

In the Supreme Court of Ohio

STATE *ex rel.* CITY OF YOUNGSTOWN, : Case No. 2015-1422
: :
Relator, : :
: :
v. : Expedited Election Case Pursuant to
: S.Ct.Prac.R. 12.08
MAHONING COUNTY BOARD OF :
ELECTIONS, *et al.*, :
: :
Respondents. :
:

MERIT BRIEF OF RESPONDENTS MAHONING COUNTY BOARD OF ELECTIONS, DAVID BETRAS, MARK MUNROE, ROBERT WASKO, AND TRACEY WINBUSH

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I. PRELIMINARY STATEMENT

The proposed amendment to the City's Charter (the "Proposal") would, among other actions, (1) excuse Youngstown from compliance with "general laws" of the State in contravention of the Ohio Constitution, (2) excuse Youngstown from compliance with decisions of this Court and other state and Federal courts, (3) criminalize the simple act of bringing a legal challenge to question the authority of the City to enact the Proposal, (4) deprive corporations from the authority to commence court actions, and (5) vest "ecosystems" with the right to bring suits in the Courts. Although the goal of the proposed amendment may be to avoid state preemption of regulation of oil and gas wells, the proposal goes far beyond that subject. The Ohio Constitution without question does not authorize these as the proper subject of initiative power.

When the Mahoning County Board of Elections (the "Board") decided not to certify the Proposal to appear on the ballot in November, it considered the proposal itself, along with (1) this Court's decision in *State ex rel. Morrison v. Beck Energy Corp.* and (2) the Ohio Secretary of State's August 13, 2015 decision finding Athens, Fulton and Medina County proposed charters were invalid. In doing so, the Board faithfully executed its duty under R.C. 3501.11(K) to review and examine "the sufficiency and validity of petitions."

The Board exercised its discretion appropriately when it voted unanimously not to place the Proposal on the November ballot.¹ The Board did not have a clear legal duty to place the Proposal on the ballot, and because the Proposal exceeds the initiative power of the City, the City does not have a clear legal right to have the Proposal appear on the ballot. The City's request for a writ of mandamus should be denied.

¹ This was not a partisan decision; the Board members include the county chairs of both the Democratic and Republican parties.

II. STATEMENT OF FACTS

A. The Proposal Bans All Oil and Gas Production and Purports to Exempt the City From State and Federal Law.

Dubbed the community’s “Bill of Rights,” the proposed amendment to the City’s Charter (the “Proposal”) does not actually address any rights, procedures, or responsibilities of the Youngstown city government. Notably, all other provisions of the City Charter do address the establishment and operation of the City’s government.² Instead, the Proposal simply bans and criminalizes all oil and gas production or “related activities” in Youngstown.

- It prohibits “**any** government or corporation to engage in the extraction of oil and gas within the City of Youngstown,” and “related activities,” including, without limitation, seeking or issuing a permit to drill, the “depositing, disposal, storage, and transportation of water or chemicals to be used in the extraction of oil and gas”; (Compl. Ex. A (hereinafter, “Proposal”), § 122-3(A))
- It imposes a civil penalty on any “[g]overnments or corporation engaging in the extraction of oil and gas adjacent to Youngstown,” by deeming them to be “strictly liable” for any harm caused within the City of Youngstown; (*Id.* at § 122-3(B))
- It purports to deprive corporations of all legal rights, including their legal status as persons, “any other legal rights, privileges, powers, or protections;” (*Id.* at § 122-3(C))
- It denies corporations the right to assert that the City lacks the authority to adopt the Proposal or to assert that the Proposal is preempted by state or federal law; (*Id.* at § 122-3(C))
- It purports to supersede state and federal authority by invalidating any “permit, license, privilege, or charter” issued by “**any** state or federal entity” contrary to the Proposal; (*Id.* at § 122-3(D))
- It creates new criminal penalties, declaring any violation of the Proposal a “first-degree misdemeanor,” (punishable by a jail term not to exceed 180 days, *see* R.C. 2929.24), and also provides a fee-shifting provision entitling the city to all costs of litigation including, but not limited to, experts’ and attorneys’ fees; (*Id.* at § 122-3(E))

² *See, e.g.* City of Youngstown Charter §§ 4-50 (establishing the executive officers, councils, and administrative departments of the city); 69-81 (proscribing the procedure for the election and recall of municipal officers); 85-87 (establishing the City Planning Commission and Administrative Council and the procedure for consolidating departments, divisions or offices set forth in the city charter); 89-91 (setting forth the procedure for creation and approval of the city budget); 92-105 (setting forth the procedures for appropriations and special assessments); 107-114 (setting forth the procedures and requirements for municipality contracts).

- It creates a new derivative right of action by residents in favor of any “natural communities or ecosystems within the City of Youngstown,” including a fee-shifting provision for costs and attorneys’ fees. (Proposal, at § 122-3(F)).

The Proposal also sets forth three vague rights to “Local Community Self-Government,” “Self-Government,” and “To a Sustainable Energy Future[.]” (*Id.* at §§ 122-1(A)-(C)).

B. The Mahoning County Board of Elections Unanimously Denied Certification of the Proposal at a Special Regular Meeting of the Board.

