Supreme Court of Ohio Clerk of Court - Filed September 13, 2015 - Case No. 2015-1475

In the Supreme Court of Ohio

STATE *ex rel*. VALERIA E. GONCALVES, *et al*.	:	Case No. 2015-1475
Relators,	:	
v.	:	Expedited Election Case Pursuant to S.Ct.Prac.R. 12.08
MAHONING COUNTY BOARD OF ELECTIONS, *et al.*	:	
Respondents.	:	

BRIEF OF THE YOUNGSTOWN/WARREN REGIONAL CHAMBER, *AMICUS CURIAE* IN SUPPORT OF RESPONDENT THE MAHONING COUNTY BOARD OF ELECTIONS

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This matter concerns the exact same controversy that is before this Court in *State of Ohio ex rel. City of Youngstown. v. Mahoning County Board of Elections, et al.*, Case No. 2015-1422. Since the controversy in this matter concerns the same actions of the Mahoning County Board of Elections (the "Board"), Amicus Curiae the Youngstown/Warren Regional Chamber (the "Chamber") fully incorporates its amicus brief in its entirety from Case No. 2015-1422 that was filed with this Court on September 12, 2015, as if rewritten fully here. For the Court's convenience a copy of the Chamber's amicus brief in Case No. 2015-1422 is attached hereto as **Exhibit A**. For the reasons stated in the Chamber's amicus brief from Case No. 2015-1422, the Chamber again supports the actions of the Board and requests that this Court deny the requested writ of mandamus and affirm the Board's decision to exclude the proposed charter amendment from the November 3, 2015 ballot.

Respectfully Submitted,

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Supreme Court of Ohio Clerk of Court - Filed September 12, 2015 - Case No. 2015-1422

Exhibit A

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.	:	

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I. INTEREST OF AMICUS CURIAE

Amicus Curiae the Youngstown/Warren Regional Chamber (the "Chamber"), is a private, non-profit organization that provides leadership and business services to its nearly 2,600 members—representing more than 150,000 employees in the Mahoning Valley. The Chamber exists to provide economic development and business services that promote the growth of its members and the Mahoning Valley, and is the lead economic development organization representing Ohio's Mahoning and Trumbull counties. Through its Government Affairs Division, the Chamber formulates policy positions on diverse issues affecting its members and is dedicated to promoting economic development in the region and fostering a business climate conducive to job creation and economic growth.

The Chamber is very concerned with the unprecedented prohibitions contained within the proposed amendment to the Youngstown City Charter (the "Proposed Amendment") that specifically target its members and seek to criminalize future ***and existing*** lawful oil and gas drilling and operations ***in toto*** in the City of Youngstown and to impose strict liability on operations in adjacent territories for any "harms" caused to Youngstown by such operations. The Proposed Amendment purports to: (1) prohibit "the extraction of oil and gas within the City of Youngstown," ***and all related activities***, including, without limitation, "the depositing, disposal, storage, and transportation of water or chemicals to be used in the extraction of oil and gas"; (2) impose new standards of civil liability to operators adjacent to Youngstown; (3) extinguish the legal rights of its corporate members in their entirety, including any right to contest the authority of the city or the constitutionality of such provisions in court once enacted; and (4) impose criminal penalties for non-compliance. (*See* Compl., Ex. A., §§ 122-3(A)-(E).) For the following reasons, the Chamber respectfully submits that the Mahoning Country Board of Elections (the "Board") acted properly in rejecting the Proposed Amendment.

II. STATEMENT OF FACTS

The Chambers adopts the Statement of Facts set forth in the Respondent's Merit Brief, as if fully rewritten herein.

