the constitutional non-delegation issue. Slip Opinion No. 2014-Ohio-4078, ¶ 30, citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677 (1976). That is, in *City of Eastlake*, the Ohio Supreme Court and U.S. Supreme Court addressed the constitutional non-delegation issue *after*, not before, Eastlake electors approved a charter amendment proposed by petition that became part of the Eastlake City Charter. *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St.2d 187, 188 n. 1 (1975). The other cases relied upon in this Court's opinion in this case

likewise address duly enacted laws rather than the content of initiative or referendum petitions. Slip Opinion No. 2014-Ohio-4078, ¶ 30, citing *Eubank v. Richmond*, 226 U.S. 137 (1912) and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

To be sure, Relators relied on this Court's uniform line of controlling precedent when pursuing the writ sought in this case. That is why Relators' argued and cited the Ohio Supreme Court case precedent directly to the point that the constitutional non-delegation issue is prematurely raised. Relators' merit brief, at 29-33. Relators were given no notice that over a century of precedent might be overturned. In fact, Respondents failed to argue that these cases should be overruled pursuant to *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 48, which this Court just reaffirmed in the companion case, *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, Slip Opinion No. 2014-Ohio-4077, ¶ 37. Respondents simply ignored Relators citations to this Court's precedent that controls this case without explaining why they should be overruled pursuant to *Galatis*. If there must be a sea change in the law under these circumstances, it should apply prospectively to future cases, not in this case, because Relators reasonably relied upon a uniform body of controlling precedent in incurring costs related to the petitions.

And as set forth in Relators' opening brief at page 32, this Court has specifically expressed concern that quashing charter amendments proposed by petition prior to voter approval enables parties opposed to the policy-content of the amendment to hold up the petition with meritless legal challenges. *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 57 (1994) ("To hold otherwise would allow council members opposed to a charter amendment initiative to circumvent their constitutional duty to submit the issue "forthwith"); *State ex rel. Citizens for a*

Better Portsmouth v. Sydnor, 61 Ohio St.3d 49, 53 (1991). If upheld, the opinion in this case would invite parties opposed to the policy content of proposed measures to raise premature and meritless legal challenges to the content of measures proposed by petition.

Still further, there is no standard to apply when reviewing the proposed charter amendment for constitutionality because it is not yet a law. Normally, laws are presumptively constitutional and must be proved unconstitutional beyond a reasonable doubt. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11 (“Laws are entitled to a strong presumption of constitutionality, and the party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.”) (internal citations and quotations omitted); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). But here, it is not clear what standard to apply to Council’s constitutional allegation or even what standard the Court actually applied in this case to decide the constitutional issue. *See* Slip Opinion No. 2014-Ohio-4078, ¶¶ 30-32.

In sum, the opinion in this case ignores Relators’ arguments that withholding the proposed charter amendment from the ballot due to constitutional non-delegation issues directly conflicts with over a century of controlling Ohio Supreme Court precedent. This Court should reconsider its opinion in light of Relators’ arguments invoking such precedent and accordingly grant the writ requested.

2. The opinion in this case unconstitutionally enables non-judges, *i.e.* Powell City Council, to decide constitutional issues.

The opinion in this case also ignores Relators’ arguments that Powell City Council, acting in a legislative capacity pursuant to Ohio Const. Art. XVIII §§ 8, 9, may not review substantive legal issues with the content of measures proposed by petition. Relators’ merit brief,

at 18-22. As an initial matter, Ohio Const. Art. XVIII § 9 provides that municipal charter amendments proposed by petition must be submitted to electors by the “legislative authority” of the municipality, here Powell City Council.

Relators explained through their briefing that Council clearly exceeded its *legislative* authority under Ohio Const. Art. XVIII §§ 8, 9 when it attempted to act *judicially* and decide whether the proposed charter amendment constitutes an unconstitutional delegation of legislative authority. Relators’ merit brief, at 18-22, citing: *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 55 (1994); *State ex rel. Polcyn v. Burkhart*, 33 Ohio St.2d 7, 8 (1973); *State ex rel. Citizens for a Better Portsmouth v. Syndor*, 61 Ohio St.3d 49, 53 (1991).