On August 26, 2015, the Mahoning County Board of Elections held a Special Regular Meeting and Protest Hearing, at which it addressed the certification of the Proposal to the ballot. At the hearing, members of the Board considered that in *Morrison*, this Court made the following statement: “Article II, Section 36 vests the General Assembly with the power to pass laws providing for ‘regulations of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals’...With the comprehensive regulatory scheme in R.C. Chapter 1509, the General Assembly has done exactly that. We hold that the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3, does not allow a municipality to discriminate against, unfairly impeded, or obstruct oil and gas activities and operations that the state has permitted under Chapter 1509.” *State ex rel. Morrison v. Beck Energy Corp.*, 2015-Ohio-485, ¶ 34; Transcript at 17: 2-8 (Mr. Betras).³ The Board considered the impact of the *Morrison* decision. *See* Transcript at 21:15-20 (Chairman Munroe: “But now the courts have ruled. . . . We should not certify a ballot issue the Supreme Court has clearly said is not allowed”.); Transcript at 18:11-16 (Mr. Betras: “nor can the City Council assess the constitutionality of a proposal because that role is reserved for the courts. I agree. That role is reserved for the courts.

³ A certified copy of the Transcript of Proceedings for the August 26, 2015, hearing (“Transcript”) was attached to Relator’s Merit Brief, filed with this Court.

The courts have clearly said the state legislature has acted. They have preempted local control, local say-so.”).

In addition, the Board considered a recent decision by the Ohio Secretary of State in which the Secretary invalidated three petitions containing “Community Bills of Rights.” In particular, the Board considered that the scope of review of such proposals was more than ministerial. Transcript at 16:1-14 (Mr. Betras).

After discussion and debate, the Board of Elections declined to certify the Proposal in a 4-0 decision. *See* Transcript, at 24:7-17. In response, Relator filed this mandamus action on August 28, 2015 (the “Action”).

C. Though The Board Had Previously Put Similar Proposals On the Ballot, The Supreme Court of Ohio’s Decision in *Morrison v. Beck Energy Corp.* Changed the Landscape.

The Proposal is the fifth consecutive ballot initiative of its kind to be addressed by the Mahoning County Board of Elections. Prior ballot initiatives in May and November of 2013, and May and November of 2014, were certified by the Mahoning County Board of Elections. Each time, the initiative was voted down by the electorate. Like the other four initiatives, the Proposal was the invention of an out-of-state environmental activist organization—the Community Environmental Legal Defense Fund (“CELDF”)—designed to obstruct oil and gas production in Youngstown, Ohio.⁴

Although all five ballot initiatives generally sought to obstruct oil and gas production in Youngstown, the current Proposal goes further. Unlike the last four ballot initiatives—which

⁴ In the past four elections, similar ballot initiatives were presented to, and certified, by the Mahoning County Board of Elections prior to the Supreme Court of Ohio’s decision in *Morrison v. Beck Energy Corp.* *See* Transcript 21:12-15. These petitions stem from the “Community Bills of Rights” initiative, sponsored by CELDF, a Pennsylvania organization. *See* Stewart, Jackie, “Voters for Ballot Integrity Formed to Combat Costly CELDF ‘Bill of Rights,’” available at <http://energyindepth.org/ohio/voters-for-ballot-integrity-formed-to-combat-costly-celdf-bill-of-rights/>.

sought only to prohibit corporations from “engag[ing] in the extraction of shale gas or oil,” using “hydro-fracturing” technologies⁵—the newest proposal seeks to ban corporations *and* governments from engaging in *any* extraction of oil or gas from all geological strata. (Proposal, at § 122-3(A)).

Since the last ballot initiative, this Court issued its decision in *State ex rel. Morrison v. Beck Energy Corp.*, on February 15, 2015.

III. THE BOARD OF ELECTIONS DID NOT ABUSE ITS DISCRETION BY REVIEWING THE PETITION IN LIGHT OF *MORRISON* AND THE SECRETARY OF STATE’S DECISION

The City is not entitled to a writ of mandamus because it has not established – with clear and convincing evidence – that the Board had a clear legal duty to grant the requested relief or that the Relator has a clear legal right to have the Proposal appear on the ballot. *See State ex rel. Brown v. Ashtabula County Bd. of Elections*, 142 Ohio St. 3d 370, 371, 2014-Ohio-4022, 31 N.E.3d 596 (denying request for writ of mandamus). “A writ of mandamus is an extraordinary remedy, exercised by this court with caution and issued only when the right is clear.” *Id.* at 372

A long line of this Court’s precedent recognizes that in extraordinary actions to review a discretionary decision by a board of elections, this Court considers “whether the board engaged in fraud, corruption, abuse of discretion, or a clear disregard of statutes or applicable legal provisions.” *State ex rel. Kelly v. Cuyahoga County Bd. of Elections*, 70 Ohio St. 3d 413, 414, 639 N.E.2d 78 (1994), quoting *State ex rel. Carr v. Cuyahoga Cty. Bd. of Elections*, 63 Ohio St.3d 136, 138, 586 N.E.2d 73 (1992); *see also, Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, 778 N.E.2d 32, ¶ 11.

⁵ The full text of the May 6, 2014 ballot question is available at [http://ballotpedia.org/Youngstown %22Community Bill of Rights%22 Fracking Ban Charter Amendment \(May 2014\)](http://ballotpedia.org/Youngstown_%22Community_Bill_of_Rights%22_Fracking_Ban_Charter_Amendment_(May_2014))

In fact, even the City recognizes that the Board's decision on whether to certify a petition to appear on the ballot is an exercise of discretion. (Complaint, ¶ 46.) Thus, it was surprising to see in Relator's Merit brief the assertion that the Board was required to submit the Proposal to the electorate. The City only contrives that argument by disregarding the totality of the provisions directing the Board's conduct and by disregarding the limits on the City's initiative power.