III. PRELIMINARY STATEMENT

The "Bill of Rights" being presented as the Proposed Amendment to the City of Youngstown's (the "City" or "Youngstown") Charter is an invention of a radical out-of-state group—the Community Environmental Legal Defense Fund ("CELDF")—whose mission is to undermine commerce in favor of "rights" of "nature and ecosystems." CELDF packages this mission into a platform of "community rights" or local "self-government" and has successfully pushed many communities around the United States to introduce boilerplate petitions targeting specifically oil and gas development in those communities. CELDF knows that whenever such petitions result in enactments of a variation of its "Bill of Rights," court challenges follow that inevitably defeat such unconstitutional enactments and cost local communities dearly. Ohio communities, including the City of Youngstown, have been one of CELDF's main targets, tying up precious resources in futile attempts essentially to exempt municipalities and counties from Ohio and federal law.

In Youngstown's case, the current petition seeks to accomplish this futile goal yet again, despite **four** previous attempts that the voters have rejected, this time by purporting to exempt Youngstown from state and federal law permanently and without any opportunity for a constitutional challenge. This unprecedented effort to upend the entire system of orderly governance is not a proper charter amendment because it attempts to legislate permanent unlimited police powers into a city charter, in violation of Ohio law. If municipalities could exempt themselves from the laws of general application simply by pronouncing their defiance through charter amendments that cannot be subject to any challenge, chaos would reign in that

businesses and individuals would be subjected to a patchwork of conflicting local regulations and, potentially, unconstitutional discrimination of all stripes.

The Mahoning Country Board of Elections (the "Board") acted properly in rejecting the facially invalid petition that would, if enacted, immediately force Youngstown into an untenable situation and into inevitable litigation.

IV. THE CURRENT PETITION INITIATIVE, LIKE MANY OTHERS THAT HAVE TIED UP OHIO AND OTHER LOCALITIES IN COSTLY LITIGATION, IS AN INVENTION OF AN OUTSIDE GROUP SEEKING THE UNATTAINABLE AND LEGALLY BASELESS END RESULT OF IMPEDING ECONOMIC DEVELOPMENT IN GENERAL AND OIL AND GAS OPERATIONS SPECIFICALLY

Behind every recent petition to amend local charters by introducing into them vague and unenforceable "Community Bills of Rights" that purport to outlaw oil and gas operations is Community Environmental Legal Defense Fund ("CELDF")—a Pennsylvania-based activist organization. CELDF's stated mission is to provide communities blueprints for "new laws that **change the status of natural communities and ecosystems from being regarded as *property* under the law to being recognized as *rights-bearing* entities.**"[1] CELDF freely admits that the new laws it is trying to foist on local governments under the guise of re-enforcing "self-government" principles "represent changes to the status of property law in the U.S., eliminating the authority of a property owner to interfere with the functioning of ecosystems and natural communities" and CELDF uses opposition to fracking or oil and gas development as the means

[1] CELDF, *Rights of Nature: Background*, http://celdf.org/rights-of-nature-background (emphasis original) (last accessed September 11, 2015).

to its end. *Id*. In Ohio, CELDF has led no less than eight communities,[2] including Youngstown, down the path towards misguided and futile ballot initiatives to outlaw oil and gas operations that are allowed and comprehensively regulated by the State of Ohio through R.C. Chapter 1509 *et seq*. To aid in its assault on Ohio's and other states' oil and gas industries, CELDF created various umbrella organizations that CELDF bills as "community rights networks,"[3] including the Ohio Community Rights Network ("OCRN"), which spearheads CELDF's efforts in Ohio.

Similar to the current Youngstown petition that enshrines CELDF's goal of providing legal rights to "natural communities and ecosystems,"[4] the Medina, Athens, and Fulton County proposals that are currently being challenged before this Court in Case No. 2015-1371 prohibit oil and gas operations and purport to give "ecosystems" various "fundamental" rights.[5] While CELDF boasts that, through these efforts, it has helped various Ohio communities to elevate "Community Rights" "above corporate claimed 'rights' and state attempts to usurp local self-governing authority,"[6] it has knowingly pushed these communities and others around the country

