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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *EX REL.* CITY OF YOUNGSTOWN,	:	**Supreme Court Case No. 2015-1422**
	:	
***Relator*,**	:	**Original Action in Mandamus**
v.	:	**Expedited Election Case Pursuant to S.Ct.Prac.R. 12.08**
MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,	:	
***Respondents*.**	:	

BRIEF OF THE OHIO CHAMBER OF COMMERCE, AFFILIATED CONSTRUCTION TRADES OF OHIO, AND THE AMERICAN PETROLEUM INSTITUTE, *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION

"There must be a rule of reason * which would save *** the needless expense of conducting a referendum concerning a proposal which, if adopted, would be invalid. *** If the public is continually presented with initiatives that are obviously and unequivocally void, it will discourage their participation."**

> **----*Wyman v. Diamond*, Kennebec No. CV-91-414, 1992 Me. Super. LEXIS 82, *21 (Mar. 31, 1992)(citing *Javers v. Council of City of New Orleans*, 351 So.2d 247, 249 (La.App. 1977)).**

The foregoing observation by the Superior Court of Maine, although made more than two decades ago and a thousand miles away, could not be more applicable right here and now. Four times, the voters of the City of Youngstown have been asked to adopt utterly baseless and legally unenforceable "Community Bill of Rights" ("CBOR") provisions targeting the oil & gas industry, whose activities in the State of Ohio are already comprehensively regulated by the Department of Natural Resources under Chapter 1509 of the Revised Code. Four times, the voters of Youngstown have wisely rebuffed those efforts at the ballot box. Finally, this time, when asked to certify the patently invalid CBOR charter petition appended to Relator's Verified Complaint, the Mahoning County Board of Elections properly and unanimously refused, thereby preventing the CBOR proponents from once again hijacking the electoral process to place an unenforceable charter amendment before frustrated voters. Expressly considering and relying upon this Court's recent decision in *State ex rel. Morrison v. Beck Energy Corp.*, Slip Opinion No. 2015-Ohio-485, as well as the Secretary of State's even more recent determination with respect to certain proposed (and equally invalid) county charters in Athens, Medina, and Fulton Counties,[1] the bipartisan Board (which includes the chair of the County Republican Party, as well as the chair of the

[1] This determination by the Secretary is the subject of another expedited elections matter pending before this Court, *State ex rel. Walker et al. v. Husted*, Case No. 2015-1371.

County Democratic Party) correctly declined to certify the charter petition, thereby fulfilling the Board's express duty under R.C. 3501.11(K) to "[r]eview, examine, and certify the sufficiency and validity of petitions and nomination papers *** [.]" There is no reason for this Court to undo that discretionary determination, either here in this extraordinary writ action filed by the City, or in the companion case[2] filed by the misguided CBOR Committee members who keep trying to foist their unenforceable CBOR upon an obviously unwilling electorate. For the following reasons, and for the reasons expressed in the briefs of the Secretary and Board of Elections, *amici curiae* the Ohio Chamber of Commerce, Affiliated Construction Trades of Ohio, and the American Petroleum Institute respectfully asks this Court to deny the extraordinary writ sought by Relator.

INTERESTS OF *AMICI CURIAE*

***Amicus Curiae* the Ohio Chamber of Commerce** ("Ohio Chamber"), founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Ohio Chamber works to promote and protect the interests of its nearly 8,000 business members and the thousands of Ohioans they employ while building a more favorable business climate. An independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy and economic development arenas. Through its member-driven standing committees and the Ohio Small Business Council, the Ohio Chamber formulates policy positions on issues as diverse as energy, environmental regulations, education funding, taxation, public finance,

[2] *State ex rel. Goncalves et al. v. Mahoning Cty. Bd. of Elections*, Case No. 2015-1475. Due to the overlapping nature of the legal issues presented here and in *Goncalves*, *amici curiae* will be submitting an *amicus* brief in *Goncalves* that is identical to the instant brief in all material respects, with minor revisions reflecting the identity of the *Goncalves* relators and their counsel.

health care and workers' compensation. The Chamber's advocacy efforts are dedicated to the creation of a strong pro-jobs environment and a business climate responsive to expansion and growth.