The Board did not act unreasonably or arbitrarily when it refused to place the Proposal on the ballot. Relator has not alleged fraud or corruption. The Board did not disregard any statutes or applicable legal provisions when it concluded that the Proposal is invalid.

A. R.C. 3501.11(K) Required The Board To Assess the Validity of the Proposal.

At the August 26, 2015 meeting, the Mahoning County Board of Elections fulfilled its responsibility to “[r]eview, examine, and certify the sufficiency and **validity** of petitions and nominating papers.” (Emphasis added.) R.C. 3501.11(K). Under R.C. 3501.11(K), boards of election have not only the right, but the duty, to scrutinize petitions to determine whether their sufficiency and validity can be certified. *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678; *State ex rel. Schultz v. Cuyahoga County Bd. of Elections*, 50 Ohio App. 2d 1, 4, 361 N.E.2d 477 (8th Dist. 1976). Boards of election are required to make an independent determination of the sufficiency and validity of a petition and are required to make such determinations even in the absence of a protest. *State ex rel. Kennedy v. Cuyahoga Cty Bd. of Elections*, 46 Ohio St. 2d 37, 40, 346 N.E.2d 283 (1976) (citing *State ex rel. Ehring v. Bliss*, 155 Ohio St. 99, 97 N.E.2d 671 (1951)).

1. Analysis of Validity is Not Ministerial.

The Board is not required to certify each and every petition that is presented to it with sufficient signatures, as claimed by Relator. Instead, the Board is permitted to certify a petition “only if the board determines under R.C. 3501.11(K) and 3501.39 that the petition is sufficient and valid.” *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St. 3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 25, quoting *State ex rel. Ditmars v. McSweeney*, 94 Ohio St. 3d 472, 477, 764 N.E.2d 971 (2002).

Neither R.C. 3501.11, nor any other provision of the Ohio Constitution or Revised Code limits the Board’s authority to reviewing only the procedural sufficiency of a petition form as Relator claims. Rather, R.C. 3501.11(K)’s mandate that the Board assess the “sufficiency and validity” of petitions is a directive to consider their legal sufficiency. *State ex rel. Burgstaller v. Franklin County Board of Elections*, 149 Ohio St. 193, 203-204, 78 N.E.2d 352 (1948) (holding that the board of election’s duty to review the sufficiency and validity of a petition relates to “the legal sufficiency and not mere numbers.”) Black’s Law Dictionary defines “validity” as the term “used to signify legal sufficiency, in contradistinction to mere regularity.” *Black’s Law Dictionary Online* (2d Ed.), www.thelawdictionary.org/validity/ (accessed Sept. 9, 2015). Similarly, the Oxford Dictionary defines validity as “[t]he state of being legally or officially binding or acceptable.” *Oxford Dictionaries*, http://www.oxforddictionaries.com/us/definition/american_english/validity (accessed Sept. 9, 2015) (valid – “having legal efficacy or force; especially: executed with the proper legal authority and formalities”).

Contrary to Relator's contention, Article XVIII, Sections 8 and 9 of the Ohio Constitution do not mandate that the Board place the Proposal on the ballot. (*See* Relator's Merit Brief, filed

Sept. 10, 2015, at 7.) Neither Section 8 nor 9 impose any requirements on the Board. *See* Art. XVIII, Section 8, 9, Ohio Constitution. To hold otherwise, would eliminate the Board's authority under R.C. 3501.11(K). To adopt Relator's position would lead to the following ridiculous scenario: activist group files petition A; the Board's hands are tied, so it certifies petition A; petition A is enacted; this Court rules that petition A is unenforceable and unconstitutional; activist group files the identical petition A, immediately after this Court strikes it down; the Board's hands are tied, so it certifies petition A; petition A is enacted; this Court again rules that petition A is unenforceable and unconstitutional; activist group files the identical petition A, immediately after this Court strikes it down, again; and the cycle continues. The Board has the authority to prevent such ridiculous scenarios from occurring.

2. Boards of Elections Have Different Authority than City Council.

This Court has held that R.C. 3501.11(K) grants quasi-judicial authority to a board of election to determine the validity of a petition. *Barton v. Butler County Bd. of Elections*, 39 Ohio St. 3d 291, 291, fn.1, 530 N.E.2d 871 (1988); *see also Schultz*, 50 Ohio App. 2d at 4 (recognizing that a board of election's exercise of authority under R.C. 3501.11(K) is quasi-judicial). "Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial." *State ex rel. City of Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093, 895 N.E.2d 177, ¶ 16 (granting a writ of prohibition when the board of elections abused its discretion by placing a proposed ordinance on the election ballot when the proposed ordinance was not a proper subject of the initiative power).

This Court has held that under R.C. 3501.11(K) the General Assembly granted greater discretionary authority to boards of election to determine a petition's validity than is granted to

city councils or clerks. *N. Main St. Coalition*, at ¶ 30. A municipal legislative authority’s discretion in determining the validity of a petition “is ‘limited to matters of form, not substance,’ is ‘more restricted than that of a board of elections,’ does not involve ‘judicial or quasi-judicial determinations . . .’ and does not permit ‘inquir[ing] into questions not apparent on the face of the petitions themselves or which require the aid of witnesses to determine.’” *Id.* quoting *Morris v. Macedonia City Council*, 71 Ohio St. 3d 52, 55, 641 N.E.2d 1075 (1994). While a city council’s discretion is limited to matters on the face of the petition, “[t]he very broad language of R.C. 3501.11 vests the board of elections with a power to go beyond the face of the petitions in determining validity and sufficiency, a power which neither city council nor township board of trustees are given.” *Schultz*, 50 Ohio App. 2d at 5.