More fundamentally, Council may not decide the constitutional non-delegation issue because it is non-judicial body of non-judges, including many non-lawyers. Only judges may invoke the power of judicial review to review laws for constitutionality and there is not a single judge on Powell City Council. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 493 (1999) (“The interpretation of the laws is the proper and peculiar province of the courts”), quoting Alexander Hamilton, THE FEDERALIST NO. 78; *State ex rel. Hoel v. Brown*, 105 Ohio St. 479, syllabus (“What the Constitution grants, no statute may take away.”).

Time and again, this Court has held that administrative tribunals, for example the Ohio Board of Tax Appeals and the Public Utilities Commission of Ohio, do not have the power to declare laws unconstitutional. *Cleveland Gear Co. Limbach*, 35 Ohio St.3d 229, 232 (1988) (“the Board of Tax Appeals may not declare the statute unconstitutional”); *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181 (“The [Public Utilities Commission of Ohio] . . . is an administrative agency with powers specifically granted by the Revised Code, and it has no

authority to declare a statute unconstitutional”); *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, ¶ 16. The bodies are comprised of non-judges who may not engage in judicial review.

To summarize, Council is a non-judicial body without the power of judicial review, particularly where, as here, it is expressly acting *legislatively* pursuant to Ohio Const. Art. XVIII §§ 8, 9. This Court should consider Relators’ arguments on this point raised in briefing, thereby leading to the inescapable conclusion that Council must submit the proposed charter amendment to Powell electors because the petition at issue is sufficient and valid.

3. When read together with *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, the opinion in this case unconstitutionally imposes an “affirmative” “duty” on the Ohio Secretary of State.

Again, by its silence, this Court implicitly overruled over a century of its own uniform case law holding that the content of measures proposed by petition may not be reviewed prior to voter approval at the ballot box. In this Court’s opinion for a companion case issued on the same day as the opinion in this case, *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, Slip Opinion No. 2014-Ohio-4077, at ¶ 44, this Court went further to *expressly* hold that boards of elections have “an affirmative statutory duty to review the content of proposed referenda and initiatives, and the only time that duty can be performed meaningfully is before the election.” (underlining added). When the opinion for the companion cases are read together, that means that the Delaware County Board of Elections would have had an affirmative duty to review the constitutional non-delegation issue had Council decided the charter amendment petition was sufficient and valid and the developer subsequently filed a protest with the Board of Elections.

Thus, this Court has judicially created an “affirmative duty” for boards of election

reviewing petition protests under R.C. 3501.01 et seq. that has been repeatedly rejected in the past. *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14; *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, ¶ 12; *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, ¶ 43; *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); *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 146 (1988).

In fact, pursuant to the plain language of R.C. 3501.01 et seq. and this Court's precedent, the current Ohio Secretary of State has successfully argued, and this Court has agreed, that he does *not* have a statutory duty to review petitions under R.C. 3501.11(k) for content. See, Ohio Secretary of State Jon Husted's Merit Brief, at 7 n.4, filed in *State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14.³ Likewise, Secretary of State Husted has successfully argued that he does not have a duty to review proposed ballot language for content under R.C. 3501.11(v). *State ex rel. Cincinnati for Pension Reform v. Hamilton Cty. Bd. of Elections*, 2013-Ohio-4489, ¶ 85 ("CPR does not dispute Secretary Husted's contention that his only statutory responsibility is to review ballot language for form, not for content.").

Thus, the opinion in this case creates a new "affirmative duty" for the Secretary of State and boards of elections to review substantive issues such as the constitutional non-delegation issue that has been raised here. This Court's precedent, cited above, demonstrates that this new affirmative duty has no basis in statutes such as R.C. 3501.11 et seq. and should be reconsidered

³ The merit brief of current Ohio Secretary of State Jon Husted filed in *State ex rel. Brecksville v. Husted* is available on the Ohio Supreme Court Clerk's website here: http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=714444.pdf.

and eliminated. Ohio Const. Art. II § 1 (legislative authority vested in the General Assembly and the people). Further, this Court should consider Relators' arguments that the constitutional non-delegation issue is prematurely raised, and consequently grant the requested writ.

C. Even if this Court overrules a century of its own uniform precedent, it should still reconsider its opinion and grant the requested writ because the opinion ignores Relators' argument that the proposed charter amendment does not constitute an unconstitutional delegation of legislative authority.

This Court's opinion in this case additionally fails to consider Relators' arguments concerning the text of the proposed charter amendment, which clearly vests all legislative authority to create the Powell comprehensive plan in Powell City Council. Relators' merit brief at 33-36; Relators' reply brief, at 6-9.