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[2] Petition drives to adopt "Bills of Rights" ghost-written by CELDF have taken place in Medina, Athens, Meigs, Portage, and Fulton Counties, and in Columbus, Youngstown, and Akron. *See* Bob Downing, *Portage County Group Kicks Off Drive For Charter Proposal To Fight Pipelines*, *Wells* (May 14, 2015), http://www.ohio.com/news/local/portage-county-group-kicks-off-drive-for-charter-proposal-to-fight-pipelines-wells-1.591940 (last accessed September 11, 2015); Jackie Stewart, *Ohio Taxpayers Beware: Costly Ballot Initiatives Coming Your Way, Courtesy of National Ban-Fracking Group* (May 22, 2015), http://energyindepth.org/ohio/ohio-taxpayers-beware-costly-ballot-initiatives-coming-your-way-courtesy-national-ban-fracking-group (last accessed September 11, 2015).

[3] CELDF, *State Community Rights Networks*, http://celdf.org/-1-87 (last accessed September 11, 2015).

[4] Relators' Verified Complaint at Exhibit A §122-1(C).

[5] *See State of Ohio, ex rel. Walker*, Case No 2015-1371, Relators' Verified Complaint at Exhibits A-C, Articles 1 of each petition.

[6] CELDF, *Ohio Community Rights Network*, http://celdf.org/ohcrn (last accessed September 11, 2015).

down the path of defying state law[7] despite the fact that these efforts prove invariably futile and incredibly costly to the taxpayers.

For example, CELDF takes pride in the fact that it drafted, among others, Broadview Heights' "Community Bill of Rights Charter Amendment – Protection from Shale Gas Drilling and Fracking."[8] The charter provision attempting to adopt this "Bill of Rights," which is very similar to the Proposed Amendment at issue in this case, was defeated in subsequent litigation, costing Broadview Heights significant unnecessary expense. The Cuyahoga County Court of Common Pleas correctly found, relying on this Court's ruling in *Morrison*,[9] 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. *See Bass Energy v. City of Broadview Heights*, Cuyahoga C.P. No. CV-14-828074 (Mar. 11, 2015).

In fomenting local "self-government" sentiment in Ohio and elsewhere, CELDF does not publicize the fact that the communities it misleads into banning lawful economic activity pay dearly for these efforts. One of the poorest counties in New Mexico, Mora County, is staring down the barrel of bankruptcy after a court invalidated one of the first CELDF-drafted ordinances banning oil and gas production in the county[10] because it conflicted with established state law and violated the U.S. Constitution. *Swepi, LP v. Mora County*, Case No. CIV 14-0035,

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[7] CELDF freely admits that in Ohio it is working against R.C. Chapter 1509 *et seq.* (which "gave full authority regarding drilling and fracking to the Ohio Department of Natural Resources") so that it can send a message and "drive change to the State level." CELDF, *What lead up to the OHCRN?*, http://celdf.org/what-lead-up-to-the-ohcrn (last accessed September 11, 2015).

[8] CELDF, *Rights-Based Local Laws Drafted By CELDF*, http://celdf.org/ordinances (last accessed September 11, 2015).

[9] *See Morrison v. Beck Energy*, 2015-Ohio-485, ¶34 (2015).

[10] Rob Nikolewski, *Rejected fracking ban may cost NM county "hundreds of thousands" in legal fees* (January 29, 2015), http://watchdog.org/195799/fracking-ban-new-mexico/ (last accessed September 11, 2015).