Although a city council does not have the statutory authority to substantively review the contents and subject of a petition, the grant of authority under R.C. 3501.11(K) allows, and even requires, that a board of elections engage in that analysis. *Compare State ex rel. Ebersole v. Delaware Cty Bd. of Elections*, 140 Ohio St. 3d 678, 2014-Ohio-4077, 20 N.E.3d 678 (holding that the board of elections was required to withhold an initiative and referendum from the ballot when the subject of the petition was beyond the scope of the referendum and initiative power granted by the Ohio Constitution), *reconsideration denied* 140 Ohio St.3d 1446, 2014-Ohio-4284, 17 N.E.3d 593, *with State ex rel. Ebersole v. City of Powell*, 141 Ohio St.3d 9, 2014-Ohio-4078, 21 N.E.3d 267, *rev’d* 144 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274 (holding that the City Council abused its discretion by considering the substance of the proposed ordinance).

Notwithstanding this distinction, the City relies on cases addressing the authority of a city council. The only issue here is the Board of Elections’ exercise of its discretion under R.C. 3501.11(K). Those clauses are not applicable to the question before the Court.

B. The Board Has the Discretion to Consider Applicable Law.

Though the discretion granted to boards of election is not absolute, it is meaningful and includes the ability to make substantive decisions regarding applicable law, even in the absence of a protest. *See Wiss v. Cuyahoga Cty. Bd. of Elections*, 61 Ohio St. 2d 298, 301, 401 N.E.2d 445 (1980) (referring to “the broad grant of power vested in [the board of elections] by R.C. 3501.11(K)” and affirming right of board to *sua sponte* assess the validity of ballot measures based on applicable law, including clear statements of this Court).

The standard by which boards are judged – clear disregard of applicable law – requires by its very terms that boards of election consider all applicable law when addressing proposed ballot measures. This Court has recognized time and again that a board of elections properly exercises its discretion in reviewing and examining a ballot initiative along with other recognized sources of the law, such as:

- When it considers constitutional limitations on local authority. *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678 (2014) (local petition properly kept off ballot where petition exceeded local constitutional initiative authority);
- When it considers prior holdings of this Court addressing an issue before the board. *See Wiss*, 61 Ohio St. 2d 298, 401 N.E.2d 445 (upholding board of election’s refusal to certify candidacy to ballot on the basis of strongly worded prior holdings of this Court that rendered the specific candidacy invalid).
- When it engages in a detailed analysis of applicable revised code provisions and case law to consider whether a particular tax levy is appropriate. *State ex rel. Choices for Southwestern City Schools, et al. v. Anthony, Jr., et al.*, 108 Ohio St.

3d 1, 2005-Ohio-5362, ¶40 (holding that the board of elections did not act in *clear* disregard for applicable law);

- When it considers provisions of the Ohio Revised Code, such as when it assesses whether a large, complex, multi-use real estate development constitutes a Planned Unit Development under R.C. 519.021. *State ex rel. Zonders v. Delaware Cty. Bd. Of Elections, et al.*, 69 Ohio St. 3d 5, 630 N.E.2d 313 (1994) (the Court held that the board of elections did not abuse its discretion);
- When it interprets the state statute governing qualifications for judge, concluding that it does not require six years of *full time* practice to stand for election. *State ex rel. Kelly v. Cuyahoga Cty. Bd. Of Elections*, 70 Ohio St. 3d 413, 415, 639 N.E.2d 78 (1994) (board did not act in clear disregard of applicable law or abuse its discretion) (citing *State ex rel. Carr v. Cuyahoga Cty. Bd. Of Elections*, 63 Ohio St. 3d 136, 137-138, 586 N.E.2d 73 (1992));
- When it considers “substantive issues of eligibility for candidacy other than technical declaration or petition requirements.” *State ex rel. Shumate v. Portage Cty. Bd. Of Elections*, 64 Ohio St. 3d 12, 16, 591 N.E.2d 1194 (1992); and,
- When it considers local charter provisions compared with the requirements of state statutes to invalidate certain petition signatures where the local charter was silent on the issue. *State ex rel. Greene v. Montgomery Cty. Board of Elections*, 121 Ohio St. 3d 631, 2009-Ohio-1716, 907 N.E.2d 300, ¶ 18 (“Under these circumstances, the board of elections did not abuse its discretion by applying statutory election provisions in its determination.”)

C. The Board Was Required To Consider Guidance from the Secretary of State.

It was not only appropriate, but required, that the Board consider and apply the guidance afforded by the Secretary of State. *See also* R.C. 3501.11(P) (the board shall perform its duties “prescribed by law or the rules, directives, or advisories of the secretary of state”); *State ex rel. Allen v. Warren County Bd. of Elections*, 115 Ohio St.3d 186, 2007-Ohio-4752, 874 N.E.2d 507, ¶¶ 16-19 (recognizing that the board may rely on opinions of the secretary of state and rulings by this Court, so long as they are applicable to the petition at issue); *State ex rel. City of Toledo v. Lucas County Bd. of Elections*, 95 Ohio St.3d 73, 79-80, 765 N.E.2d 854 (2002) (implicitly upholding the board of elections’ ability to rely on an opinion issued by the Secretary of State in election matters).