***Amicus Curiae* Affiliated Construction Trades of Ohio** ("ACT Ohio") was created by the Ohio State Building & Construction Trades Council to facilitate economic and industrial development and promote industry best practices for Ohio's public and private construction projects. ACT Ohio works on behalf of fourteen regional councils, one hundred thirty-seven local affiliates, and close to 92,000 of the most highly-skilled, highly trained construction workers in this State. ACT Ohio is funded by union construction workers who believe it is their duty to protect the State's construction industry and the many working families it supports.

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

For these reasons, API and the Ohio Chamber joined an *amicus* brief filed in this Court in *State ex rel. Morrison v. Beck Energy Corp.*, *supra*, seeking to preclude the unlawful and preempted municipal regulation of an industry already comprehensively regulated by the State in Chapter 1509 of the Revised Code. And just last week, API, ACT-Ohio, and the Ohio Chamber joined another *amicus brief* filed in this Court in *State ex rel. Walker et al. v. Husted et al.*, *supra*. In that brief, these *amici curiae* urged this Court to deny the relators' requested writ, which seeks to undo the Secretary of State ("Secretary")'s proper rejection of facially invalid county charter petitions submitted by CBOR proponents in Athens, Medina, and Fulton counties. Like the municipal charter amendment at issue here, the county charter petitions invalidated by the Secretary in *Walker* incorporated hopelessly vague and legally unenforceable CBORs.

As they did in *Walker*, *amici curiae* share profound concerns about the CBOR contained within the initiative petition invalidated by the Mahoning County Board of Elections ("Board"), which targets Ohio's critical oil and natural gas industry, as well as oil and gas extraction activities undertaken by *amici*'s members. Section 122-1(C) of the CBOR, for example, provides:

> Right to a Sustainable Energy Future. All City residents possess the right to a sustainable energy future. <u>That right shall include the right to be free from any oil and gas extraction that would violate the right of residents to pure water, clean air, the peaceful enjoyment of their home, or their right to be free from toxic chemical trespass; or that would violate the right of natural communities and ecosystems to exist and flourish</u>.

(CBOR; Verified Compl., Exh. A; emphasis added.) Section 122-3(A) of the CBOR then includes the following broadly-worded prohibition against oil and gas extraction activities such as those engaged in by *amici*'s members, as follows:

> It shall be unlawful for any government or corporation to engage in the extraction of oil and gas within the City of Youngstown. The term "*to engage in the extraction of oil and gas*" shall include the use of unconventional high volume, high pressure, horizontal and directional drilling technology, commonly known as "hydro-fracturing," and related activities. It shall also include the depositing, disposal, storage, and transportation of water or chemicals to be used in the extraction of oil and gas, and the disposal or processing of waste products from the extraction of oil and gas. The term shall also include the extraction of water within Youngstown for use in the extraction of oil and gas, as well as the application for, or issuance of, permits which allow any of these activities. These prohibitions shall not apply to the manufacture, production, sale, or distribution of materials and components used in the extraction of oil and gas, so long as such materials and components are not sited to engage in the extraction of oil and gas within the City of Youngstown.

(*Id.;* emphasis in original.) The CBOR even purports to impact oil and gas extraction activities occurring <u>outside</u> the municipal boundaries of Youngstown, saying in Section 122-3(B):

> Governments or corporations engaging in the extraction of oil and gas <u>adjacent to Youngstown</u> shall be strictly liable for all harms caused within the City of Youngstown, including, but not limited to, harm to Meander Creek and its tributaries.

(*Id.*; emphasis added.)

Then, in a baseless and cynical attempt to insulate <u>itself</u> from any future legal challenges that *amici*'s members (among many others) might understandably wish to assert against the CBOR, including any legal challenges based on binding preemption doctrines, the CBOR goes on to provide in Section 122-3(C) that:

> Corporations which violate this Charter Section, or which seek to violate this Charter Section, shall not be deemed to be "persons," nor shall they possess any other legal rights, privileges, powers, or protections which would interfere with the rights or prohibitions enumerated by this Amendment. <u>The term "*rights, privileges, powers, or protections*" shall</u>

> include the power to assert that the people of this municipality lack the authority to adopt this Amendment, and the power to assert state, federal, or international preemptive laws in an attempt to overturn this Amendment.