As set forth through Relators' briefs, the proposed charter amendment requires Council to legislatively create a new comprehensive plan for land use and development in Powell. Exhibit C (proposed charter amendment). Before Council enacts the Final Comprehensive Plan, the proposed charter amendment organizes a citizens' *advisory* committee called the "Comprehensive Plan Commission." This advisory Comprehensive Plan Commission makes *non-binding recommendations* to Council through the creation of an advisory Preliminary Comprehensive Plan. This Court's opinion did not recognize the *advisory* nature of citizens commission or the *non-binding* nature of their recommendations. Slip Opinion No. 2014-Ohio-4078, ¶¶ 23-29.

Under the proposed charter amendment, moreover, Council must enact a Final Comprehensive Plan, separate and apart from the Preliminary Comprehensive Plan. The requirements for the legislatively enacted Final Comprehensive Plan are set forth in Article 4, Section 19 of the proposed charter amendment, as follows:

The Final Comprehensive Plan shall be in compliance with the following objective criteria:

- (1) the needs and desires of the residents of Powell are the paramount consideration;
- (2) preserve the natural, cultural, and visual elements of the City of Powell;
- (3) limit traffic congestion on Powell roads;
- (4) balance residential and non-residential land use in Powell based upon the scope and cost of existing City services and level of tax revenues;
- (5) land in Powell should be available for parking in retail areas;
- (6) real property in the Powell “Downtown Business District” shall not be developed with “high-density housing.”

None of these criteria require the Final Comprehensive Plan to be consistent with the advisory Preliminary Comprehensive Plan or the findings of the citizens’ advisory commission. Relators’ pointed this out in their merit and reply briefs, but the argument was not addressed in this Court’s opinion.

As written, Section 18 of Article 18 of the proposed charter amendment provides:

The City Council of Powell, Ohio shall consider the Preliminary Comprehensive Plan, make adjustments as necessary consistent with the Phase I findings of Comprehensive Plan Commission, and pass an ordinance no later than March 31, 2016 legislatively adopting a Final Comprehensive Plan.

This language does *not* require the Final Comprehensive Plan to be consistent with the advisory commission’s finding. This Court’s opinion implicitly inserts the phrase “consistent with the Phase I findings of Comprehensive Plan Commission” onto the end of this Section 18.

But there is no basis for inserting language that does not appear in the proposed amendment as circulated and relied upon by the electors signing the petitions. And again, the requirements for the Final Comprehensive Plan are all set forth under Section 19 of Article 18 -- none of which require the Final Comprehensive Plan to be consistent with the advisory commission's findings. The proposed charter amendment vests all legislative authority under the amendment in Council.

Separately, to the extent there is any concern with the "standards" set forth under the proposed charter amendment, as the opinion in this case expresses, this Court again ignored Relators' arguments. Slip Opinion No. 2014-Ohio-4078, ¶ 31. Relators' reply brief at page 17 points out that the proposed charter amendment actually provides more standards than the existing legislative authorization for Council to enact a comprehensive plan under Powell Charter § 4.07. The opinion in this case thus calls into question the constitutionality of Powell's existing "standardless" comprehensive plan under Powell Charter § 4.07.

In summary, this Court should address Relators' argument that, even if the constitutional issue is prematurely addressed in this case, the proposed charter amendment does not require Council to follow the non-binding recommendations of the citizens' advisory committee. This Court should fully review the text of the proposed amendment and grant the writ compelling Council to submit the proposed charter amendment to the Powell electorate.

D. Independently, this Court should reconsider its decision and grant the requested writ because this Court's opinion ignores Relators' argument that the proper remedy is to sever any offending language rather than rule the entirety of the proposed charter amendment unconstitutional.

Independently, this Court should address Relators' argument to sever any offending language if the proposed charter amendment is prematurely and erroneously determined to be an

unconstitutional delegation of legislative authority. In Relators' reply brief, Relators specifically argued that:

If a party challenges the charter amendment after electors approve the amendment, **and if** there is a ripe and justiciable controversy at that time, **and if** a deciding tribunal found the language offensive of some law, **still a deciding tribunal could sever any offending language** (and Relators submit there is none) under Powell City Charter § 12.02 and/or *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927).