D. Conclusion: The Board Did Not Abuse Its Discretion or Act in Clear Disregard of Applicable Law.

When the Board of Elections reviewed and examined the validity of the Proposal in light of *Morrison* and the Secretary of State’s recent decision regarding the validity of proposed county charters, the Board did not abuse its discretion or clearly disregard applicable law. To the contrary, had the Board failed to do so, it would not have met its obligations under R.C. 3501.11(K).

IV. THE PETITIONERS DO NOT HAVE A CLEAR RIGHT TO HAVE THEIR PROPOSED CHARTER AMENDMENT APPEAR ON THE BALLOT BECAUSE IT IS AN IMPERMISSIBLE USE OF THE ELECTORATE’S INITIATIVE POWER.

A. The Ohio Constitution and State Laws Limit the People of Youngstown’s Power.

The people of Youngstown do not have unlimited authority to enact local laws. “[M]unicipal power is derived from the Ohio Constitution, not from a charter.” *State ex rel. Bedford v. Board of Elections*, 62 Ohio St.3d 17, 20, 577 N.E.2d 645 (1991) (citing *Northern Ohio Patrolmen’s Benevolent Assn. v. Parma*, 61 Ohio St.2d 375, 402 N.E.2d 519 (1980));

Perrysburg v. Ridgeway, 108 Ohio St. 245, 140 N.E. 595 (1923) paragraph one of the syllabus (“Since the Constitution of 1912 became operative, all municipalities derive all their ‘powers of local self-government’ from the Constitution direct, by virtue of Section 3, Article XVIII, thereof.”).

1. The Ohio Constitution Reserves to the State the Power of Preemption.

Article XVIII, Section 3 of Ohio Constitution, commonly known as the Home Rule Amendment, expressly reserves to the State the power of preemption. “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, ***as are not in conflict with general laws.***” (Emphasis added.) Article XVIII, Section 3. Through Article XVIII, Section 7, the Constitution authorizes a municipality to amend its charter, conditioned on the limitations set forth in Section 3. Article XVIII, Section 7. This Court recognizes: “By reason of Sections 3 and 7 of Article XVIII of the Ohio Constitution, a charter city has all powers of local self-government except to the extent that those powers are taken from it or limited by other provisions of the Constitution or by statutory limitations on the powers of the municipality which the Constitution has authorized the General Assembly to impose.” *Bazell v. Cincinnati*, 13 Ohio St. 2d 63, 233 N.E.2d 864, paragraph one syllabus (1968). Thus, even a municipality’s “home-rule powers [are] limited ‘by other provisions of the Constitution.’” *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶ 40 (citing *Buckeye Community Hope Found v. Cuyahoga Falls*, 82 Ohio St.3d 539, 541-542, 697 N.E.2d 181 (1998)). The City ignores these limitations by not giving effect to the full contents of the provisions of the Constitution or Charter.

2. The City's Charter Acknowledges the City's Authority is Limited by the Constitution and State Law.

The Youngstown Charter itself recognizes that the Ohio Constitution and the State's laws give the City power, but that the City does not have power other than that which has been afforded by the Constitution and the State's laws. The Youngstown City Charter provides that the City: "*shall have all powers that now are, or hereafter may be granted to municipalities by the Constitution or laws of Ohio.*" (Emphasis added.) Section 1, Youngstown City Charter. As if that provision was not broad enough, the City's Charter further provides:

The enumeration of particular powers by this Charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, *the City shall have, and may exercise all other powers which, under the Constitution and laws of Ohio, it would be competent for this Charter specifically to enumerate.*

(Emphasis added.) Section 2, Youngstown City Charter. In its Merit Brief, the City tries to ignore the portions of the Youngstown Charter highlighted above. But, they cannot do that. The City only has the powers that the State Constitution and laws of the State of Ohio confer on it.

While the City of Youngstown, as a charter Home Rule municipality, has the authority to adopt and amend its charter, those powers are expressly limited by the Constitution itself and those constitutional provisions expressly foreclose the amendment proposed here.

B. Specifically, The City's Initiative Power is Limited.

Article II, Section 1f of the Ohio Constitution limits the people's power of initiative to those "questions which such municipalities may now or hereafter be authorized by law to control by legislative action." Courts routinely evaluate local boards of elections' decisions to determine if they have properly assessed whether the subject of a ballot initiative is a valid exercise of the municipality's legislative authority. *See Ebersole*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678, ¶¶ 29, 36 (holding that the board of elections properly considered and applied the

limitations placed on the initiative and referendum power by Art. II, § 1f, Ohio Constitution when the board invalidated the petition for exceeding the municipality's initiative power) (reconsideration denied).⁶

For example, this Court held that Section 1f prohibits use of the initiative to enact: (1) administrative acts, *Buckeye Community Hope Found v. Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998), and (2) legislative actions not authorized by law, *State ex rel. Rhodes v. Lake Cty. Bd. of Elections*, 12 Ohio St.2d 4, 230 N.E.2d 347 (1967).

