



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. Delaware County Board of Elections*, Slip Opinion No. 2014-Ohio-4077 and grant the writ requested therein. Relators are the organizers of the two petitions at issue in this case: a referendum petition for Powell City Ordinance 2014-10 and an initiative petition to repeal Ordinance 2014-10.<sup>1</sup> Powell City Council (“Council”) passed Ordinance 2014-10 on June 17, 2014 to approve a development plan for a high-density apartment project that fundamentally alters the landscape of Downtown Powell, Ohio.

After Council determined that the two petitions were sufficient and valid in all respects, Respondent Delaware County Board of Elections (“Respondent Board”) held a protest hearing to address a protest raised by Intervening Respondent The Center at Powell Crossing, LLC (“Respondent Developer”). Respondent Board sustained the protest because it found that: (1) Ordinance 2014-10 is an administrative act that is not subject to popular initiative and referendum; and (2) Relators’ petitions are invalid because they did not exactly follow the Ohio Secretary of State’s form for municipal initiative and referendum petitions. Due to Respondent Board’s erroneous findings, Relators filed the present action in mandamus to compel Respondent Board to perform its clear legal duty under Powell Charter § 6.02 (initiative) and § 6.04 (referendum) to submit the proposed measures to the Powell electorate.

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<sup>1</sup> In addition, Relators organized an initiative petition for a proposed charter amendment to the Powell City Charter directing Council to legislatively create a new comprehensive plan for land use and development in Powell in the long-term interests of the City of Powell, Ohio. The charter amendment petition is the subject of a companion case, *State ex rel. Ebersole v. Powell*, Case No. 2014-1469.

This Court initially denied the writ to Relators in this case, but in doing so raised issues not discussed in briefing, ignored Relators' arguments, and failed to address controlling precedent. 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, as here, an issue was not "fully considered," the issue addressed in an opinion was not raised previously, and/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).

This Court should reconsider its opinion in this case, among other reasons, to address Relators' arguments and reconsider the new affirmative "duty" that the opinion imposes on county boards of elections. Slip Opinion No. 2014-Ohio-4077, ¶ 44 (discussing an "affirmative statutory duty"); Relators' merit brief, at 31-36 (arguing that the "administrative issue" is premature because it goes to the content, not form, of the petitions). This new affirmative "duty" that *requires* county boards of election to review the substantive content of petitions was not raised in the briefing for this case. This new affirmative duty should be reconsidered and eliminated for several reasons.

***First***, the new "affirmative statutory duty to review the content of proposed referenda and initiatives" was not previously addressed in briefing. *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, Slip Opinion No. 2014-Ohio-4077, ¶ 44. This new duty for county boards of elections runs contrary to over a century of this Court's own uniform decisional law that Relators' cited in their merit brief, but nonetheless went unaddressed in this Court's opinion.

Relators' merit brief, at 31-36, citing *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999), *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 293 (1995), *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921), and *Pfeifer v. Graves*, 88 Ohio St. 473 (1913).

These decisions uniformly hold that reviewing the content of measures proposed by petition must wait until after the election; only the form, not content, of petitions may be reviewed prior to voter approval at the ballot box. As Relators' have argued, moreover, these cases bar *any* tribunal from reviewing the content of petitions, including this Court. Relators' merit brief, at 31-36. Paragraphs 43 and 44 of the opinion in this case incorrectly suggest that Relators' have only objected to Respondent Board reviewing the content of the petitions.

Rather than address this uniform body of controlling precedent, the opinion in this case relies heavily upon prior case law that fails to address the issue central to this case. The cases relied upon in the opinion hold that administrative laws are not subject to referendum, but fail to address whether the "administrative issue" is prematurely raised prior to voter approval because the issue goes to the content, rather than the form, of the petition. Slip Opinion No. 2014-Ohio-4077, at ¶¶ 29-42, citing *State ex rel. Comm. For the Referendum of Ordinance No. 3844-02 v. Norris*, 99 Ohio St.3d 336, 2003-Ohio-3887, *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539 (1998), *State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093.

