IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division (Youngstown)

Susan Beiersdorfer, *et al.*,	)	
Plaintiffs,	)	Case No. 4:19-cv-00260
v.	)	Judge Pearson
Frank LaRose, Secretary of State, *et al.*,	)	
Defendants.	)	
	)	

* * * * *

PLAINTIFFS' MEMORANDUM RESPONSE IN OPPOSITION TO FRANKLIN COUNTY BOARD OF ELECTIONS' MOTION TO DISMISS

Now come Plaintiffs Susan Beiersdorfer *et al.*, by and through counsel, and respond in opposition to the "Motion to Dismiss of Defendant Franklin County Board of Elections."

STATEMENT OF FACTS

As the Court is aware, it must assume the truth of well-pleaded material allegations in the Complaint when considering a procedural dismissal motion. *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008)).

Defendants members of the Franklin County Board of Elections ("Franklin County BOE") have moved this Court to dismiss the Plaintiffs' claims against them pursuant to Fed. R. Civ. P. 12(B)(1) and Fed. R. Civ. P. 12(B)(6) for failure to state a claim upon which relief can be granted. The Plaintiffs urge the Court to deny the motion.

Plaintiffs Gregory Pace and William Lyons joined the Columbus Community Rights Group because the people of the City of Columbus and Franklin County's drinking water is

threatened by 13 active fracking wastewater injection wells in the Scioto River watershed. which encompasses the City of Columbus and provides drinking water. This wastewater is a byproduct of horizontal hydraulic fracturing ("fracking"), a method of oil and gas extraction. The wastewater is radioactive waste, routinely containing spiking levels of radium-226 (Ra-226) up to 3,000 times the Environmental Protection Agency's permissible safe drinking water limits. Fracking wastewater also contains a cocktail of other carcinogens, neurotoxins, and hormone disruptors. Further, the people of Columbus are threatened by the oil and gas industry's land filling of radioactive shale drill cuttings in Columbus. Authority over the regulatory process of injecting oil and gas waste in the State of Ohio is delegated to the Ohio Department of Natural Resources (ODNR). ODNR has consistently failed to protect the people of Columbus from the radiotoxic and chemically hazardous wastes of the fracking industry.

Owing to ODNR's failures, in 2018, the Columbus Community Rights Group drafted a proposed ordinance, titled "Community Bill of Rights for Water, Soil and Air Protection and to Prohibit Gas and Oil Extraction and Related Activities and Projects" ("Columbus BOR"). Complaint ¶ 132. The proposed Columbus BOR contained a comprehensive community bill of rights declaring that Columbus residents possess rights to local, community self-government, potable water, clean air, safe soil, peaceful enjoyment of home, freedom from toxic trespass, and a sustainable energy future, and endows natural communities including wetlands, streams, and rivers, with the rights to exist and flourish within the City of Columbus. *Id.* ¶ 133.

On June 26, 2018, a Committee of Petitioners, which included Plaintiffs Lyons and Pace, submitted 617 part-petition forms containing 18,404 signatures to the Columbus City Clerk in support of placing the Columbus BOR on the November 2018 city ballot. Id. ¶ 132. On July 9,

2018, the Franklin County Board of Elections notified the Columbus City Council that it had determined at least a total of 12,134 signatures to be valid. Only 9,000 valid signatures were required, which means the Columbus Community Rights Group exceeded the requirement by more than 130%. Complaint ¶ 134. Then, on July 30, 2018, the Columbus City Council unanimously passed Ordinance No. 2244-2018 instructing the Franklin County BOE to put the Columbus BOR on the November 6, 2018 ballot. *Id.* ¶ 135. The City delivered the ordinance to the BOE on August 1, 2018. *Id.*

On August 24, 2018, the Franklin County BOE engaged in content-based, substantive pre-enactment review of this proposed ballot measure and voted 4-0 to reject the Columbus BOR. Complaint ¶ 136. Board of Elections member Brad K. Sinnott, a practicing corporate lawyer in Columbus, uniquely summarized the unconstitutional commands of O.R.C. §§ 3501.11(K) and 3501.38(M) and described precisely how the Franklin County BOE engaged in content-based, substantive pre-enactment review of the Columbus BOR:

> Now, before describing what the General Assembly has instructed us to do in this instance, I will note a couple of things that have occurred to me as I reflected on this matter. First, the instruction given to us by the General Assembly is one that a Board of Elections is ill-equipped to follow. **It's an instruction to perform a highly technical and complicated legal analysis relative to, among other things, the Home Rule provisions of Ohio's Constitution.**
>
> The members of the Board of Elections in this state are generally not lawyers. Where there are lawyers serving on boards, as is true of me, we sit as co-equal members of the board and we're not practicing law on behalf of the board. **The boards have no legal staff. The boards have no legal research capabilities. We have on staff no legal researchers or writers. The making of the determination required by the current statutes is a task ill-suited for a Board of Elections. Were I a legislator, I would vote against the adoption of such statutes.**
>
> I also share the concerns of the three justices who joined in the lead opinion in *Espen,* relative to the constitutionality of the statutes. **It's hard to imagine a more clear**

> **instruction to an administrative body that it perform the judicial function of assessing the constitutionality of a statute enacted by the General Assembly.** If I were a judge, I would hold the statutes unconstitutional, but I'm here today neither as a legislator nor a judge. I'm here today as a member of a county board of elections.

Complaint ¶ 137 (from Franklin County Board of Elections meeting transcript, August 24, 2018, attached hereto) (Emphasis added).

After the Franklin County BOE rejected the Columbus BOR, the Petition Committee sought expedited review under Ohio Supreme Court Rule of Procedure 12.08. The Ohio Supreme Court, however, denied the writ of mandamus, holding that the Board of Elections had "clearly acted within their discretion by rejecting the petition because it would create new causes of action." *State ex rel. Bolzenius v. Preisse*, 2018-Ohio-3708, ¶ 12. Id. ¶ 139. In rejecting the ordinance from the ballot, the Ohio Supreme Court engaged in content-based pre-enactment review.

Both the Defendant Franklin County BOE's and the Ohio judiciary's content-based pre-enactment review kept the Columbus BOR off of the ballot violated the Plaintiffs' multiple First Amendment rights as well as the separation-of-powers doctrine.

LAW AND ARGUMENT

In response to Franklin County Board of Elections, Plaintiffs incorporate by reference their arguments made in response to the other Defendants' Motions for Judgment on the Pleadings or Motions to Dismiss, at ECF Nos. 40, 45, 48, 67, 76. In the interest of judicial efficiency, Plaintiffs do not repeat those rule statements and arguments here, but rather apply those precepts to the actions of Franklin County BOE.

The Franklin BOE was unabashed in its use of content-based pre-enactment review of a

proposed law by the people to keep the measure off the ballot. Plaintiffs fear the Court will apply its previous holdings based on the same reasoning in those orders (ECF Nos. 69, 77). Thus, Plaintiffs must take issue here with the foundational framework upon which the Court is analyzing the claims in this case.