(*Id.*; italics in original; underscoring added.) As if closing the courthouse doors to *amici*'s members was not enough, the CBOR goes on to subject violators of the amendment's vaguely worded prohibitions to serious criminal penalties (Section 122-3(E)), while opening the courthouse doors to any city resident seeking to bring an equitable action for damages (and attorneys' fees) "to secure or protect the rights of natural communities or ecosystems within the City of Youngstown *** [.]" (Section 122-3(F).)

In light of facially invalid provisions such as the foregoing, it is not hard to see why Youngstown voters previously rejected similarly-worded CBORs by significant margins on no less than four separate occasions, prompting the Editorial Board of the Youngstown *Vindicator* to accuse the CBOR proponents of committing a blatant "abuse of the electoral process." Vindy.com: The Valley's Homepage, *Top Ohio court must guide charter cities on fracking* (Sept. 2, 2015).[3] For the following reasons, and for the reasons set forth in the briefs of the Secretary and Board, *amici curiae* respectfully ask this Court to reject Relator's request for an extraordinary writ of mandamus. The Secretary is not a proper respondent in this action because he did not reject the proposed charter amendment at issue and he is not required to perform any legal duties that may be compelled by a writ of mandamus in this procedural context. Nor should this Court disturb the Board's statutorily authorized and substantively correct determination that the CBOR is facially invalid under R.C.

[3] *Available at*: http://www.vindy.com/news/2015/sep/02/top-ohio-court-must-guide-charter-cities/ (last accessed Sept. 8, 2015).

3501.11(K) and this Court's settled precedent applying the home-rule amendment to the Ohio Constitution.

STATEMENT OF THE FACTS

Amici curiae adopt the Statements of the Facts set forth by the Secretary and the Board in their briefs as if fully set forth herein.

LAW AND ARGUMENT

A. Relator cannot establish a clear legal right to an extraordinary writ of mandamus against the Secretary of State because the Secretary is not a proper party in this action.

Relator's identification of the Secretary as a respondent reveals Relator's misunderstanding of the extraordinary writ actions that this Court has original jurisdiction to hear. The Secretary is not a proper party to this action. The Secretary has taken no official action on the proposed municipal charter amendment at issue here and he is under no duty in this procedural context. The Board of Elections – not the Secretary – rejected the proposal by a 4-0 vote at its August 26, 2015 Board meeting. Indeed, the "Factual Averments" alleged in Relator's Verified Complaint (at ¶¶ 21-34) nowhere mention the Secretary. And the statute cited in Relator's Request for Relief (Verified Compl. at p. 12), R.C. 3501.11, sets forth the duties of the Board, not the Secretary. A different section of the Revised Code within Title 35 establishes the elections-related duties of the Secretary. *See* R.C. 3501.05. This statute includes over thirty lettered subsections (A)-(EE) setting forth numerous election-related duties of the Secretary, yet not a single one of these duties is identified in Relator's Verified Complaint as one that the Secretary has failed to abide by in the context of the proposed charter amendment at issue here. In fact, in its own Request for Relief, Relator does not seek a writ compelling the Secretary to undertake any specific

legal duty in this context. (*Id.*) As such, this Court should promptly dismiss the Secretary as a respondent and issue no writ against him.

B. Relator cannot establish a clear legal right to an extraordinary writ of mandamus against the Mahoning County Board of Elections or its individual members because they properly determined that the proposed city charter amendment is invalid pursuant to their duty under R.C. 3501.11(K).

Nor should this Court issue any extraordinary writ against the Board or its members in this case. The General Assembly expressly endowed the Board with the statutory and discretionary duty to "[r]eview, examine, and certify the sufficiency and validity of petitions," R.C. 3501.11(K), not just to rubber-stamp any patently unenforceable petition placed before it in some rote, ministerial fashion. The Board complied with its statutory duty in this case, declining to certify a CBOR petition that is fatally defective – or, as the *Wyman* court described it, "a proposal that is not a proper subject for the initiative process, *i.e.*, which is obviously beyond the power of the people to enact and consequently clearly and conclusively void." *Wyman*, *supra*, 1992 Me. Super. LEXIS 82, at *22-23.[4]