Because the cases relied upon in the opinion fail to address the issue at bar regarding prematurely raised substantive objections, these cases do *not* stand for the proposition that boards of election may review the content of petitions. In fact, this Court's uniform body case law holds

that boards of election holding a protest hearing under R.C. 3501.01 et seq. may review petitions only for form, not content. *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).

**Second**, this new affirmative “duty” unconstitutionally requires non-judges and non-lawyers sitting on boards of election to judicially review the constitutional validity of laws proposed by petition. *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; *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] . . . has no authority to declare a statute unconstitutional”). In this very case, Respondent Board member Ed Helvey, who happens to be an experienced attorney, specifically admitted “I don’t feel overly qualified than any other lay person looking and hearing these issues for the first time.” Exhibit Y, Tr. at 43, 173-74.

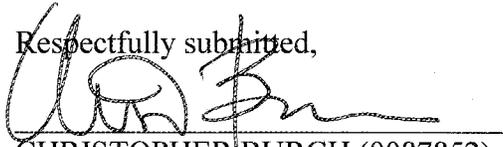
**Third**, the new duty contravenes the expressly stated position of current Ohio Secretary of State Jon Husted in recent litigation. Merit Brief of Secretary of State, at 7 n.4, filed in *State*

*ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14.<sup>2</sup>; *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.”). Secretary of State Husted was absent from this expedited election matter that now imposes a new affirmative duty upon boards of elections.

Relators respectfully request that this Court consider their arguments regarding this Court’s uniform line of controlling precedent dating back to 1913, reconsider the affirmative “duty” set forth for the first time in this case, and grant Relators the requested writ compelling the Respondent Board to submit the proposed measures to Powell electors. 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 (2005).

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](mailto:chris@callenderlawgroup.com)

*Counsel for Relators*

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<sup>2</sup> 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](http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=714444.pdf).

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

Through its opinion in *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, this Court imposes a new affirmative “duty” upon county boards of election to review the content of petitions. Slip Opinion No. 2014-Ohio-4077, ¶ 44. The prospect of a new affirmative duty was not raised in the briefing for this case. And, the new duty is in direct conflict with over a century of uniform Ohio Supreme Court precedent holding that measures proposed by initiative and referendum petition may not be reviewed for content prior to voter approval. Only the form of petitions may be reviewed prior to voter approval. The opinion in this case ignores Relators’ arguments regarding this Court’s uniform line of controlling precedent. Relators’ merit brief, at 31-36, citing *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999), *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 293 (1995), *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921), and *Pfeifer v. Graves*, 88 Ohio St. 473 (1913).

As background, Relators organized the two petitions at issue in this case after Powell City Council passed City Ordinance 2014-10 on June 17, 2014 to approve a high-density apartment project that fundamentally alters the landscape of Downtown Powell. Specifically, Relators organized a referendum petition on Powell City Ordinance 2014-10 and an initiative petition to repeal Ordinance 2014-10.<sup>3</sup>

Even though Powell City Council found that the two petitions were sufficient and valid in

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<sup>3</sup> In addition, Relators organized an initiative petition for a proposed charter amendment to the Powell City Charter directly Council to legislatively create a new comprehensive plan for land use and development in Powell in the long-term interests of the City of Powell, Ohio. The charter amendment petition is the subject of a companion case, *State ex rel. Ebersole v. Powell*, Case No. 2014-1469.

all respects, Respondent Board sustained Respondent Developer's protest to the petitions because it found that: (1) Ordinance 2014-10 is an administrative act that escapes popular initiative and referendum; and (2) Relators' petitions are invalid because they did not exactly follow the Ohio Secretary of State's form for municipal initiative and referendum petitions. In turn, Relators filed the present action in mandamus to protect their clear legal rights and compel Respondent Board to perform its clear legal duty under Powell Charter § 6.02 (initiative) and § 6.04 (referendum) to submit the proposed measures to the Powell electorate.