A. The Right To Initiate Is A Hard-Won Constitutional Right In Ohio

The Court's first substantive order begins with the sentence "Ohio permits its citizens to pass laws through an initiative process." (ECF No. 69 (hereinafter "Opinion and Order") at 2.) This incorrectly identifies the actors. But the State of Ohio does not "permit" the constitutional right of initiative. Rather, the people of Ohio created, and now retain, the authority to enact laws through an initiative process.

That conceptual reframing reflects that these are priority powers of constitutional magnitude, enshrined in the Ohio Constitution. The Ohio Constitution restricts the plenary power of the Ohio General Assembly. *E.g., State ex rel. Jackman v. Ct. of Common Pleas of Cuyahoga Cty.*, 9 Ohio St.2d 159, 224 N.E.2d 906, 38 O.O.2d 404, 405 (Ohio 1967) ("That duty applies both to the General Assembly of Ohio and to the federal Congress. However, it should be noted that the federal Constitution is a grant of power to the Congress, while the state Constitution is primarily a limitation on legislative power of the General Assembly. It follows that the General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions."); *see also, generally,* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. Ann. Surv. Am. L. 329 (2003).

Hence Ohio does not "permit" its citizens to pass laws through an initiative process; instead, the people of Ohio have reserved unto themselves the power to enact a county charter,

Ohio Const. Art. X, § 3, to amend a municipal charter, *id.* Art. XVIII, § 7, and to enact a municipal ordinance, *id.* Art. II, § 1. (Opinion and Order at 2.) This relationship between the People (expressing their collective will in the Ohio Constitution) and the state (acting through the General Assembly) is like that of principal and agent. It must be clear that the People are the principal, and the state their agent. This relationship was explicitly recognized by the Ohio Supreme Court three years after the 1912 amendment of the Ohio Constitution to add initiative and referendum.

> In 1915, the Ohio Supreme Court said, of the then-new initiative and referendum powers:
>
> > Now, the people's right to the use of the initiative and referendum is one of the most essential safeguards to representative government. * * * The potential virtue of the 'I. & R.' does not reside in the good statutes and good constitutional amendments initiated, nor in the bad statutes and bad proposed constitutional amendments that are killed. Rather, the greatest efficiency of the 'I. and R.' rests in the wholesome restraint imposed automatically upon the general assembly and the governor and the possibilities of that latent power when called into action by the voters.

State ex rel. Nolan v. Clendening, 93 Ohio St. 264, 277–278, 112 N.E. 1029 (1915), quoted in *State ex rel. LetOhioVote.org v. Brunner* , 2009-Ohio-4900, ¶¶ 19-20, 123 Ohio St. 3d 322, 328, 916 N.E.2d 462, 470 (2009).

Consequently, the People have powers superior to the combined powers of the Governor and General Assembly when they initiate laws. The People have the clear "wholesome restraints" they may exercise on the Executive and Legislative branches, including the power to create and amend county and city charters – local constitutions. But despite being constitutional powers, the General Assembly and the courts prefer to treat these constitutional powers as if they are gifts bestowed by the state and so despite the express constitutional text ironically, they do not provide cognizable constitutional protection. These reserved legislative powers are expressly provided for

in the state constitution. There is no higher authority in state law, yet those constitutional provisions are now mere paper rights. They have become quaint because of the Defendants' assumed power to deny the people a vote on duly-qualified charters, charter amendments, or municipal ordinances.

How did things reach a point where express constitutional provisions are worth less than the paper they were written on? This is almost the same question Professor Harvey Walker asked back in 1955, when local government advocates attempted to expand the role of cities by reinvigorating the original intent behind "home rule." Harvey Walker, *Toward a New Theory of Municipal Home Rule*, 50 Northwestern U. L. Rev. 571 (1955). Walker observed that despite broad language in state constitutions on powers of local self-government (*e.g.*, Ohio Const. Art. XVIII, § 3,[1] §7[2]) "there is a clearly discernible tendency on the part of the courts to undermine the solid foundations which the cities thought they had secured through the grant of municipal home rule." Walker, *supra*, at 574. Walker theorized that "[t]he reasons for the antipathy of the judiciary toward urban self-determination seem to rest on several bases: 1. Historical [through viewing cities as equivalent to crown-chartered corporations subservient to the King, and then after the American Revolution, subservient to the state legislatures]. 2. Theoretical [through assuming that there can be only one ultimate source of power in the state: the legislature]. 3. Educational [through "overemphasiz[ing] the historical line of decisions which resulted in the

[1]Titled "Municipal Powers of Local Self-Government," this section, enacted in 1912, provides in full: "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."

[2]Titled "Home Rule; Municipal Charter," this section, also enacted in 1912, provides in full: "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."

enunciation of Dillon's Rule . . ."]. 4. Common Law Doctrines [whereby courts rely on prior decisions rather than the constitutional texts concerning local power]." *Id.* at 575-78.

But this controversy here encompasses more than how the courts view local power; it also deals with how the courts view direct democracy: the people making their own laws outside of the representative process. The judiciary has a strong bias against direct democracy. Writing back in 1835, Alexis de Tocqueville said the courts held "repugnance to the actions of the multitude, and . . . secret contempt of the government of the people." Kermit L. Hall *et al.*, AMERICAN LEGAL HISTORY: CASES AND MATERIALS 353 (3d ed. 2005). This leads courts to frame direct democracy as "Ohio permits its citizens to pass laws through an initiative process," rather than recognizing the initiative process as a hard-fought means by which the people have decided to exercise a reserved and inherent right.

Plaintiffs thus face both an anti-local and an anti-democracy bias in how courts interpret the constitutional powers of local governments, because here the local lawmaking is done by the people themselves. It's the role of the courts to tell the people only the "constitutionality, rather than prudence,"[3] of the form of their governance. It's the role of the courts to interpret the People's constitution as the People intended it.

The express reservation of direct democracy in the form of initiative and referendum processes was the core focus of the 1912 Ohio Constitutional Convention. That convention was the reaction to over sixty years of the state legislature's unbridled supremacy that resulted from the 1853 Constitution. Those sixty years saw the rise of the robber barons during the Gilded Age,

[3]As the Court itself admits, "But the question in front of the Court is the constitutionality, rather than prudence, of Ohio's pre-enactment review of initiative petitions." Opinion and Order at 20.

when the General Assembly was selling charters to monopolists. In response, the people gathered in 1912 and amended the Constitution to insert initiative and referendum and the Home Rule Amendment (which was politically watered-down, but still brought into being some notion of local rule).