Citizens of the City of Youngstown “may not exercise powers of [initiative], by charter or other means, greater than those powers granted by Section 1f of Article II of the Ohio Constitution.” See *Buckeye*, at 544; *N. Main St. Coalition*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 34 (holding that mandamus will not lie to compel a board of elections to submit an “initiative petition to the electorate if [it] does not involve a subject which a municipality is authorized by law to control by legislative action.”) (citing cases); *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 22 (because it arises from the same constitutional source, the power of initiative is subject to the same limitation as the power of referendum); *State ex rel. City of Upper Arlington v. Franklin County Bd. of Elections*, 119 Ohio St. 3d 478, 2008-Ohio-5093, 895 N.E.2d 177, ¶ 20 (“actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute *administrative* action, are not subject to [initiative or] referendum proceedings.”).

⁶ This *Ebersole* case should not be confused with another line of cases also involving Ebersole, as Relator, but against the City of Powell. See *State ex rel. Ebersole v. City of Powell*, 144 Ohio St.3d 17, 2014-Ohio-4283, 21 N.E.3d 274, ¶ 6 (on reconsideration, holding that the City Council impermissibly assessed and concluded that the proposal was unconstitutional under the United States Supreme Court's opinion in *Eastlake v. Forest City Ents., Inc.*, 426 U.S 668, 96 S.Ct. 2358, 49 L.E.2d 132 (1976).)

C. The City Does Not Have Authority to Exempt Itself from Preemption by State, Federal, and International Laws.

The Proposal is invalid because the municipality does not have the legislative authority to exempt itself from the laws of Ohio or the United States through an initiative petition. *See Rhodes*, 12 Ohio St.2d 4, 4, 230 N.E.2d 347 (holding that a ballot initiative was properly excluded from the electorate because the initiative power did not permit the people to enact local law attempting to control the powers of the President of the United States).

1. The City May Not Give Itself More Power Than the Federal and Ohio Constitutions Allow.

Under the United States Constitution and Ohio Constitution, the citizens of Youngstown are required to adhere to general federal and state laws. *Cook v. Moffat & Curtis*, 46 U.S. 295, 308, 12 L. Ed. 159 (1847) (“The constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States.”); the Supremacy Clause, U.S. Constitution, Article VI, cl. 2; Article XVIII, Section 3, Ohio Constitution (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”) (Emphasis added.)

By exempting the City of Youngstown from any state, federal, or international law that may preempt its provisions, the Proposal confers more power on the City of Youngstown than permitted by the Ohio Constitution. “Any provision in a charter which purports to confer powers upon a municipal government in excess of those permitted to be granted by the constitution, or which disregards in any way the limitations imposed by that instrument, *would of course be void.*” (Emphasis added.) *State ex rel. Taylor v. French*, 96 Ohio St. 172, 183-84, 117 N.E. 173 (1917). *See Oberlin Citizens for Responsible Dev.*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶ 17 (stating that it is axiomatic that relator is not entitled to mandamus to simply

compel a vain act); *State ex rel. Moore v. Malone*, 96 Ohio St.3d 417, 2002-Ohio-4821, 775 N.E.2d 812, ¶ 38 (“Mandamus will not issue to compel a vain act.”).

2. The People of Youngstown Do Not Have the Authority to Amend the Ohio Constitution Through Local Initiative.

Nowhere in the Revised Code does the legislature grant a municipality the legislative authority to amend the Ohio Constitution or the Ohio Revised Code. *See generally*, R.C. Title VII.⁷ However, that is exactly what the Proposal purports to do. (*See* Proposal, at § 122-3.)

As noted above, Article XVIII, Section 3 of the Ohio Constitution currently provides:

Section 3: Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

If enacted, Section 122-3 of the Proposal would effectively re-write Article XVIII, Section 3 to add “**except the City of Youngstown, whose local police, sanitary and other regulations control over conflicting general laws, regulations, permits, powers, and protections afforded by general laws of the state of Ohio**” at the end of the section.

A similar effect would be seen with Article XVIII, Section 7 of the Ohio Constitution, which currently reads:

Section 7: Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

⁷ The Ohio Constitution delegates the “power to the Legislature to provide how the initiative and referendum powers that were reserved to the people of each municipality may be applied on such questions as they were then or might thereafter be authorized to control by legislative action.” *Youngstown v. Craver*, 127 Ohio St. 195, 187 N.E. 715 (1933). Included in Title VII are provisions outlining those matters over which a municipality may exercise legislative authority. *See e.g.*, R.C. Chapter 715 – General Powers; Chapter 717 – Specific Powers.

If enacted, the proposed charter amendment would have the effect of adding “**except the City of Youngstown, which is exempt from the conflicts analysis found in section 3 of this article**” at the end.

If the people of Youngstown wish to exempt themselves from the Ohio Constitution’s home-rule amendments, they need to follow the process outline in the Ohio Constitution. An initiative petition to amend the City’s Charter is not the proper procedural mechanism to accomplish that goal. *See* Article II, Section 1a, Ohio Constitution (outlining the procedure for amending the Ohio Constitution through initiative of the voters of the State of Ohio). The people of Youngstown do not possess the legislative authority to amend the Ohio Constitution through an initiative petition to enact local legislation.

3. The People of Youngstown Do Not Have the Authority to Invalidate Rights, Privileges, Powers, Protections, Permits, Licenses, or Charters Issued by State, Federal, or International Authorities.