The Court's opinion in this case setting forth an affirmative duty for county boards of election to review the content of petitions for sufficiency and validity effectively overrules over a century of this Court's own uniform case law. Now introduced into this case are several constitutional issues and, fundamentally, Relators were denied their constitutional right to initiative and referendum. Upon further review, this Court should consider Relators' previously unaddressed arguments, reconsider the new affirmative "duty" set forth in the opinion for this case, and grant Relators the requested writ compelling Council to submit the proposed referendum and initiative to repeal Ordinance 2014-10 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), citing *Matthews v. Matthews*, 5 Ohio App.3d 140 (1981) (emphasis added). *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 and grant the requested writ because the new affirmative “duty” set forth in the opinion for this case directly conflicts with over a century of uniform Ohio Supreme Court precedent.**

The opinion in this case implicitly overrules over a century of uniform Ohio Supreme Court precedent. Specifically, this Court set forth a new affirmative “duty” for county boards of election to review the content of measures proposed by petition prior to voter approval, as follows:

{¶ 43} Alternatively, relators argue that no “case or controversy” exists until and unless the voters approve the referendum (or initiative). Thus, according to relators, the board’s objection to the contents of the two petitions was premature.

{¶ 44} The response to this argument is simple: the “case or controversy” requirement is a predicate requirement for a court to exercise subject-matter jurisdiction. See, e.g., *State v. Graves*, 179 Ohio App.3d 107, 2008-Ohio-5763, 900 N.E.2d 1045 (4th Dist.), at ¶ 5 (“an appellate court’s jurisdiction is limited to actual cases or controversies under Section 3, Article IV, of the Ohio Constitution”). By contrast, as discussed in the next section, the board of elections has 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.

Slip Opinion No. 2014-Ohio-4077, ¶¶ 43-44 (emphasis added). But this Court has never before stated that boards of election, *or any other entity*, have a duty to review the content of petitions

prior to voter approval. To be sure, Relators have argued that review of the substantive content of measures proposed by petition is premature when reviewed by *any* public body, including this Court. Relators' merit brief, at 31-36.

For the following eight reasons, this Court should reconsider the affirmative "duty" placed upon county boards of election through the opinion in this case:

**First**, as Relators extensively argued in briefing, this Court's precedent *uniformly* holds that the content of measures proposed by petition may *not* be reviewed prior to voter approval. Relators' merit brief, at 31-36. In fact, at least twenty-one controlling Ohio Supreme Court cases so hold dating back to 1913, just one year after Ohioans adopted 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 in this case relies heavily upon cases that fail to address the issue central to this case. The cases relied upon in the opinion for this case hold that administrative laws are not subject to referendum, but fail to address whether the “administrative issue” is prematurely raised prior to voter approval because the issue goes to the content, not the form, of the petition. Slip Opinion No. 2014-Ohio-4077, at ¶¶ 29-42, citing *State ex rel. Commt. For the Referendum of Ordinance No. 3844-02 v. Norris*, 99 Ohio St.3d 336, 2003-Ohio-3887, *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539 (1998), *State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093. Since these cases fail to address whether the “administrative issue” is prematurely raised, they do not stand for the proposition that boards of election may review the content of petitions. This Court should follow the uniform body of case law set forth above and through Relators’ briefing to hold that the “administrative issue” is prematurely raised.

**Second**, and more fundamentally, the “affirmative statutory duty” that this Court cited at Paragraph 44 of the opinion actually does *not* have a basis in Ohio statutes, certainly not R.C. 3501.01 et seq. In fact, the uniform body case law holding that petitions may only be reviewed for form, not content, prior to voter approval includes many recent cases foreclosing

boards of election from addressing the content of petitions in R.C. 3501.01 et seq. protests. *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).

Additionally, the current Ohio Secretary of State, Jon Husted, agrees that this new duty contravenes the plain language of R.C. 3501.01 and this Court’s controlling precedent. 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 to this Court 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.<sup>4</sup> 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.”).

***Third***, this new “affirmative duty” unconstitutionally requires non-judges and non-lawyers sitting on boards of election to judicially review the constitutional validity of proposed

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<sup>4</sup> 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](http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=714444.pdf).

laws presented through petitions. 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.

In this very case, Respondent Board member Ed Helvey, who happens to be an experienced attorney, repeatedly questioned his ability to review the content of the two petitions for the zoning issue here. Exhibit Y, Tr. at 43, 173-74. Board member Helvey, who happens to be an experienced attorney, specifically admitted “I’m new to this zoning stuff, I’ll make no bones about that.” Exhibit Y, Tr. at 43. Board Member Helvey further admitted that “I don’t feel overly qualified than any other lay person looking and hearing these issues for the first time.” Exhibit Y, Tr. at 173-74.