2015 U.S. Dist. LEXIS 13496 (D.N.M. Jan. 19, 2015). Grant Township in Pennsylvania is currently engaged in a legal battle to defend its CELDF-drafted "Bill of Rights" and appears prepared to be bankrupted by the litigation.[11] In fact, CELDF's founder is clear that his goal is not to write local laws that would stand up in court, but laws that would "trigger a national movement," and callously acknowledges that: "if a town goes bankrupt trying to defend one of our ordinances, well, perhaps, that's exactly what is needed" to accomplish that goal.[12]

As one observer put it: "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."[13] As an association representing the businesses attacked by CELDF's harmful effort to mislead communities into banning lawful business activity, *amicus curiae* fully agrees with this analysis. Allowing the Proposed Amendment to Youngstown's Charter to be put on the ballot and, potentially, enacted, would bring certain litigation, disrupt business activity while the litigation runs its inevitable course towards invalidating the amendment, and cost local taxpayers dearly by wasting funds on expensive but ultimately meaningless elections and legal fees. Moreover, allowing the Proposed Amendment to go forward would encourage other groups to propose deficient ballot petitions seeking to exempt local communities by fiat from any number of state and federal laws, including civil rights and non-discrimination legislation.

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[11] Richard Valdmanis, *Green Group's Unconventional Fight Against Fracking* (January 29, 2015), http://www.reuters.com/article/2015/06/29/us-usa-fracking-lawsuits-insight-idUSKCN0P90E320150629 (last accessed September 11, 2015).

[12] *Id.*

[13] Jackie Stewart**,** *Lifting the Curtain on the Pennsylvania Group behind Ohio's "Local" Anti-Fracking Campaigns* (July 21, 2015), http://energyindepth.org/national/lifting-the-curtain-on-the-pennsylvania-group-behind-ohios-local-anti-fracking-campaigns/ (last accessed September 11, 2015).

Because the Proposed Amendment seeks to accomplish what a municipality cannot accomplish as a matter of law—ban business activity permitted and regulated by state law—to compel the Board to place the amendment on the ballot would be a vain act that the Court should not entertain. *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 106 Ohio St.3d 481, 2005-Ohio-5061, 836 N.E.2d 529, ¶17 (if a matter cannot be appropriately placed on the ballot, mandamus "will not issue to compel a vain act").

V. THE CITY OF YOUNGSTOWN IS NOT ENTITLED TO THE EXTRAORDINARY WRIT OF MANDAMUS IN CONNECTION WITH ITS ATTEMPT TO ENSHRINE A PERMANENT OVERBROAD AND INVALID EXERCISE OF POLICE POWERS IN ITS CHARTER

A "city charter is merely a vehicle for the exercise of municipal power and cannot confer authority upon a municipality in excess of the power conferred by the [Ohio] constitution itself." *Cleveland Tel. Co. v. Cleveland*, 98 Ohio St. 358, 375, 121 N.E. 701 (1918). Charters allow cities to establish and structure their form of government, but a city "cannot, by charter, take unto itself any powers. The charter of a municipality merely selects methods and prescribes the mode of exercising powers fully granted by the constitution." *Kraus v. Halle Bros. Co*., 100 N.E.2d 103, 109, 1950 Ohio Misc. LEXIS 351, *18-19 (Ohio C.P. Cuyahoga 1950). Thus, city charters are not proper places to enshrine any new "fundamental rights" inuring to city residents, as the Proposed Amendment aims to do. To regulate local affairs related to community health and safety concerns, cities can pass ordinances in the exercise of their local police powers, so long as such ordinances do not cross the line into "the arbitrary and unreasonable exercise of that power to the prejudice of private rights guaranteed by the constitution of the state." *Cleveland Tel. Co*. at 363.

Here, the Proposed Amendment impermissibly seeks to insert into Youngstown's charter a permanent[14] prohibition against all oil and gas production or "related activities," sets forth criminal and civil penalties for violation of this prohibition, and declares new rights of action,[15] all in the name of the "right of residents to pure water, clean air, the peaceful enjoyment of their home . . . or . . . the right of natural communities and ecosystems to exist and flourish." Compl. Ex. A, § 122-1(C). While presented as a well-intentioned revision of the City's Charter, the Proposed Amendment is a poorly-disguised effort to enact permanent police ordinances that criminalize ordinary business activity and arbitrarily deny the oil and gas industry, governmental agencies, and regulators the rights and freedoms unequivocally protected by this Court's recent ruling in *Morrison*.