The General Assembly has not granted municipalities the legislative authority to invalidate legal rights, privileges, powers, or protections granted to classes of persons under state, federal, or international law. Yet, the Proposal purports to strip all corporations, including those operating lawfully outside the City’s jurisdiction, of any “legal rights, privileges, powers, or protections.” (Proposal, at §§ 122-3(B)-(C).) By doing so, the people of Youngstown are impermissibly attempting to amend the Ohio Revised Code, *see* R.C. 1701.13 (defining the rights, duties, and privileges of corporations), as well as invalidate rulings by this Court and the United States Supreme Court. The City of Youngstown, however, is not authorized by law to control through legislation the rights, privileges, powers, and protections afforded corporations under state and federal law.

While the City does not have the legislative authority to enact laws which interfere with governmental affairs of the state, the Proposal directly does so by purporting to invalidate

lawfully issued permits, licenses, privileges, and charters. (*See* Proposal, § 122-3(D).) “[T]o hold that a municipality could . . . make any other provision relating to governmental matters of the state or any of its subdivisions except the municipality itself, would be to confer on it powers not at all contemplated by the home-rule amendment.” *Taylor*, 96 Ohio St. at 184. The City does not have the legislative authority to enact local laws that usurp and interfere with the governmental affairs of the state of Ohio, *id.*, or the federal government, Supremacy Clause, U.S. Constitution, Article VI, cl. 2; *Rhodes*, 12 Ohio St.2d at 4; *State v. Summit County Bd. of Elections*, 9th Dist. Summit No. 9087, 1979 Ohio App. LEXIS 8656, *4 (May 2, 1979) (holding that the initiative petition cannot be used to request that the United States Congress perform an act).

D. The City Does Not Have Authority to Exempt Itself from a Supreme Court Holding By Enacting a Charter Amendment.

By banning any and all extraction of oil and gas within the City of Youngstown, imposing civil and criminal penalties for any violation of the Proposal, and invalidating state and federal permits and licenses, the Proposal attempts to exempt the City of Youngstown from the legal principles articulated by this Court’s ruling in *Morrison v. Beck Energy*.

But, a municipality is not free to pick and choose which Supreme Court decisions it will comply with. And a municipality cannot enact laws that limit the Court’s ability to consider express provisions of the Ohio Constitution or the Court’s prior rulings. *Taylor*, at 184 (concluding that to allow a municipality to make any provision interfering with the state judiciary’s authority “would be to confer on it powers not at all contemplated by the home-rule amendment” because “Section 1, Article IV of the Constitution, makes provisions for courts to exercise the judicial power of the state. That is a matter wholly within the state governmental authority, to be provided for and regulated by the state.”)

1. The Holding and Analysis in Morrison Limit the Authority of a Municipality to Regulate Oil and Gas Activities and Production Operations.

With the decision in *Morrison*, this Court clarified that R.C. 1509, *et seq.* established a general law of the state of Ohio, and that local efforts to prohibit or limit oil and gas operations in conflict with R.C. 1509, *et seq.* are preempted and unenforceable. *Morrison*, 2015-Ohio-485, ¶ 34; *see also Bass Energy v. City of Broadview Heights*, Cuyahoga C.P. No. CV-14-828074 (Mar. 11, 2015) (holding a charter provision containing language similar to Youngstown’s Proposed Charter Amendment banning certain types of drilling is an unenforceable exercise of home-rule authority). While this Court limited its holding “to the five municipal ordinances at issue in [the] case,” *Morrison*, at ¶ 33, much of the opinion articulates general principles of law that would be applicable to the Proposal, had the Proposal not exempted itself from this Court’s application of state preemption.

Specifically, this Court – and the Board – recognized that Article II, Section 36 of the Ohio Constitution vests the General Assembly with the power to pass laws providing for the “regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals.” (Emphasis in original.) *Id.* at ¶ 34, quoting Article II, Section 36, Ohio Constitution. The General Assembly exercised that authority by enacting the comprehensive regulatory scheme found in R.C. Chapter 1509, *et seq.* *Id.* Pursuant to the comprehensive, statewide regulatory scheme found in Ohio Revised Code Chapter 1509, the Ohio Department of Natural Resources (the “ODNR”) has the exclusive authority to regulate oil and gas drilling and operations in the State of Ohio. *Id.* at ¶ 30.

R.C. 1509.02 is a general law that “applies to all municipalities in the same fashion...by prohibiting all local governments from interfering in the regulation of any oil and gas activities covered by R.C. Chapter 1509.02.” *Id.* at ¶ 23. “R.C. 1509.02 not only gives ODNR ‘sole and

exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations’ within Ohio; it explicitly reserves for the state, to the exclusion of local governments, the right to regulate ‘all aspects’ of the location, drilling, and operation of oil and gas wells.” *Id.* at ¶ 30. Pursuant to the home-rule authority they possess, Ohio municipalities may lawfully regulate oil and gas drilling and operations only to the extent of enacting police regulations that are not in conflict with or do not unfairly impede or obstruct activities permitted by R.C. 1509.02. *See id.*

2. The Proposal’s Outright Ban on Oil and Gas Operations Is an Effort to Exempt Youngstown from Morrison Which the City Does Not Have the Authority to Do.

As noted above, Article II, Section 1f of the Ohio Constitution limits the initiative power of a municipality to those questions on which the municipality is authorized by law to control by legislative action. Nothing in the Ohio Constitution or Ohio Revised Code authorizes the City to exempt itself from the holdings in *Morrison*. But, that is effectively what that Proposal does.