1. The Board complied with its duty under R.C. 3501.11(K) to determine the validity or invalidity of the petition.

In rejecting the CBOR petition at its August 26 meeting, the Board was simply fulfilling its express statutory duty under R.C. 3501.11(K) to "[r]eview, examine, and certify the sufficiency and validity of petitions and nominating papers *** [.]" As *amici curiae* described in their *amicus* brief in *Walker*, which addressed the Secretary's statutory duty under R.C. 307.95(C) to determine the "validity or invalidity" of a proposed county charter

[4] *See infra* at Section B(2), noting that the home rule amendment to the Ohio Constitution only permits municipalities to "*adopt*" (not merely enforce) those police regulations "not in conflict with general laws," thereby reflecting *Wyman*'s conclusion that certain proposed initiatives are simply "beyond the power of the people to enact." *Wyman*, 1992 Me. Super. LEXIS 82, at *22-23.

petition in the context of a protest, this kind of legislative charge to the Board compels more than just a rote, ministerial review. It requires a substantive and discretionary assessment concerning whether the petition is "valid" – a term defined to mean "legally sufficient," "binding," or "meritorious." *See Amici's* Br., Case No. 2015-1371, at 6 (citing *Black's Law Dictionary* 101 (New Pocket Edition, 1996).) As such, although Relator accuses the Board of "arrogating to itself the power to peremptorily 'invalidate' the proposed charter amendment," (Verified Compl., ¶ 32), this is hardly a power that the Board "arrogated to itself." It is a power that the General Assembly expressly endowed upon the Board, and for good reason. And it would be improper for this Court to judicially insert any limitations on or exceptions to that power. *E.g.*, *State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-333, 881 N.E.2d 1214 (holding that it would be inappropriate for this Court to add an exemption to a statutory referendum procedure, as the Court cannot add exceptions to the General Assembly's statutes).

2. The petition in question is facially invalid; or, as the *Wyman* court put it, "obviously and unequivocally void."

Once this Court confirms that the Board acted within its discretion under R.C. 3501.11(K) in reviewing the "sufficiency and validity" of the CBOR petition at issue here, the only question that remains is whether the Board abused that discretion. Relator's own cited cases confirm this highly deferential, abuse-of-discretion standard. *E.g.*, *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, 977 N.E.2d 590, ¶ 8 (noting that "'[i]n extraordinary actions challenging the decisions of the *** boards of elections, the standard is whether they engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions.'") (quoting *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 9) (other internal

citations omitted). Here, it is apparent that the Board engaged in no fraud, corruption, abuse of discretion, or clear disregard of applicable legal provisions. On the contrary, the Board's decision to reject the CBOR petition reflects the Board's consideration of recent precedent from this Court reflecting long-established constitutional limitations on municipal home rule.

In February 2015, less than six months before the CBOR petitions at issue here were submitted to the council clerk for the City of Youngstown, this Court issued a long-awaited and critical home-rule decision in *State ex rel. Morrison v. Beck Energy Corp.*, Slip Opinion No. 2015-Ohio-485, which addressed the outer boundaries of municipal home rule in the context of the oil and natural gas industry. In *Morrison*, which concerned the City of Munroe Falls' unlawful attempt to impose its own separate and onerous local licensing scheme upon oil and natural gas operations – operations that were already permitted by the State of Ohio Department of Natural Resources ("ODNR") – this Court reaffirmed the bedrock principle of Ohio home-rule jurisprudence that a municipal corporation may not exercise police powers in a manner that conflicts with the State's general laws, or that prohibits what State law allows, including state-licensed oil and gas production. *Morrison*, 2015-Ohio-485, ¶ 25-26.[5] Interpreting the Ohio Constitution's home-rule amendment and the plain language of R.C. 1509.02 granting the ODNR "sole and exclusive authority" to regulate oil and gas operations, the Court held that Munroe Falls' licensing scheme was

[5] Citing *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted*, 65 Ohio St.3d 242, 245, 602 N.E.2d 1147 (1992); *Auxter v. Toledo*, 173 Ohio St. 444, 447, 183 N.E.2d 920 (1962); *Anderson v. Brown*, 13 Ohio St.2d 53, 58, 233 N.E.2d 584 (1968); and *Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 46 (stating that "any local ordinances that seek to prohibit conduct that the state has authorized are in conflict with the state statutes").