**Fourth**, the Court’s discussion of ripeness that set forth the affirmative duty is internally inconsistent with the rest of the opinion. In setting forth the new duty, the opinion implies that this Court does not have jurisdiction to review the content of petitions prior to voter approval, but county boards of election do. Slip Opinion No. 2014-Ohio-4077, ¶ 44 (“The response to this argument is simple: the “case or controversy” requirement is a predicate requirement for a court to exercise subject-matter jurisdiction.”). Paragraph 44 of the opinion further implies that the “administrative issue” *does* indeed arise from the content, not form, of the petition. Despite questioning its own jurisdiction, however, the Court in this very case actually addresses whether Ordinance 2014-10 is legislation or an administrative act. Slip Opinion No. 2014-Ohio-4077, ¶¶ 29-42. If this Court does not have jurisdiction to address the content of petitions and the “administrative issue” goes to the content of the petitions here, as Paragraph 44 suggests, it is difficult to understand why the Court extensively discusses the premature and unripe “administrative issue” and ultimately denies the writ.

**Fifth**, Paragraph 44 of the opinion suggests that the content of measures proposed by petition may not be “meaningfully” reviewed after voter approval. But laws certainly may be challenged after enactment. *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921) (“Of course if the electors adopt legislation which violates the Constitution it will be invalid, and all parties injuriously affected thereby will be protected by the courts.”). In fact, it is inconsistent for laws proposed by petition to be reviewed *prior* to enactment while laws proposed by a legislative body may be reviewed only *after* enactment. *Id.*

**Sixth**, Relators relied on this Court’s uniform body 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 “administrative issue” is premature. Relators’ merit brief, at 31-36. Relators were given no notice that over a century of precedent might be overturned through a new affirmative “duty.” Slip Opinion No. 2014-Ohio-4077, ¶ 44. 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 Paragraph 37 of the opinion in this case.

**Seventh**, as set forth in Relators’ opening brief at page 34, this Court has specifically expressed concern that quashing measures proposed by petition prior to voter approval enables parties opposed to the policy-content of the measures 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, this Court’s opinion in this case invites parties opposed to the policy-content of proposed measures to prematurely raise meritless legal challenges the content of measures proposed by petition.

**Eighth**, there is no standard to apply when reviewing the proposed measures for constitutionality because the measures are not yet laws. 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 allegation that the proposed measures are unconstitutional under Ohio Const. Art. II § 1f or even what standard the Court applied in this case to address the constitutional issue. *See* Slip Opinion No. 2014-Ohio-4077, ¶¶ 29-42.

In sum, this Court's opinion in this case ignores Relators' arguments citing to over a century of controlling Ohio Supreme Court precedent. Further, the opinion sets forth a new affirmative duty for county boards of election that was not raised in briefing or fully considered prior to the issuance of the opinion in this expedited elections matter. This Court should reconsider its opinion in light of Relators' arguments and grant the writ requested.

**C. This Court should fully consider all of Relators' arguments.**

Relators' presented several other arguments in briefing that have not been fully considered in the opinion and should be further addressed. ***First***, in light of this Court's own statement at Paragraph 44 suggesting that the "administrative issue" addresses the content, not form, of the petition, this Court should apply the legion case law cited by Relators' and hold that the "administrative issue" is prematurely addressed by any entity prior to voter approval. Relators' merit brief, at 31-36, citing *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999), *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 293 (1995), *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300 (1921), and *Pfeifer v. Graves*, 88 Ohio St. 473 (1913).

***Second***, the opinion does not fully consider Relators' argument that the proposed ordinance to repeal Ordinance 2014-10 is legislation due to the legislative process it follows under Ohio Const. Art. II § 1f. Relators' merit brief, at 29-31; Relators' reply brief, at 10-11. Instead, the opinion sets forth a novel explanation for refuting the argument, and does so through a parenthetical to a case citation for *State ex rel. Oberlin Citizens for Responsible Dev. v.*

*Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061. Slip Opinion No. 2014-Ohio-4077, ¶ 30. But the *Talarico* case does not explain how an initiative under Ohio Const. Art. II § 1f gives rise to an administrative action.