After the 1912 Convention, the Ohio Supreme Court forcefully ruled out any inquiries into the content of measures proposed by the people, reasserting this holding over and over again. "The proper time for an aggrieved party to challenge the constitutionality of a proposed charter amendment is after the voters approve the measure, assuming they do so." *State ex rel. Ebersole v. City of Powell*, 2014-Ohio-4283, 21 N.E.3d 274, ¶¶ 2, 6, 7. The boards of election are limited to considering the "propriety of its submission to the voters," not the legality or efficacy of the initiated proposal. *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 38 (2005); *see also State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012- Ohio-4530, ¶ 14 (claim that public policy requires removal of initiative from the ballot because electorate cannot force mayor to speak in support of an issue contrary to the U.S. Constitution attacks substance of proposed ordinances; challenge is premature before adoption of the proposed ordinance by the people); *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999) ("Any claims alleging the unconstitutionality or illegality of the substance of the proposed ordinance, or action to be taken pursuant to the ordinance when enacted, are premature before its approval by the electorate."); *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5, 6, 7 OBR 317, 318 (1983) ("It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature."); *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223, ¶¶ 13-15

(2017); *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶ 11; *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, ¶ 15 (2015); State ex rel. Lange v. King, 2015-Ohio-3440, 2015-1281, ¶ 11 (2015); *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, ¶ 12 (2012); *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶ 24 (2010); *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. Of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, ¶ 43 (2007); *State ex rel. Lewis v. Rolston*, 115 Ohio St.3d 293, 2007-Ohio-5139, ¶ 28 (2007); *Mason City School Dist. v. Warren Cty. Bd of Elections*, 107 Ohio St.3d 373, 2005-Ohio-5363, ¶ 21 (2005); *State ex rel. Commt. for the Charter Amendment v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶ 43 n. 3 (2002); *State ex rel. Hazel v. Cuyahoga Cty. Bd of Elections*, 80 Ohio St.3d 165, 169 (1997); *State ex rel. Thurn v. Cuyahoga Cty. Bd of Elections*, 72 Ohio St.3d 289, 293 (1995); *State ex rel. Williams v. Iannucci*, 39 Ohio St.3d 292, 294 (1988); *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 146 (1988); *State ex rel. Walter v. Edgar*, 13 Ohio St.3d 1, 2 (1984); *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 17-18 (1977); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, syll. (1941); *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 138 N.E. 881, syll. (1922); *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, syll. ¶ 2 (1921); and *Weinland v. Fulton*, 99 Ohio St. 10, syll. (1918).

Even in the mandamus litigations in which the Plaintiffs have participated, the Ohio Supreme Court has reasserted that holding. *See, e.g., Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, 15 (2015); *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223, 2017 WL 4701143 (2017). *See also*, *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*,

144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶ 11 ("An unconstitutional amendment may be a proper item for referendum or initiative."). But instead of letting Plaintiffs' duly-qualified measures appear on the ballot, the county Boards of Elections and the Secretary of State establish new *ad hoc* criteria whenever they wanted to stop the proposed measure from appearing on the ballot. The rule against pre-election content-based inquiry has been swallowed by a swarm of "procedural" or "subject-matter" exceptions that ultimately deny the people their constitutional rights.

B. Plaintiffs Seek For Ohio's Initiative Process To Conform To Requirements Of The First And Fourteenth Amendments

The reason Plaintiffs approached this Court is to have it consider the General Assembly's passage of legislation that is unconstitutional both on its face and when enforced by the Defendants state election officials. They hope that the Court sees that the enforcement of HB 463 and the statutes under challenge over the course of multiple initiative campaigns plainly amounts to a recurring violation of a century of Ohio Supreme Court interpretations of the Ohio Constitution. They hope that in so doing, the legislative enactments and arbitrary obstacles erected by both State and County elections officials deny Plaintiffs due process and violate their rights of free speech, assembly, and petition for redress of grievances. Ohio's courts have refused to hear these issues in anything but expedited mandamus proceedings, thus providing no chance for a more discursive review in the state courts.

The U.S. Constitution does not require a state initiative process, but it does require that a state initiative process does not violate the First and Fourteenth Amendments. *Meyer v. Grant*. 486 U.S. 414, 415, syll., 100 L.Ed.2d 425 (1988) ("[T]he power to ban initiatives entirely does not include the power to limit discussion of political issues raised in initiative petitions");

Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . "). Plaintiffs are before this Court because of the recurring insistence of the courts and election authorities of Ohio that they may limit the content of proposed laws raised via initiative.

It goes without saying that executive or judicial officials would never be allowed to interfere in the legislative process of the General Assembly, or even the Columbus City Council, by preventing a vote on a bill. So why can they do that to the people's legislative process?

C. The Defendant Board of Election Engages In Context-Based Prior Restraint Of Political Speech When It Denies A Duly-Qualified Initiative A Place On The Ballot

The Franklin BOE argues (Motion to Dismiss at 6) that "Ohio's ballot-initiative laws . . . regulate the process by which initiative legislation is put before the electorate, which has as its most, a second-order effect on protected speech." Citing *Schmitt v. LaRose,* 963 F.3d 628, 638 (6th Cir. 2019). Relying on *Schmitt*, this Court determined earlier in the case that "[b]ecause the ballot initiative regulations challenged by Plaintiffs apply and were applied, 'without regard to the subject matter or viewpoint of the initiative to the subject matter or viewpoint of the initiative[,] they are content neutral restrictions." Opinion and Order (ECF 69), at 14 (citation omitted).

Plaintiffs disagree; the Ohio statutory regulations are not neutral in intent or application. Those statutes prompt governmental scrutiny and confer a discretionary power upon the Boards of Election to engage in pre-election censorship. BOEs are to decide "whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative," which entails quite a laundry list, including whether petitions conform with the limitations set forth in Sections 3 and 7 of Article XVIII of the Ohio Constitution, "are not in conflict with general

laws," and "whether the petition satisfies the statutory prerequisites to place the issue on the ballot. . . ." O.R.C. § 3501.38(M)(1)(a). This is quasi-judicial review of a *proposed* law. The statute is not value-neutral at all. It amounts to a contrivance by which Executive Branch boards of election are directed to sniff out contents within an initiative that would change or counter pre-existing law and then, to utter a subjective value judgment as to whether such alterations of existing law are consonant the BOE members' opinions of what Ohio law supposedly says. Moreover, that BOE value judgment is handed down in a hurried pre-election atmosphere when the most that can be expected of courts is anecdotal mandamus review set, in the Ohio Supreme Court, to the tempo of hyper-accelerated briefing in the form of three-day briefing increments (weekends included). The ostensibly value-neutral statutory regulation further heightens the pressures of this lock-step Executive Branch veto with an all-or-nothing feature whereby the slightest offending phraseology in the initiative dooms the entire proposal, irrespective of whether the proposal contains a severability clause. O.R.C. § 3501.38(M)(1)(a) ("The petition shall be invalid if any portion of the petition is not within the initiative power.").