invalid. The Court further held that the General Assembly intended for oil and gas development to be subject to uniform statewide regulation, and that municipalities are therefore without power to "discriminate against, unfairly impede, or obstruct oil and gas activities and production operations[.]" *Id.*, ¶ 34. Although only two other Justices joined Justice French's plurality opinion in *Morrison*, four Justices agreed that R.C. Chapter 1509 preempted local permitting ordinances applicable to the construction and operation of oil & gas wells within a municipality. *Id.*, ¶ 36 (O'Donnell, J., concurring).

Less than a month after *Morrison* was decided, the Cuyahoga County Court of Common Pleas considered a challenge to a CBOR adopted as an amendment to the municipal charter of the City of Broadview Heights. The charter amendment, adopted by voter initiative in 2012, was representative of many CBORs that have been proposed in municipalities and counties across the State, including the CBOR at issue here. Like the proposed CBOR at issue here, the municipal charter amendment in Broadview Heights prohibited the extraction of gas or oil within the City, but made an exception for gas and oil wells already installed and operating. And like the proposed CBOR at issue here, the municipal charter amendment in Broadview Heights contained numerous other objectionable provisions.[6] Relying on *Morrison*, the trial court granted a declaratory judgment and found that the Broadview Heights charter's ban on drilling "directly conflicts

[6] Article XV of the municipal charter amendment in *Broadview Heights* contained general provisions purporting to strip corporate entities of their constitutional rights and protections. *Compare* Section 122-3(C) of the CBOR at issue here. Moreover, Article XV of the municipal charter amendment in *Broadview Heights* sought to invalidate any state or federal permit, license, privilege, or charter authorizing activities that would violate the terms of the City's charter. *Compare* Section 122-3(D) of the CBOR at issue here.

with the state regulatory scheme." *Bass Energy, Inc. v. City of Broadview Heights*, Cuyahoga Common Pleas Case No. CV-14-828074, Opinion and Judgment Entry at 7 (March 10, 2015).

At bottom, the CBOR here improperly seeks to endow the City of Youngstown with even greater home-rule powers vis-à-vis oil and gas operations than the Ohio Supreme Court deemed impermissible for municipal corporations to exercise in *Morrison*. The CBOR petition at issue here flatly outlaws almost any oil and gas activity within City limits – and not pursuant to any traditional zoning scheme of the type left unaddressed by the Court in *Morrison*. This attempt to endow the City of Youngstown with powers far beyond those given to municipal corporations by the home rule amendment to the Constitution, or by *Morrison* and its progeny in *Broadview Heights*, renders the CBOR at issue here invalid on its face.[7] Though the home rule amendment undoubtedly allows electors to consider municipal charter amendments, it also limits municipal home rule powers. *See* OHIO CONSTITUTION, Art. XVIII, Section 3 (municipalities shall have power to "*adopt* and enforce *** police, sanitary and other similar regulations, *as are not in conflict with general laws*.") (emphasis added). Thus the Constitution, by its express terms, places a limitation on the power of a municipality to "*adopt*" such regulations, not merely on the enforcement of such regulations. Thus, the argument can be restated: the Board has not substituted its judgment on substantive legal issues with the proposed charter amendment for that of a court; rather, it has determined that the amendment is properly outside the power of the City of Youngstown to "*adopt*" it in the first place. Without that determination, the City would be engaging in an *ultra vires* and ultimately useless act, well outside its corporate

[7] Of course, the CBOR at issue here contains numerous other conclusively inappropriate provisions, such as its provisions purporting to strip corporations of their legal privileges and their constitutional rights of access to the courts. (*E.g.*, CBOR Section 122-3(C).)

powers under the Constitution, by proceeding to consider adoption. For this reason, the charter amendment is properly subject to rejection by the Board under R.C. 3501.11(K).

3. The Board's refusal to certify patently invalid charter petitions furthers the public interest and safeguards the electoral process.