There is nothing in Ohio law that would permit a city to use a charter amendment to grant itself far-reaching police powers, reaching well beyond all constitutional limits, to criminalize and prosecute conduct authorized by general state law. Thus, the City is not entitled to the extraordinary remedy of a writ of mandamus because it has no "clear legal right to relief" and because the Board has no "clear legal duty to perform the requested relief" when the requested relief would be to allow an impermissible expansion of the charter mechanism. *State ex rel. Brown v. Ashtabula County Bd. of Elections*, 142 Ohio St. 3d 370, 371-72, 2014-Ohio-4022, 31 N.E.3d 596 (holding that a writ of mandamus must be issued with caution and only when the right is clear). Therefore, the Court should deny the requested writ of mandamus.

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[14] The Proposed Amendment, if enacted, would strip any party deemed to violate the amended Charter section of any right to challenge the authority of the City to adopt the amendment. Compl. Ex. A, § 122-3(C).

[15] *Id.* at § 122-3(A)-(F).

VI. IF THE EXTRAORDINARY WRIT OF MANDAMUS IS ISSUED HERE, LOCAL GOVERNMENTS WILL BE FREE TO EXEMPT THEMSELVES FROM PREEMPTION PRINCIPLES BY MERE *IPSE DIXIT*, WITH DEVASTATING EFFECT ON BUSINESSES AND INDIVIDUALS

If the City is allowed to place its Proposed Amendment on the ballot and the amendment is enacted, the City will effectively elevate the City Charter over Ohio statutory and constitutional law. Because these new provisions of the charter would be in conflict with the general laws of Ohio, they would be unenforceable and undoubtedly challenged in the courts. But, it would take time and unnecessary expense to resolve any ensuing litigation, especially in light of the City's grant to itself of a right to be free from any challenge to its authority to enact the facially invalid amendment. The wasted time and expense of litigation over the invalid amendment would be only the tip of the iceberg of the havoc that the amendment would cause.

The Proposed Amendment creates exclusive rights for Youngstown residents that would not be available to the residents of any other city in Ohio. The amendment would also impose civil and criminal liability on public and private entities that may run afoul of its provisions for activities that those entities are specifically authorized to undertake under state law anywhere outside of Youngstown's boundaries. This will immediately place any business currently operating in the oil and gas industry in Youngstown or its vicinity (to the extent that activities outside of the City may have an impact in the City) in danger of being sued or criminally prosecuted for acts that are perfectly lawful in the rest of Ohio. Also, while the inevitable legal challenges work their way through the courts, any owners of mineral rights within the City's boundaries will suffer a loss or waste of their rights, and any owners of common pools with mineral interests inside the City boundaries will suffer discriminatory treatment since any owner outside of the City boundary would be able to drain the entire pool. Moreover, even if the legal battle over the Proposed Amendment is mercifully short, the damage to Youngstown's reputation

as a place to do business will be damaged even more than it is now, after four failed attempts to force through similar ballot measures. Further, other Ohio city or local governments would be encouraged by the City's ability to get its Proposed Amendment on the ballot yet again and similarly could decide to try to exempt themselves from various laws of general application simply by saying that they chose not be subject to those laws. Thus, Ohio may become an untenable patchwork of conflicting rules and regulations that no public or private entity will be able to navigate.

As the New Mexico District Court that struck down the Bill of Rights CELDF foisted on Mora County aptly noted in response to the argument that the County could strip corporations of their rights and trump state and federal law through an ordinance facially aimed at regulating health, safety, or welfare of its residents:

> If this argument has validity, it would signal the end of all civil rights that the Constitution protects. A county could pass an unconstitutional ordinance, but then say that anyone who challenged the ordinance lacks constitutional rights to support the challenge. The county could enforce its unconstitutional ordinance free of constitutional restrictions, because no one could challenge the validity of the ordinance. The consequences of such an outcome could be devastating to the Union as the Nation has known it since the Civil War. Some counties could prohibit speech on certain viewpoints. Others could deny basic rights to members of certain racial ethnicities. Still others could prohibit religious practices; others could require participation in religious services. The Constitution would be applied in a cookie-cutter fashion across the United States with such inconsistency from place-to-place that it would cease to be a Constitution of the United States at all. The Supremacy Clause prohibits such a result.