When viewed against the backdrop and context of a century's worth of Ohio Supreme Court pronouncements prohibiting such an abusive pre-election substantive veto, *supra,* the Franklin County BOE's application of O.R.C. § 3501.38(M)(1)(a) to Plaintiffs' initiative proposal expresses the choice of Ohio's General Assembly to cripple a constitutional hallmark. Boards of Elections are free to use this Executive Branch foil to destroy any legislative proposal that the BOE members, in their inconsistent subjectivity, desire to scrutinize according to the legal standards they perceive to be relevant. This part of the statutory process isn't a "second-order effect on protected speech" per *Schmitt.* Rather, it is a first-order implement created by the

Ohio General Assembly to leave the Article I, § 2 initiative power a quaint legal nullity. Two dozen state Supreme Court decisions prohibiting pre-election content analysis of initiatives by unqualified election officials have been subsumed by a legislated prescription allowing a free rein for subjective standards to interdict politically controversial measures. Proposals that offend local political elites are easily a place on the ballot, and the measure's proponents' are left with mandamus recourse to the courts. This derogates the precept that "An unconstitutional amendment may be a proper item for referendum or initiative." *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶ 11. The Court continued, "Such an amendment becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction. Any other conclusion would *authorize a board of elections to adjudicate a constitutional question and require this court to affirm its decision even if the court disagreed with the board's conclusion on the underlying constitutional question, so long as the board had not abused its discretion*." *Id.* (emphasis added).

Plaintiffs have repeatedly argued earlier in this litigation that the plaintiffs in *Schmitt v. LaRose,* 963 F.3d 628 (6th Cir. 2019) raised a distinctly different point from the Plaintiffs here. The *Schmitt* plaintiffs argued that the ballot-initiative statutes did not provide for *de novo* judicial review of a BOE's decision. So, in *Schmitt,* as the Sixth Circuit made clear, the plaintiffs "never challenged the legitimacy of the legislative/administrative distinction or the state's right to vest in county boards of elections the authority to apply that distinction." *Schmitt* at 638. *Schmitt* ruled on a ballot-regulatory statute that, in its words, "enable[d] boards of election to make structural decisions that inevitably affect — at least to some degree — the individual's right to speak about political issues and to associate with others for political ends." *Id.* (citing *John Doe No. 1 v.*

Reed, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) and *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) of the *Anderson-Burdick* test). However, O.R.C. § 3501.38(M)(1)(a) isn't "structural;" it doesn't prescribe what the components of an initiative must be; it commands evaluation of content. And it is therefore not "a step removed from the communicative aspect of core political speech," but stands as a barrier to core political speech.

So while the *Schmitt* court concluded that the procedure challenged there was not a "prior restraint," consistent application of its logic strongly suggests that the Sixth Circuit will find that O.R.C. § 3501.38(M)(1)(a) and the other associated changes wrought by HB 463,by contrast, are prior restraints:

> In *Freedman v. Maryland*, the Supreme Court articulated three procedural safeguards necessary for a system of prior restraint to survive constitutional challenge. 380 U.S. at 57-59, 85 S.Ct. 734.
>
> > First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. Second, the licensing scheme must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor.
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> *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) (discussing Freedman, 380 U.S. at 57-59, 85 S.Ct. 734) (internal citations and quotation marks omitted).

Schmitt at 637-38. The contrasts of the instant matter with the *Schmitt* facts are significant. The mandatory scrutiny of initiative measures for censorable content does not allow for preservation of the *status quo* pending a final judicial determination on the merits, nor a prompt judicial determination to timely correct abusive exercise of BOE discretion. O.R.C. § 3501.38(M)(1)(a) assigns the burden of going to court and proving that the initiative may lawfully be placed on the ballot upon the proponents of the initiative.

> Earlier in this case, the Court pronounced that:
>
> But *Schmitt* concluded Ohio's ballot-initiative process is not a prior restraint because the statutes regulated the process by which initiative legislation is put before the electorate, rather than directly restricting core expressive conduct. Whether Ohio law permitted pre-election review has no bearing on whether the statutory scheme directly burdened core expressive conduct.

Opinion and Order, p. 16.

Respectfully, the Court hitherto has analyzed the HB 463 scheme only as process, when in fact the statutes oblige boards of election to dive directly into the contents of initiative proposals and execute a complicated analysis of sifting, weighing, and speculation all directed at producing a probabilistic assessment of the lawfulness of a proposed measure as filtered through the BOE's unstandardized comprehension of Ohio law. That complicated process will yield a stream of censorious decisions from the Executive Branch which, by virtue of the limited pre-election time to decide, plus the limited mandamus remedy, eviscerates the longstanding role of the courts. Plaintiffs request the Court to cease to presume that election authorities in Ohio are merely managing how measures are placed before the public. The Secretary of State and BOEs are ordered by the General Assembly to ferret out initiatives that would legislate change. Because they would change the *status quo*, any argument concerning their unconstitutionality, if adopted by 3 votes of a Board of Elections suffices to snuff the use of initiative despite its nature as a core speech and democracy right.

D. The Statutory Scheme Fails Under Anderson-Burdick Analysis

Franklin County BOE urges that the Ohio ballot regulation scheme, when reviewed under the *Anderson-Burdick* framework, can be sustained. But it cannot be. The three-step framework weighs the character and magnitude of the burden the State's rule imposes on Plaintiffs' First

Amendment rights against the interests the State contends justify that burden, and considers the extent to which the State's concerns make the burden necessary. The Sixth Circuit described the three *Anderson-Burdick* [4] steps as follows:

> The first, most critical step is to consider the severity of the restriction. Laws imposing severe burdens on plaintiffs' rights are subject to strict scrutiny, but lesser burdens trigger… less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. Regulations that fall in the middle warrant a flexible analysis that weighs the state's interests and chosen means of pursuing them against the burden of the restriction. At the second step we identify and evaluate the state's interests in and justifications for the regulation. The third step requires that we assess the legitimacy and strength of those interests and determine whether the restrictions are constitutional.

(citations and internal quotation marks omitted). *Schmitt* at 639. In addition, the Sixth Circuit has stated that "[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016).

In this case, the Franklin County BOE excluded the Plaintiffs' initiative from the ballot, and the Plaintiffs have alleged in the Complaint numerous examples of how other BOE Defendants have excluded proposed charter amendments from the ballot. These include situations where Defendants have engaged in unlawful reviews of the substance of proposed charter amendments to exclude proposed initiatives from the ballot, Complaint, ¶¶108- 230. The Plaintiffs also described how pre-enactment substantive review largely precludes controversial measures from the ballot and effectively curtails campaigning focused on debate over the measures from the point of wrongful ballot exclusion to election day, "depriving voters of the opportunity to vote on such measures." Complaint, ¶¶ 80-81. And, they have shown that content-

[4]Derived from the Supreme Court's holdings in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi* 504 U.S. 428 (1999).

based, substantive pre-enactment review of proposed ballot measures interferes with core political speech and petition for redress of grievances, violates voters' fundamental right to vote, and inhibits citizens from reforming or altering their current form of government. Complaint, ¶ 239.