It is not surprising that the General Assembly endowed the Board with the power and duty to review proposed initiative petitions for invalidity in R.C. 3501.11(K). As the Superior Court of Maine has recognized, there are sound policy reasons for doing just that. *Wyman v. Diamond*, *supra*, 1992 Me. Super. LEXIS 82, *21 ("There must be a rule of reason *** which would save *** the needless expense of conducting a referendum concerning a proposal which, if adopted, would be invalid.") (citing *Javers v. Council of City of New Orleans*, 351 So.2d 247, 249 (La.App. 1977)).

In *Wyman*, a mandamus action was brought against Maine's Secretary of State, after he informed a citizen-petitioner that he would not approve his proposed ballot question or approve the petitioner's circulation of petition forms for the collection of signatures. Although the *Wyman* court determined that the petitioner "should be allowed to exercise his right to circulate petitions prior to either executive or judicial interference," the court also confirmed that once the petition forms had been circulated, the Secretary was indeed empowered under the law of Maine to examine them "not only for procedural defects, <u>but also to determine whether the subject matter of the petition is clearly and conclusively inappropriate for the initiative process</u>." *Wyman*, 1992 Me. Super. LEXIS at *3-4 (Emphasis added). In reaching this conclusion, the *Wyman* court studied the extent of the Secretary's authority under a Maine statute that, much like R.C. 3501.11(K), called upon the Secretary to "determine the validity of these petitions *** [.]" *Id.* at *9, Fn.6 (quoting 21-A M.R.S.A. §

905). The *Wyman* court also carefully studied the approaches of other courts across the country in this context, noting:

> It is the prevailing view in the several states whose constitutions provide for initiative process that if the proposed law is clearly beyond the scope of the electorate to enact, the Secretary of State has the authority to prevent submission of the proposal to the public for approval. *See*, *e.g.*, *White v. Welling*, 89 Utah 335, 57 P.2d 703 (Utah 1936) (the Secretary of State could refuse to certify for election a proposed initiative if it was "unquestionably and palpably on its face *** unconstitutional," advisory, not "legislative" in nature, unintelligible, or outside the scope of the initiative power); *** *State ex rel. Fidanque v. Paulus*, 297 Ore. 711, 688 P.2d 1303, 1307 (Or. 1984)(the distinction drawn is between the substantive validity and the attempt to use the initiative process for an improper purpose); *Holmes v. Appling*, 237 Ore. 546, 392 P.2d 636 (Or. 1964) (Approval by the Secretary is conditioned not only upon verification of the required number of sponsor signatures, but also upon determination that the use of the initiative power in each case is authorized by the Constitution); *Bailey v. County of El Dorado*, 162 Cal. App. 3d 94, 210 Cal. Rptr. 237, 239-240 (Cal.App.3 Dist. 1984) (it is usually more appropriate to review constitutional and other challenges to *** initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, *in the absence of some clear showing of invalidity* [emphasis added]); *Javers v. Council of City of New Orleans*, La.App., 351 So. 2d 247, 249 (If there were any doubt that the substance of the proposal might be valid the Council could not decline to submit the matter to referendum, but in this case no such doubt exists.); *Adams v. Cuevas*, 133 Misc. 2d 63, 506 N.Y.S.2d 614 (Supp. 1986) [aff'd 68 N.Y.2d 188, 499 N.E.2d 1246 (1986)]; *Sinawski v. Cuevas*, 133 Misc. 2d 72, 506 N.Y.S.2d 396, 399 (Supp. 1986) [aff'd 123 A.D.2d 548, 506 N.Y.S.2d 711 (1986)] (City Clerk could refuse to transmit initiative petition to legislative body because recall of the city officials by direct vote of the electorate was not a proper subject for the exercise of the public's reserved power. Initiative was thus invalid and fatally defective).

Wyman, *supra*, at *18-20 (emphasis added). As the *Wyman* court concluded, "[t]he trend, therefore, is to find that pre-election authority to invalidate a clearly improper initiative does reside with the Secretary." *Id.* at *20. *See also* 42 American Jurisprudence 2d, Initiative and Referendum, Section 35 (noting that "if a proposed initiative seeks a clearly unconstitutional end, the State may deny certification.") (citing *Kohlhaas v. State, Office of Lt. Gov.*, 223 P.3d 105 (Alaska 2010)).