The Proposal purports to ban all oil and gas drilling and to invalidate any permit issued by the state authorizing drilling. But, under this Court’s guidance in *Morrison*, ODNR has the exclusive authority to regulate oil and gas drilling within the state. The only way the Proposal could survive after *Morrison* is if *Morrison* does not apply to the City of Youngstown. Otherwise, the City of Youngstown does not have the authority through initiative to enact an outright ban on any drilling.

The City does not have the legislative authority to exclude itself from this Court’s decision in *Morrison*. Consequently, the City does not have the authority to enact a local initiative banning oil and gas drilling.

E. The People of Youngstown Do Not Have the Authority to Abolish Legal Defenses.

The notion that simply questioning the authority of a government to enact a law could subject the challenger to legal – even criminal – sanction is an extreme and dangerous proposition. But, that is what section 122-3.C. of the Proposal does. If the Proposal were to pass, it would be illegal to challenge the Charter amendment as outside the authority of the City to enact or as preempted. A challenge to the Charter amendment would subject the challenger to potential civil and criminal penalties. Fear of those sanctions would have a chilling effect on corporations who might otherwise question the validity of the law.

The prohibition on challenging the Proposal exposes how disingenuous the City is when it argues that the Proposal should go to a vote and, only then would it be subject to scrutiny. If the Proposal is enacted, it would be illegal – even criminal – to pose the challenge the City suggests.

The City has not and cannot cite any legal support for its efforts to establish authoritarian rule. There is none.

F. Conclusion: The Board Did Not Abuse Its Discretion Because the Proposal Exceeds the People of Youngstown’s Initiative Power.

Initiative petitions exceeding the authority granted the people of a municipality in Article II, Section 1f of the Ohio Constitution must be withheld from the ballot. *See Upper Arlington*, 2008-Ohio-5093, ¶¶ 25-27 (holding that the board of elections abused its discretion by placing a petition on the ballot that exceeded the electorate’s initiative power); *Rhodes*, 12 Ohio St.2d 4 (holding that an initiative petition to control the President of the United States decisions in the conduct of war could not appear on the ballot because it exceeded the people’s initiative power). The Proposal exceeds the people’s initiative power by containing questions the municipality is

not authorized by law to control by legislative action. The Board's decision to withhold the Proposal from the November 3, 2015, election should be upheld.

V. RELATOR'S PETITION FAILED TO MEET PROCEDURAL REQUIREMENTS.

A. The Complaint Is Not Supported By Affidavits That Are Based On Personal Knowledge And Thus Should Be Dismissed.

This Court should dismiss Relator's Complaint because Relator has failed to comply with S.Ct.Prac.R. 12.02(B). The City did not support its Complaint with an affidavit based on personal knowledge. Rule 12.02(B)(1) requires "[a]ll complaints . . . shall be supported by an affidavit specifying the details of the claim." Rule 12.02(B)(2) further requires "the affidavit . . . be made on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit."

This Court has "routinely dismissed original actions . . . that were not supported by an affidavit expressly stating the facts in the complaint were based on the affiant's personal knowledge." *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St.3d 131, 2007-Ohio-5699, 876 N.E.2d 953, ¶ 14. The "personal knowledge" requirement is not satisfied when the affidavit attests to facts based on the best of the affiant's knowledge, information, or belief. *Id.* at ¶¶ 14-16. Indeed, this Court has a long history of requiring strict compliance with this rule and dismissing original actions that fail to comply with it. *See, e.g., State ex rel. Comm. for Charter Amendment for an Elected Law Dir. v. City of Bay Village*, 115 Ohio St.3d 400, 2007-Ohio-5380, 875 N.E.2d 574, ¶ 1 ("Because relators failed to comply with the personal-knowledge requirement of S.Ct.Prac.R. X(4)(B)⁸, we dismiss the cause."); *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 32 (dismissing complaint where supporting affidavit stated that the factual allegations in the complaint "are true and

⁸ In 2013, the Supreme Court Practice Rules were renumbered. Former S.Ct.Prac.R. X(4)(B) is now S.Ct.Prac.R. 12.02(B).

correct to the best of his knowledge”); *State ex rel. Tobin v. Hoppel*, 96 Ohio St.3d 1478, 2002-Ohio-4177, 773 N.E.2d 554; *State ex rel. Shemo v. Mayfield Hts.*, 92 Ohio St.3d 324, 750 N.E.2d 167 (2001).

The City’s filed affidavit does not satisfy the “personal knowledge” requirement because the verification signed by Mayor John A. McNally states that the allegations in the Complaint “are true to the best of my knowledge, information, and belief.” Complaint at Verification of Mayor John A. McNally. The City’s Complaint should be dismissed. *see Esarco*, 116 Ohio St.3d at ¶¶ 14-16 (“Eсарco specifies in his verification that the facts in his complaint are based simply on the ‘best’ of his knowledge, information, and belief: . . . This affidavit is insufficient. . . . Therefore, dismissal is warranted.”).

VI. CONCLUSION

The Board properly exercised its discretion when it examined and reviewed the Proposal, this Court’s decision in *Morrison*, and guidance from the Secretary of State, and when it decided not to certify the Proposal to appear on the Ballot in November. The Proposal attempts to do through initiative that which the City is not authorized to do. The City is not authorized, through a charter amendment, to ban all oil and gas drilling, to free itself from the preemptive effects of state and federal law, or to abolish the right of corporations to challenge the validity of the Proposal. Consequently, this Court should not disturb the decision of the Board of Elections.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email upon the following this 12th day of September, 2015:

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