Oddly, while the Court cited the *Grimes* assessment that the "hallmark of a severe burden is exclusion or virtual exclusion from the ballot," it proceeded to find that "Plaintiffs, however, have not been burdened with exclusion or virtual exclusion from participating in the election process. Rather, they have been restricted from placing initiatives on the ballot that were determined by state officials to exceed the scope of legislative authority." Opinion and Order at 18. The Court mistakenly sees the exclusion of Plaintiffs' initiatives from the ballot as the product of rote procedural rulings by boards of election or the secretary of state instead of what they are, case-by-case content-weighing judgments which then allow "exclusion. . . from the ballot." This is not the same as the BOE determining that an initiative petition failed to gather sufficient signatures, which is a clear factual determination of the kind appropriate for the BOE. Instead, and at issue here, the General Assembly, through HB 463, has purported to give BOEs the power to conduct judicial review of a proposed measure pre-election and thereby determine whether it is excluded from the ballot.

Plaintiffs, the Court continues, "remain free to exercise the initiative power in compliance with Ohio's initiative ballot statutes." Opinion and Order at 18. But what Plaintiffs "remain free to exercise" is participation in an egregious guessing game of how a particular majority of elections officials will interpret such things as local government powers and pre-emption. The Court erroneously believes that "Plaintiffs offer nothing more than conclusory allegations that the

ballot initiative statutes were applied based on content." Plaintiffs are not conclusionary or failing in any evidentiary respect; the challenged statutes *order* unqualified elections officials (as Franklin County BOE member Sinnott confesses) "to determine. . . [w]hether the petition falls within the scope of a municipal political subdivision's authority to enact. . . " by considering, construing and applying "the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot."

To the contrary, Plaintiff's proofs are conclusive and extraordinary evidence in the form of the statutory commands themselves. On its face, the statutory scheme mandates content analysis by elections officials before an initiative can go to the ballot. The sole allowable "engagement in political expression" left to Plaintiffs, then, is an impossible shell game prompted by the recurring need for the People to guess what content in an initiative petition will finally be acceptable to the election agency commissariat for it to proceed to the ballot. While it wouldn't clear up the enormous constitutional defects in this process, the General Assembly has omitted from the legal checklist in § 3501.38 obedience to the century of Ohio Supreme Court jurisprudence against content vetoes. That, alone, is an ominous signal that the legislature has arrogantly usurped the Ohio Constitution.

The Court places a surprising degree of confidence in nonjuridical, untrained elections regulators as the final arbiters to decide what comprises the "scope of state law" instead of the courts, post-election. This improper delegation of power is made even more absurd by the all-or-

nothing provision of the statutes under challenge. A BOE or SOS finding of exceeding-the-scope as to any part of an initiative bars the entire measure from the People's vote.

E. Incorporation By Reference As To Counts Six, Seven and Eight

In response to Franklin County BOE's arguments for dismissal of Counts Six, Seven and Eight of the Complaint, Plaintiffs hereby incorporate fully herein by reference their arguments appearing on pp. 9-13 of ECF 76, "Plaintiffs' Response to Defendant Portage County Board of Elections' Motion to Dismiss."

F. Conclusion

The Plaintiffs have alleged "enough facts to state a claim to relief that is plausible on its face" against the Franklin County BOE. *Traverse Bay Area Immediate Sch. Dist. v. Mich. Dep't of Educ.,* 615 F.3d 622, 627 (6th Cir. 2010). Therefore, Defendant's motion should be denied.

WHEREFORE, Plaintiffs pray the Court deny the Franklin County Board of Elections' Motion to Dismiss in its entirety.

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Co-Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2020, I deposited a copy of the foregoing Memorandum Response in Opposition into the Electronic Case Filing system maintained by the Court, and that according to protocols of the system, it was electronically served upon all counsel registered to receive electronic filings.

/s/ Terry J. Lodge
Terry J. Lodge, Esq.
Co-Counsel for Plaintiffs

BEFORE THE FRANKLIN COUNTY BOARD OF ELECTIONS

- - -

In Re: :
:
Special Meeting. :

- - -

EXCERPT OF PROCEEDINGS

before Chairman Douglas J. Preisse, Director Edward J. Leonard, Deputy Director David Payne, and Board Members Bradley K. Sinnott, Kimberly E. Marinello, and Michael E. Sexton, at the Franklin County Board of Elections, 1700 Morse Road, Large Hearing Room, Columbus, Ohio, called at 10:00 a.m. on August 24, 2018.

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Columbus, Ohio 43215-5201
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APPEARANCES:

Franklin County Prosecutor's Office
By Mr. Timothy A. Lecklider, Esq.
and Mr. Nick A. Soulas, Jr., Esq.
Assistant Prosecuting Attorneys
373 South High Street, 13th Floor
Columbus, Ohio 43215

On behalf of the Board.

ALSO PRESENT:

Ms. Mellissia Fuhrmann, Esq., Bd. of Elections
Ms. Alica Healy, Bd. of Elections
Mr. Zachary Manifold, Bd. of Elections
Mr. Gene Shell, Bd. of Elections
Mr. Jeffrey O. Mackey, Bd. of Elections
Ms. Carla D. Patton, Bd. of Elections
Ms. Suzanne M. Brown, Executive Assistant to the Board

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MEMBER SINNOTT: Next we turn to the subject of an initiative petition concerning a ballot issue that has been proposed for the electors of the City of Columbus, commonly referred to as the Community Bill of Rights. The Board has not yet voted to place the matter on the November ballot. That subject now comes before the Board.

How to proceed in this instance is a challenging matter. Decisions by other boards about the placement of issues on the ballot raised by initiative petition have become a common subject for litigation in recent years. Further, within the last couple of years, the General Assembly created a statute giving Boards of Elections specific instruction on how to proceed when an initiative petition concerning a ballot issue is proposed for the electors of a city.

The constitutionality of that instruction from the General Assembly, found in Revised Code Section 3501.11(K) and Revised Code Section 3501.38(M), has been challenged by three of the seven members of the Ohio Supreme Court in the Espen decision from October of last year. Significantly, however, three is not a majority of

seven. The three justices who would hold the General Assembly's enactment unconstitutional constitute a minority of the Court. Accordingly, their opinion in Espen constitutes a lead opinion, but it is not the law of the State of Ohio.

It is Justice Fischer, writing only four months ago, in the Khumprakob case, who aptly describes the state of the law in his dissent. Interestingly, Justice Fischer is one of the justices in the minority of three who joined in that lead opinion in Espen. The Paragraph 15 in Justice Fischer's excellent dissent he writes as follows: "Espen does not resolve this case because the lead opinion in that case, joined by only three justices, did not articulate a holding of this Court."