The trend noted in *Wyman* serves a valuable public purpose. For as the court in *Wyman* explained, "[s]ome discretion should remain in the Secretary to protect the integrity of the electoral process when it is a foregone conclusion that the electorate does not have the power to enact the proposed legislation. <u>If the public is continually presented with initiatives that are obviously and unequivocally void, it will discourage their participation</u>." *Wyman*, *supra*, at *21 (Emphasis added). Given the fundamental legal shortcomings in the CBOR petition at issue here, and the manner in which these proposals are continually being presented in Youngstown and in various other jurisdictions across the State, this concern rings loud and true. The Board thus acted well within its statutory discretion, and consistent with authorities discussed in *Wyman*, when it unanimously invalidated the CBOR charter petition at issue here at its August 26, 2015 meeting.

4. Relator's cited precedent does not apply in this context in light of the Board's express duty under R.C. 3501.11(K).

In its Verified Complaint, Relator cites three prior decisions from this Court for the general proposition that "the substance of a charter proposal is off-limits to pre-election protest." (Verified Compl., ¶ 36) (citing *Kilby v. Summit Cty. Bd. of Elections*, *supra*, 2012-Ohio-4310; *State ex rel. Citizen Action v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902; and *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 1999-Ohio-239, 716 N.E.2d 1114). Relator also cites this Court's recent decision in *State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274 (2014) for its statement that "[t]he proper time for an aggrieved party to challenge the constitutionality of the charter amendment is after the voters approve the measure, assuming they do so." (Verified Compl. ¶ 40, citing *Ebersole*, *supra*, ¶ 13.)

There are compelling reasons why this precedent should not compel a writ here. For one, as the Secretary recently described in his Merit Brief in *Walker* (at p. 8-9), neither *Kilby*, *Citizen Action*, nor *DeBrosse* implicated a statute such as R.C. 3501.11(K) expressly endowing the Board with authority to determine the "sufficiency and validity" of petitions.

Moreover, as the *Wyman* court explained at length, "the right of the electorate to participate directly in the legislative process through initiative and referendum has been accorded great respect" and this right of the people is due great deference. *Id.* at *6. Even so, the prevailing view in the states whose constitutions provide for initiative process is to recognize restrictions on that process where "the attempted exercise is clearly and conclusively outside the realm of the legislative capacity of the people." *Id.* at *20.

> There is nothing novel about restrictions on the initiative process. The reserved power to the people to legislate directly is clearly not unlimited.
> ***
> Some discretion should remain in the Secretary to protect the integrity of the electoral process when it is a foregone conclusion that the electorate does not have the power to enact the proposed legislation.
> ***
> Therefore, although the reserved power to legislate directly must be "jealously guarded," there are instances in which the proposal is so evidently beyond the ability of the electorate to enact that the Secretary of State has the authority to declare the petitions to be invalid. Before the Secretary may be permitted to interrupt this "precious right," however, there must be a "clear showing of invalidity." The legality must be more than speculative: "because petitions are often prepared by inexpert sponsors who nonetheless espouse worthy or popular causes *** courts are reluctant to invalidate them in cases of mere doubtful legality." *Yute Air Alaska v. McAlpine*, 698 P.2d 1173 (Alaska 1995).

Id. at *20-22.

Wyman thus describes a necessary safeguard against overt abuses of the initiative and referendum process, such as those engaged in by the CBOR petitioners here. It is a safeguard that the Board applies by complying with its statutory duty to review petitions for validity under R.C. 3501.11(K), just as the Board did in this case. Indeed, the need for such safeguards was presaged nearly a century ago by one of Ohio's most esteemed judicial minds, former Chief Justice Carrington Marshall, who after serving as Chief Justice of this Court also served as a judge at the Nuremberg trials after World War II. In his dissenting opinion in *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 138 N.E. 881, former Chief Justice Marshall noted that some "legislative absurdities" must of necessity be subject to substantive, pre-election review:

> unless this court is willing to sponsor the theory that any proposition, no matter how absurd or ridiculous or how clearly violative of the federal constitution, must be submitted to the electorate upon a petition being filed with the secretary of state. That is to say, the proposal must be submitted if a petition should be filed proposing an amendment to the Ohio constitution to the effect that people shall no longer grow old, or that the laws of gravitation shall be repealed, or, to be more consonant with reason and good sense, to provide that the state of Ohio shall be empowered to enter treaties with foreign nations, to coin money, to pass bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, granting titles of nobility, denying persons of color the right to vote, and other laws which are clearly forbidden by the federal constitution. Surely no one will seriously contend that any of those propositions should be submitted to the electors.