Relators' reply brief, at pages 8-9 n. 3 (emphasis added). Relators reply brief further provides the text of the severance provision in Powell Charter § 12.02, as follows:

[a] determination that any part of this Charter is invalid shall not invalidate or impair the force or effect of any other part thereof, except to the extent that such other part is wholly dependent for its operation upon the part declared invalid.

In the opinion for this case, this Court found that the proposed charter amendment constitutes an unconstitutional delegation of legislative authority because:

[T]he city council's authority in this process would be sharply constrained by the findings of the five private citizens on the commission. Specifically, when adopting a final plan, **the city council would be permitted to 'make adjustments' to the commission's preliminary plan only to the extent that they are consistent with the commission's findings at Phase I.** And the proposed charter amendment does not set forth any standards to govern those findings. In short, the city council would be deprived of final decision-making authority over zoning matters.

Slip Opinion No. 2014-Ohio-4078, ¶ 31 (emphasis added).

The Court based this finding on the following language in Section 18 of Article 18 of the proposed charter amendment:

The City Council of Powell, Ohio shall consider the Preliminary Comprehensive Plan, **make adjustments as necessary consistent with the Phase I findings of Comprehensive Plan Commission,**

and pass an ordinance no later than March 31, 2016 legislatively adopting a Final Comprehensive Plan.

Slip Opinion No. 2014-Ohio-4078, ¶¶ 28, 31 (emphasis and underlining added).

But even if the proposed charter amendment is read to deprive Council of legislative authority due to language above (it should not be), the remedy is not to strike the entire proposed charter amendment but instead to sever the offending language. Relators' reply brief at page 9, citing Powell City Charter § 12.02 and this Court's longstanding precedent under *Geiger v. Geiger* and its progeny. Under this Court's own reasoning, the clause "make adjustments as necessary consistent with the Phase I findings of Comprehensive Plan Commission" could be severed from the proposed charter amendment to cure any alleged constitutional defect.

And, if there is any question whether Powell Charter § 12.02 applies to a proposed charter amendment that is not yet adopted, that question further demonstrates that the constitutional issue is prematurely raised prior to voter approval. Charter amendments should be read together with the entire Powell Charter and prematurely addressing constitutional issues potentially alters proper legal analysis. After enactment, moreover, laws enjoy a presumption of constitutionality that may or may not be available to proposed laws.

In summary, even if this Court upholds its opinion inasmuch as it addresses the constitutional issue prior to voter approval and finds a constitutional violation, the remedy is to sever the offending language under Powell Charter § 12.02 and *Geiger v. Geiger* rather than strike the proposed charter amendment in its entirety.

E. As yet another independent ground for reconsidering its opinion and granting the writ sought, this Court’s opinion ignores Relators argument that the proposed charter amendment should be submitted to Powell electors because Council violated Ohio Const. Art. XVIII §§ 8, 9 when it failed to act “forthwith” at its August 5, 2014 meeting.

Finally, this Court altogether ignored Relators’ argument that the proposed charter amendment must be submitted to Powell electors because Council failed to act “forthwith” at its August 5, 2014 meeting pursuant to Ohio Const. Art. XVIII §§ 8, 9. Relators’ merit brief at pages 15-17 specifies that Council was required to provide for the submission of the proposed charter amendment to Powell electors “forthwith,” or immediately, upon receiving a signature attestation statement from the Delaware County Board of Elections in this case.

Relators’ argument on this point was not addressed in the opinion and Respondents arguments to the contrary are unavailing. ***First***, the unnecessary and unlawful two-week delay that Council caused by acting at its August 19, 2014 meeting rather than “forthwith” at the August 5, 2014 meeting matters. Council’s delay in this case has prejudiced Relators by delaying the filing of this motion for reconsideration until after the deadline for sending absentee ballots to uniformed service members pursuant to the Uniformed and Overseas Citizens Absentee Voters Act. Valuable time was lost due to Council’s unnecessary and unlawful delay.

Second, this Court has repeatedly held that “forthwith” under Ohio Const. Art. XVIII §§ 8, 9 means “immediately.” *State ex rel. Concerned Citizens for more Professional Govt. v. Zanesville City Council*, 70 Ohio St.3d 455, 459 (1994) (“forthwith means immediately”); *State ex rel. Commt. For Charter Amendment Petition v. Avon*, 81 Ohio St.3d 590, 593 (1998). Powell City Council did not act immediately or “forthwith” when it could have acted at its regularly

scheduled meeting on August 5, 2014 but instead chose to withhold the charter amendment petition for two weeks until addressing it at its August 19, 2014 meeting.