Thus, as of today, we have a specific instruction on how to proceed given to us by the Ohio General Assembly. I understand that to be the law of the State of Ohio, and I am prepared to follow the instruction of the statute.

Now, before describing what the General Assembly has instructed us to do in this instance, I will note a couple of things that have occurred to me as I reflected on this matter. First, the instruction given to us by the General Assembly is

one that a Board of Elections is ill-equipped to follow. It's an instruction to perform a highly technical and complicated legal analysis relative to, among other things, the Home Rule provisions of Ohio's Constitution.

The members of the Board of Elections in this state are generally not lawyers. Where there are lawyers serving on boards, as is true of me, we sit as co-equal members of the board and we're not practicing law on behalf of the board. The boards have no legal staff. The boards have no legal research capabilities. We have on staff no legal researchers or writers. The making of the determination required by the current statutes is a task ill-suited for a Board of Elections. Were I a legislator, I would vote against the adoption of such statutes.

I also share the concerns of the three justices who joined in the lead opinion in Espen, relative to the constitutionality of the statutes. It's hard to imagine a more clear instruction to an administrative body that it perform the judicial function of assessing the constitutionality of a statute enacted by the General Assembly. If I were a judge, I would hold the statutes unconstitutional,

but I'm here today neither as a legislator nor a judge. I'm here today as a member of a county Board of Elections.

The instruction I have received from our legislature is to do this, quoting now from 3501.38(M), "The Board of Elections shall examine the petition to determine whether the petition falls within the scope of a municipal political subdivision's authority to enact by initiative, including, if applicable, the limitations placed on Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations...." We are also told, "The petition shall be invalid if any portion of the petition is not within the initiative power."

After rendering that instruction, the General Assembly then tells the Board, "After making a determination under Division (M)(1)(a) or (b) of this section, the Board of Elections shall promptly transmit a copy of the petition and a notice of the Board's determination to the office of Secretary of State."

Because this is an instruction of the legislature, and no court of competent jurisdiction

has held the statutes containing that instruction to be unconstitutional, I believe that not only our authority but our obligation is to make the determination required of us by the General Assembly.

We have had the benefit of writings from proponents and opponents of this measure being placed on the ballot. After having examined the proposal known as the Community Bill of Rights, and considering the arguments presented by proponents and opponents, I now make the following motion: I move that in satisfaction of the statutory instruction of Revised Code Section 3501.11(K)(2) and 3501.38(M)(1)(a) and (2), that the Board determine that the initiative petition proposing the Community Bill of Rights is invalid and that the provisions of the petition fall outside the scope of a municipal political subdivision's authority to enact by initiative because of limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution, noting the particular bases that the proposal calls for the regulation of oil and gas extraction and transportation, the regulation of corporations, and the creation of new causes of action.

That is my motion. Is there a second?

CHAIRMAN PREISSE: Second.

DEPUTY DIRECTOR PAYNE: All those in favor of the motion signify by saying aye.

(Vote taken.)

DEPUTY DIRECTOR PAYNE: All opposed same sign.

(No response.)

DEPUTY DIRECTOR PAYNE: The motion carries.

MEMBER SINNOTT: Now having made the determination required by statute, Ed and David, will you please see --

DEPUTY DIRECTOR PAYNE: Sure.

MEMBER SINNOTT: -- to it that our decision is transmitted promptly to the Secretary of State?

DEPUTY DIRECTOR PAYNE: We will do as well.

MEMBER SINNOTT: Now, the Board is mindful that we are meeting on the 24th of August. There have been writings on the merits of the placement of the Columbus Bill of Rights on the November ballot tendered by two lawyers. One is Derek Clinger, under dates of August 9, 2018, and an undated writing submitted subsequent to that. The other is Terry Jonathan Lodge, who has written in

opposition to Mr. Clinger's position by way of a letter dated August 17, 2018.

It appears that at the time that these writings were prepared, counsel were proceeding on the premise that the Board would make the determination that the Community Bill of Rights would appear on the November ballot. Accordingly, Mr. Clinger described his writing as being in support of a protest, and Mr. Lodge wrote that his was a response to a protest. Logically, Mr. Lodge is the one who would want to protest on behalf of his clients the determination just made by the Board.

Is Mr. Lodge present?

MR. LODGE: I am.

MEMBER SINNOTT: Mr. Lodge, if you will affirm that you wish to protest the determination just made by the Board, then we will consider your writing to be in protest, and we will allow both Messrs. Lodge and Clinger to be heard.

Mr. Lodge, do you wish to be heard in protest to the determination just made by the Board?

MR. LODGE: Yes, sir.

MEMBER SINNOTT: If you would, please, go to the lectern, introduce yourself, and for the sake of having an orderly proceeding today, if you

could limit your oral presentation to five minutes, and I'll ask Mr. Clinger to do the same when he speaks in response.

MR. LODGE: Very good.

CHAIRMAN PREISSE: Do you want to swear him in?

MEMBER SINNOTT: No.

MR. LODGE: That was a very interesting exposition. My name is Terry Lodge. I'm an attorney. I've been practicing for 39 years in Ohio, in Toledo. My business --

THE FLOOR: The microphone, please.

MR. LODGE: My business address is --

CHAIRMAN PREISSE: That's a media microphone, not --

MR. LODGE: I can make it louder.

(Multiple speakers at once.)

MEMBER SINNOTT: Mr. Lodge, hold for a moment and we'll use the public address microphone.

CHAIRMAN PREISSE: Can you make it taller, Ed?

MR. LEONARD: Yeah.

MR. LODGE: All right. I'll try again.

MEMBER SINNOTT: Very good.

MR. LODGE: Okay. I'm Terry Lodge.

I've been practicing for 39 years in Toledo. My business address is 316 North Michigan Street, Suite 520, Toledo. And yes, I'm entering an appearance on behalf of the petition committee.

As a -- as a mechanical matter, I'd like to move Exhibits A, B, C, and D that were attached to our letter of last week into the record, just so -- as well as the letter itself, if that needs to be done.

MEMBER SINNOTT: Mr. Lodge, your writing and its attachments will be considered a part of the record before the Board.

MR. LODGE: Very good. I appreciate your preparatory comments, Mr. Sinnott. What disturbs me about the Board of Elections' vote, among other issues, is the fact that even though you have an instruction from the General Assembly, you have supposedly discretion to reject that instruction or at least to apply it and still vote to place the Bill of Rights on the ballot.

In 2015, the Ohio Supreme Court, in State ex rel. Youngstown versus Mahoning County Board of Elections, 2015-Ohio-3761, which is cited in our letter, stated the following with regard to a very similar proposal that was before the Mahoning Board

of Elections, "The boards of elections, however, do not have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms. An unconstitutional amendment may be a proper item for referendum or initiative."