Id. at 601-2 (Marshall, C.J., dissenting). The facially invalid CBOR at issue here is precisely the kind of "absurdity" foretold by former Chief Justice Marshall.

C. Granting the extraordinary writ sought by Relator would only encourage the submission of facially invalid city charter petitions impermissibly seeking to bypass this Court's recent decision in *State ex rel. Morrison v. Beck Energy Corp*. and numerous other decisions recognizing the constitutional limitations on home-rule authority.

As *amici curiae* previously explained in their *amicus* brief filed in the pending *Walker* case, the proposed city charter amendment at issue here is just another recent example of an emerging phenomenon in Ohio, in which small groups of activists try to foist vague and unenforceable CBORs on local governments in a misguided and legally baseless attempt to outlaw oil and gas operations that are already permitted and comprehensively regulated by the State of Ohio in Chapter 1509 of the Revised Code.

As detailed by Jackie Stewart in her recent article "*Lifting the Curtain on the Pennsylvania Group behind Ohio's 'Local' Anti-Fracking Campaigns*"[8] these "CBOR" charter petition initiatives do not truly originate in Ohio; they are the brainchild of a Pennsylvania-based environmental activist group called the Community Environmental Legal Defense Fund ("CELDF") that has been shopping CBOR language all over the country, including in Colorado, Illinois, and New York – not just Ohio. As Stewart describes, in Youngstown, CELDF authored and organized a ballot measure to ban fracking through a CBOR, which has been rejected decisively by the voters no less than <u>four different times</u> – with the taxpayers footing the bill each and every time the State's costly election machinery is diverted to this dubious purpose. After describing the economic woes faced by localities that have adopted CELDF's CBOR provisions in one form or another, Stewart notes:

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[8] Energy In Depth (July 21, 2015), *available at* http://energyindepth.org/national/lifting-the-curtain-on-the-pennsylvania-group-behind-ohios-local-anti-fracking-campaigns/(last accessed August 26, 2015).

> As Reuters recently reported, CELDF is behind more than a dozen anti-fracking ordinances across the country. The organization has never won a case that went to court, and taxpayers are still footing the bill for CELDF's attempts to use cities as launching pads for a "national movement" against corporations.
>
> Far from giving a voice to communities, CELDF's advocacy is a direct attack on all businesses, large and small; on all workers, union and non-union; on local government budgets; and, most prominently, local taxpayers.

Amici curiae, as major associations representing the aggrieved businesses and workers Stewart describes, could not agree more. Granting the writ of mandamus sought here by Relator would not only undercut the discretion that the General Assembly expressly endowed on the Board under R.C. 3501.11(K), but also encourage an untold number of other groups to file legally defective charter petitions elsewhere in the State, seeking to accomplish what this Court has already confirmed (in *Morrison*, and in numerous other cases construing the limits of home-rule authority) may *not* be accomplished by municipalities in a manner consistent with the Ohio Constitution. The taxpayers of this State should not be forced to subsidize costly elections so that voters can cast meaningless ballots for or against legally unenforceable city charters, and that is precisely why the General Assembly gave the Board the statutory power and duty to review and determine the "sufficiency and validity" of proposed initiative petitions before they are placed on the ballot.

CONCLUSION

For the foregoing reasons, and for the reasons stated by the Secretary and the Board in their briefs, this Court should decline to issue the extraordinary writ of mandamus sought here by Relator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, pursuant to S.Ct.Prac.R. 3.11(B)(3), a copy of the foregoing Brief of *Amici Curiae* the Ohio Chamber of Commerce, Affiliated Construction Trades of Ohio, and the American Petroleum Institute was served via electronic mail upon the following counsel this 12th day of September, 2015:

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