***Third***, this Court should reconsider the argument that Ordinance is “void,” not “voidable,” as enacted because Respondent Developer did not provide evidence of financing, ability to post bond, or attest to the truth of its application to develop the property. Contrary to the statement in the opinion in this case, adopting Relators’ argument would *not* “make every alleged zoning error subject to referendum and wipe out the well-established distinction between municipal legislative and administrative activity.” Slip Opinion No. 2014-Ohio-4077, ¶ 34. Relators’ extensively briefed the well-settled distinction between subject matter jurisdictional defects that are “void,” as opposed to other “voidable” defects. Relators’ reply brief, at 3-10, citing *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, ¶¶ 10-12 (“It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.”) (internal citations omitted). This argument should be fully considered.

In sum, this Court should fully address Relators’ arguments and grant the requested writ.

**D. This Court should reconsider the opinion and expressly reject Respondent’s contention that petitioners need to comply with the Ohio Secretary of State’s form when creating municipal initiative and referendum petitions.**

As set forth in the opinion in this case, Respondent Board refused to submit the referendum and proposed ordinance to repeal Ordinance 2014-10 to Powell electors for the additional reason that the petitions do not exactly comply with the Ohio Secretary of State’s form for municipal initiative and referendum petitions. Slip Opinion No. 2014-Ohio-4077, ¶ 21. As

extensively discussed in Relators merit brief at pages 15-16, but unaddressed in the opinion, Relators did not exactly follow the Secretary of State's form because it is impossible to simultaneously comply with the Powell Charter and the Secretary of State's form. The Secretary of State's form is generally applicable to all municipalities and the requirements for petitions are set forth by municipal charters that vary greatly among the dozens of charter municipalities in the State. One form cannot apply to municipal petitions for all charter municipalities. Further, as counsel for the Respondent Board has repeatedly admitted, there is no legal requirement to follow the Secretary of State's form. Exhibit Y, Tr. at 80, 101, 191-92 ("I'm not aware of a hard and fast rule that says you have to use that Secretary of State's form").

By failing to expressly reject Respondent Board's contention that the petitions were required to follow the Secretary of State's form, the opinion introduces confusion in the municipal initiative and referendum process across the State. This, again, gives parties opposed to the policy-decisions in the content of petitions an opportunity to delay the process 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). Respondent Board's contention that Relators' were required to exactly follow the Secretary of State's form should be rejected to avoid future confusion over the issue and promote the practical workability of the law.

### **III. CONCLUSION**

Against this background, and 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 sufficient and valid initiative and referendum petitions signed by a sufficient number of Powell electors. Respondent Board has a clear legal duty to perform the actions sought pursuant to Powell Charter § 6.02 (initiative) and § 6.04 (referendum). 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. Delaware Cty. Bd. of Elections*, Slip Opinion No. 2014-Ohio-4077 to fully address Relators' arguments and fully consider the new affirmative duty set forth under Paragraph 44 of the opinion. Upon full consideration of the arguments that Relators have set forth, this Court should grant the relief sought through Relators' complaint and briefing, including the issuance of a writ of mandamus compelling Respondent Board to submit the referendum on Ordinance 2014-10 and the proposed ordinance to repeal Ordinance 2014-10 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

F: (614) 324-3201

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:

Carol O'Brien  
Christopher D. Betts  
Andrew King  
Delaware County Prosecutor's Office  
140 North Sandusky Street, 3d Floor  
Delaware, OH 43015  
cobrien@co.delaware.oh.us  
cbetts@co.delaware.oh.us  
aking@co.delaware.oh.us

*Counsel for Respondent Delaware  
County Board of Elections*

Bruce L. Ingram  
Joseph R. Miller  
Christopher L. Ingram  
Vorys, Sater, Seymour and Pease LLP  
52 E. Gay Street  
Columbus, OH 43216  
blingram@vorys.com  
jrmiller@vorys.com  
clingram@vorys.com

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

  
\_\_\_\_\_  
CHRISTOPHER B. BURCH  
*Counsel for Relators*