The principle is, even if illegal, the people have an absolute unfettered constitutional right to decide, to vote. If the Columbus City Council were in the middle of its three readings of the Bill of Rights, if they undertook to simply initiate the passage of it, that is local legislators under the Charter of Columbus, no one could successfully walk into any level of court in the State of Ohio and get some type of injunctive relief stopping the Columbus City Council from deliberating and even passing the Bill of Rights.

The people, by the Amendment of 1912, the people were extended the right to be co-legislators with whatever levels of government they wished to act as an equal to. That is what they have done. They have proposed legislation. The Ohio General Assembly, in its united state, apparently doesn't understand that there is a Constitution and that there are at least 25 Ohio Supreme Court decisions dating from 1913 that uphold the very

simple premise that Boards of Elections and election officials are restricted to inquiring into matters of form and not substance when it comes to initiated -- initiatives as well as referendums, that Boards of Elections and city councils and village councils don't have a veto power simply because they think that this might be illegal if passed, that portions of it are things I don't personally agree with, or even my county prosecutors told me we need to just focus them down.

This decision, as well reasoned as your preparatory comments were, Mr. Sinnott, I respectfully submit that the General Assembly has passed an unconstitutional law, which is certainly not the first time in Ohio history, that the Ohio Supreme Court has sent a very significant signal that it is doomed at some point, if not -- if not right now, if not today, it is doomed, because it is so irrationally set up.

You aren't a court. As much time and deliberation and consultation as you may have undertaken, you aren't a court. That is a post-election role that the parsing of legality and illegality, preserving those portions that might be legal, vetoing things that aren't legal is reserved

to the courts, who have been doing it for a very long time in Ohio.

I respectfully request that the Board reconsider and place the measure on the ballot. Thank you.

MEMBER SINNOTT: Thank you. Thank you, Mr. Lodge, and I congratulate you on exactly five minutes of presentation.

MR. LODGE: That's a first.

MEMBER SINNOTT: Mr. Clinger, do you wish to be heard?

MR. WALLACE: Thank you, Mr. Sinnott. My name is Ben Wallace. I signed the protest letter on behalf of the protestor, Mr. Clinger. I'm an attorney. My law firm, I'm with McTigue & Colombo. I'm here with John McTigue as well today, and on behalf of the protestor, Mr. Chairman and Mr. Sinnott, the rest of the Board, I would agree with Mr. Sinnott's characterization of the ruling in Espen. The controlling decision was not joined by a majority of the Court, and, therefore, does not control this Board's decision today.

We would also agree with the reasoning of the Board on the substance of the motion that the proposed ordinance is outside a municipal authority.

We would also note that in the protest letter and the subsequent memorandum, we laid out other grounds for invalidating the proposed ordinance under the Columbus Charter, and we would ask to move to include the protest -- the protest letter and the memo in the record of this proceeding.

MEMBER SINNOTT: And, Mr. Wallace, your writing as submitted to the Board will be considered a part of the record in this matter.

MR. WALLACE: Okay. Yes. Thank you, and that is all I have.

MR. LODGE: I wonder if I may make one reply observation, sir, one minute.

MEMBER SINNOTT: Mr. Lodge, I'll give you 15 seconds.

MR. LODGE: Very good. Thank you. I'll see if I can make that timely. In Wood County last year, while House Bill 463 was in legal effect, the Wood County Board of Elections did place on the ballot a very similar measure to the Bill of Rights, and the problem precisely is the statute now makes 88 separate courts out of the Boards of Election, and some -- some voters will have rights in their counties, other voters won't have in their counties. It's a big problem. It is a separation-of-powers

problem that cannot be fixed by a General Assembly statute. Thank you.

MEMBER SINNOTT: Thank you, Mr. Lodge.

Having now considered the protest to the Board's prior determination regarding the Community Bill of Rights, I move that the protest be denied for the reasons cited in the motion making the determination.

Is there a second?

MEMBER SEXTON: Second.

DEPUTY DIRECTOR PAYNE: All those in favor of the motion signify by saying aye.

(Vote taken.)

DEPUTY DIRECTOR PAYNE: All opposed, same sign.

(No response.)

DEPUTY DIRECTOR PAYNE: The motion carries.

THE FLOOR: Our friends have worked very hard to get these signatures. It's a single issue. It's been approved by the city council.

CHAIRMAN PREISSE: I'm sorry --

THE FLOOR: The lawyers have approved it.

THE FLOOR: The General Assembly doesn't

get to take constitutional rights.

(Multiple speakers at once.)

THE FLOOR: I'm an individual person and my vote and my voice not included, but -- you know, all the signatures that were collected, we're volunteers. We're not paid people. These are people that want clean water in our city, and this is a part of democracy and we're supposed to be able to participate in our democracy? That's what we're here doing. We have followed all the loops. Why didn't somebody say that originally, that you know what, it's just going to be thrown out because of the General Assembly? You know, why are we out there collecting signatures for anything, then?

MEMBER SINNOTT: Okay. I'm going to intervene at this point. This is not an open community forum.

THE FLOOR: That's fine.

MEMBER SINNOTT: This is a business meeting of the Board of Elections, and we're now engaging in a quasi-judicial function. There are going to be many opportunities for you to be heard in your opinions on the subject of the Board today, but it's not going to be during the course of this particular --

THE FLOOR: (Inaudible.) And right now is not the opportunity and --

MEMBER SINNOTT: Madam --

(Multiple speakers at once.)

MEMBER SINNOTT: Ma'am --

(Multiple speakers at once.)

MEMBER SINNOTT: We are going to go into recess.

THE FLOOR: Yeah, I figured you would. That's fine.

(Multiple speakers at once.)

THE FLOOR: General Assembly in a very gerrymandered state --

MEMBER SINNOTT: Friends --

THE FLOOR: -- I have to say.

MEMBER SINNOTT: Friends, I welcome you to stay and observe, but you are going to be observing the Board of Elections as it goes about its business. You will not be interrupting the Board of Elections as it goes about its business.

THE FLOOR: For the record --

(Multiple speakers at once.)

MEMBER SINNOTT: We will --

(Multiple speakers at once.)

MEMBER SINNOTT: We will recess --

THE FLOOR: Did you look at what the county prosecutor --

MEMBER SINNOTT: We will recess --

THE FLOOR: -- recommended to this Board, yes or no?

MEMBER SINNOTT: We are going to be in recess while order is restored in the room.

(Recess taken.)

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CHAIRMAN PREISSE: Okay. Let's resume.

MEMBER SINNOTT: Next we turn to an initiative petition which proposes to enact an ordinance in Grandview Heights. It appears as though the ordinance is sometimes referred to as the Green Space Overlay District. This is an instance where the Board has received an August 7 writing from Attorney Eugene Hollins, writing on behalf of the City of Grandview Heights, and an August 16 response -- this is not a dramatic pause, I'm looking for where I am in my notes -- prepared by Mr. Clinger, representing three proponents of the Green Space Overlay District.