In fact, on September 19, 2014, the same day that this Court issued its opinion in this case and the companion case, this Court reaffirmed that “forthwith” means immediately through another case, *State ex rel. Commt. For Charter Amendment Petition v. Maple Hts.*, Slip Opinion No. 2014-Ohio-4097, ¶¶ 19-22. There, this Court rejected the municipality’s argument that a “two readings rule” under the city charter prevented the city council from acting without holding two readings at two separate meetings. *Id.* at ¶ 21. But when Relators in the present action made the very same argument, this Court ignored not only altogether ignored Relators’ argument that Powell City Council did not act “forthwith” under the Ohio Constitution but also ignored Relators’ argument that Powell City Council did not have to hold two readings. In other words, this Court’s holding in *Maple Hts.* further supports Relators’ argument that Powell City Council violated its duty to act “forthwith” under Ohio Const. Art. XVIII §§ 8, 9.

Third, this Court’s failure to address Relators’ arguments in the present action and simultaneous willingness to entertain the same arguments made by a different group of similarly situated people, namely the Relators in the Maple Heights case, violates the Equal Protection Clauses of the Ohio Constitution and of the Fourteenth Amendment to the United States Constitution. *See Bush v. Gore*, 531 U.S. 98, 104 (2000); *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 60 (1999); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (providing that restrictions on access to the ballot burden fundamental rights).

In sum, this Court should consider Relators arguments that Council did not act “forthwith” pursuant to Ohio Const. Art. XVIII §§ 8, 9 and grant Relators the requested writ.

III. CONCLUSION

As set forth in Relators’ opening and reply briefs, Relators have established a clear legal right, clear legal duty, and the lack of an adequate remedy in the ordinary course of law entitling them to a writ of mandamus. *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 440-41, 2005-Ohio-5009, ¶ 23 (2005). Relators have a clear legal right to the relief requested because they have submitted a sufficient and valid charter amendment petition signed by a sufficient number of Powell electors. Respondent Council has a clear legal duty to perform the actions sought under Ohio Const. Art. XVIII §§ 8, 9. And, Relators have no adequate remedy in the ordinance course of law due to the proximity of the November 4, 2014 general election.

Accordingly, Relators respectfully request that this Court reconsider its opinion in *State ex rel. Ebersole v. Powell*, Slip Opinion No. 2014-Ohio-4078, address Relators arguments, and grant the relief sought through Relators complaint and briefing, including the issuance of a writ of mandamus compelling Respondent Council to provide for the submission of the proposed charter amendment to a vote of the Powell electorate.

Respectfully submitted,



CHRISTOPHER BURCH (0087852)

Counsel of Record

Callender Law Group

20 S. Third Street, Suite 261

Columbus, OH 43215

T: (614) 300-5300

chris@callenderlawgroup.com

Counsel for Relators

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Reconsideration of Relators Brian Ebersole, Sharon Valvona, and Thomas Happensack was served by email this 22nd day of September, 2014, upon the following counsel:

Eugene Hollins
Jennifer B. Croghan
Frost Brown Todd
10 W. Broad Street, Suite 2300
Columbus, OH 43215-3484

*Counsel for Respondents
City Council of Powell, Ohio
and City Clerk of Powell, Ohio*

Bruce L. Ingram
Joseph R. Miller
Christopher L. Ingram
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43216

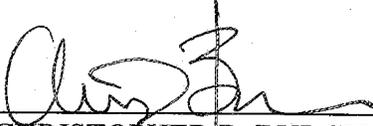
*Counsel for Intervening Respondent The
Center at Powell Crossing LLC*

KRISTEN SOURS (0082212)
17 S. High Street, Suite 700
Columbus, OH 43215
kklaus@ohiohba.com

*Council for Amicus Curiae The
Building Industry Association of
Columbus and The Ohio
Homebuilders Association*

PHILLIP HARTMANN (0059413)
YAZAN ASHWARI (0089565)
JOHN GOTHERMAN (0000504)
Frost Brown Todd
10 W. Broad Street, Suite 2300
Columbus, OH 43215-3484
phartmann@fbtlaw.com

*Council for Amicus Curiae
The Ohio Municipal League*


CHRISTOPHER B. BURCH
Counsel for Relators