Swepi, LP v. Mora County, Case No. CIV 14-0035 JB/SCY, 2014 U.S. Dist. LEXIS 170638, *155-56 (D.N.M. Dec. 5, 2014). The slippery slope that the *Swepi* court identifies is not theoretical. The Proposed Amendment already cuts against the well-established principle that fundamental rights, when they are created or recognized through constitutional means or the development of case law, must apply equally and inure to the benefit of all citizens equally.

Given the relentless nature of CELDF's assault on economic rights of certain segments of the business community, there is no guarantee that similar efforts directed at other areas of local affairs are not far behind, including proposed amendments which would seek to prohibit same-sex marriage, outlaw gun ownership, ban individuals of Middle Eastern origin from owning property, and many more.

In 1968, in *Otey v. Common Counsel of the City of Milwaukee*, 281 F. Supp. 264 (E.D. Wis. 1968), the United States District Court for the Eastern District of Wisconsin denied a requested writ of mandamus to compel placement on the ballot of an ordinance that would have granted local residents the right to discriminate against persons of color in the sale of real property. The District Judge reasoned that because the measure was so patently unconstitutional, he would not compel local election officials to perform the futile act of submitting the measure to the voters. Though the court in *Otey* was dealing with the important issue of civil rights, the same underlying analysis applies in this case: regardless of its motives or its packaging, the Proposed Amendment to augment the Home Rule powers of the City is not a proper use of the City Charter, initiative, or petition powers. Accordingly, it was proper for the Board to serve as a gatekeeper and reject the measure, and this Court should reject the Relator's request for a writ of mandamus.

VII. THE BOARD PROPERLY EXERCISED ITS DISCRETION WHEN IT INVALIDATED THE CITY'S PETITION

Boards of election have a duty under R.C. 3501.11(K) to scrutinize ballot 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); *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St. 3d 437, 441, 442, 2005-

Ohio-5009, 835 N.E.2d 1222 (a board of elections is not required to certify a petition unless it determines "under R.C. 3501.11(K) and 3501.39 that the petition is sufficient and valid"). To fulfill that duty, boards of election are required to make an independent determination of the sufficiency and validity of a petition, even in the absence of a protest. *State ex rel. Kennedy v. Cuyahoga Cnty Bd. of Elections*, 46 Ohio St. 2d 37, 40, 346 N.E.2d 283 (1976).

In the exercise of the authority granted it under R.C. 3501.11(K), the Board is permitted to consider the applicable laws of this state, opinions of the Secretary of State, as well as relevant rulings by this Court, in order to determine the validity and sufficiency of the petition. *See State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678; 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"). Thus, the Board acted properly when it rejected the City's petition after considering its legal sufficiency pursuant to the recent decision of the Secretary of State in the *State of Ohio, ex rel. Walker* matter and this Court's ruling and analysis in *Morrison*. *See State ex rel. Burgstaller v. Franklin County Board of Elections*, 149 Ohio St. 193, 203-04, 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"); *State ex rel. 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).

VIII. CONCLUSION: THE COURT SHOULD DISMISS THE CITY'S WRIT BECAUSE THE BOARD PROPERLY EXERCISED ITS DISCRETION AND DETERMINED THAT THE CITY'S PETITION IS INVALID

The Board properly exercised its discretion and complied with its duty to undertake a substantive analysis of the Proposed Amendment's validity. Given the City's impermissible

attempts to limit the application of *Morrison* and exempt itself from state and federal law in general, the Board's review of the substance of the Petition was not only permissible, but necessary. Therefore, the City's writ cannot lie.

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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