As a preliminary matter, I received a letter from Mr. Clinger dated August 17 which I should address. Mr. Clinger asked me to recuse

myself from consideration of whether the proposal should be placed on the ballot, saying that it is his "understanding" that my law firm "provided input on the drafting of the protest filed by the city." He also says that one of my law partners has represented in a zoning matter in Grandview Heights owners of property that would "be affected by the petition" and that these property owners have been outspoken in their opposition to the petition.

As to the suggestion that my law firm has played any role in the drafting of the protest, I have inquired, and that is a factually inaccurate suggestion. That is not true, and I will not recuse myself on that basis.

As to the suggestion that a lawyer or other professional should recuse himself from the consideration of any matter that could have an effect on a client or business associate, I can identify no legal basis for such a contention. None is cited in the August 17 letter.

My law firm has no client in the matter before the Board today, the question of whether the initiated ordinance should be put on the ballot. All of us who sit on a Board of Elections might have clients or business associates who could be affected

by a measure being put on the ballot and that measure's subsequently being approved by the voters in a jurisdiction. Probably some such measures affect multiple clients and business associates, some positively and others negatively. That is not, however, a proper basis for a recusal. In this instance, it is also true that I am not voting on the measure itself, only addressing whether the measure satisfies the standards for being put on the ballot.

I appreciated the opportunity to consult with the staff of the Secretary of State's office and the staff at the Ohio Elections Commission. They were helpful in reaching the conclusion that there is no "affected by" standard when it comes to the question of whether a board member should recuse himself. Similarly, the observation that my law firm has one or more clients outspoken in political support for or against a measure that might become subject to popular vote is not a basis for recusal.

It is important that public officials not acquiesce to every request for recusal, as that invites gamesmanship on the part of interested parties and deprives the body of the benefit of its full strength. There should be recusal only -- only in the event of a proper basis, and none exists here.

Accordingly, I will participate in the consideration of the Grandview Heights subject.

This matter reaches us in the same posture as did the Community Bill of Rights. There is no point in repeating the observations that I earlier made about the difficulty of a board's situation under the terms of modern statute.

For the reasons earlier stated, I perceive the Board has having an obligation to make the determination of whether the petition falls within the scope of the city's authority to enact the proposal via initiative. We are told our consideration must extend to Sections 3 and 7 of Article XVIII of the Ohio Constitution. If any portion of the petition is not within the initiative power, the petition shall be held invalid.

We have the benefits -- I'm sorry, we have the benefit rather of writings from proponents and opponents of this measure. After having examined the proposal known as the Grandview Heights Green Space Overlay District and considering the arguments presented by proponents and opponents, I now make the following motion: I move that in satisfaction of the statutory instruction of Revised Code Section 3501.11(K)(2) and 3501.38(M)(1)(a) and (2), that the

Board determine that the initiative petition proposing the Grandview Heights Green Space Overlay District is invalid and that the provisions in the petition fall outside the scope of a municipal political subdivision's authority to enact by initiative because of limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution, the initiative petition is also a challenge to an administrative and not a legislative action, and on the particular bases described in the August 7, 2018, correspondence to Director Leonard from Attorney Hollins.

Is there a second on that motion?

CHAIRMAN PREISSE: Second.

DEPUTY DIRECTOR PAYNE: All those in favor of the motion signify by saying aye.

MEMBER SEXTON: If I may before --

MEMBER SINNOTT: There can be discussion.

MEMBER SEXTON: I believe that the arguments in the petition in response to the protest filed by the City of Grandview Heights are persuasive. I believe that petitioners are seeking to enact this through initiative petition and is within the authority of the municipality to enact

and, therefore, appropriate for placement on the ballot.

Therefore, I would vote no on the motion to deny certification of the petition.

CHAIRMAN PREISSE: We've had a motion and it's been seconded, and you were about to --

DEPUTY DIRECTOR PAYNE: All those --

CHAIRMAN PREISSE: If there's no more discussion, we can call the roll.

DEPUTY DIRECTOR PAYNE: Is there any more discussion?

All those in favor of the motion presented by Chairman Sinnott --

MEMBER SINNOTT: Well, let's see. Is there any discussion?

MEMBER MARINELLO: I believe that the Green Space Overlay District, which would be a legislature action, that the municipality itself could do it and, therefore, a matter that -- you know, for an initiative petition, so I would --

(Discussion off the record.)

MEMBER MARINELLO: That it would be an appropriate matter for an initiative petition.

MEMBER SINNOTT: Well, we now have a motion and a second. There's been discussion. I

think we're now ready for a vote.

DEPUTY DIRECTOR PAYNE: All those in favor signify by saying aye.

MEMBER SINNOTT: Aye.

CHAIRMAN PREISSE: Aye.

DEPUTY DIRECTOR PAYNE: All opposed, same sign.

MEMBER SEXTON: Nay.

MEMBER MARINELLO: Nay.

DEPUTY DIRECTOR PAYNE: Okay. There's --

MEMBER SINNOTT: Why don't you do a roll call on this particular matter.

DEPUTY DIRECTOR PAYNE: I will do it. Kim Marinello.

MEMBER MARINELLO: No.

DEPUTY DIRECTOR PAYNE: Michael Sexton.

MEMBER SEXTON: No.

DEPUTY DIRECTOR PAYNE: Doug Preisse.

CHAIRMAN PREISSE: Yes.

DEPUTY DIRECTOR PAYNE: And Brad Sinnott.

MEMBER SINNOTT: Yes.

DEPUTY DIRECTOR PAYNE: It's a tie-tie vote -- or two vote --

Do you want to tell what happens in --

DIRECTOR LEONARD: It is an appropriate matter to submit to the Secretary of State to break the tie. We have, as is set forth in -- well, as set forth in the Election Official Manual, the protocol is for the two members to draft a memorandum in support of their position, and the two members against to do so as well, that that would be submitted by the Chair or the Director within 14 days after the tie vote occurs. In this instance, that would be by September 6th, and again, we would submit the exact motion that was presented, the statements from both parties, as well as all the minutes and all the documentation to the Secretary of State to break the tie.

MEMBER SINNOTT: So we're evenly split on this one, so we'll send it over to the Secretary for a decision. Because we are talking about a matter that relates to the November ballot, let's go to work, Board Members, as quickly as we can and get our positions prepared, and we'll submit those simultaneously.

DIRECTOR LEONARD: Yes.

MEMBER SINNOTT: And then they can be forwarded to the Secretary, and we'll see what the

Secretary says. So in light of the fact that we've not made a determination today, it would be premature for there to be a protest or presentation on a protest. We understand what our mission is, and we'll go about satisfying it.

DIRECTOR LEONARD: Thank you, Mr. Sinnott.

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