IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI *ex rel.* MARK MILLER,	:	Case No. 2024-1687
Relator-Appellant,	:	On appeal from the First District Court of Appeals, Hamilton County, Case No. C-230683
v.	:	
CITY OF CINCINNATI, *et al.*,	:	
Respondents-Appellees,	:	

CITY RESPONDENTS-APPELLEES' MEMORANDUM IN OPPOSITION TO JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case concerns the scope of a single city council's powers under a single section of its unique charter. It does not involve a substantial constitutional question or constitute a case of public or great general interest.

Respondent-Appellee Over-the-Rhine Community Housing ("OTRCH"), the owner of the property located at 2000 Dunlap Street ("Property"), sought a historic certificate of appropriateness ("COA") and certain zoning variances from the City's Historic Conservation Board ("HCB") to construct a new residential housing development on the Property. The HCB approved OTRCH's request for a COA and most of the other zoning approvals, but it denied the zoning variance to exceed normal density regulations.

Several Cincinnati City Council Councilmembers subsequently sponsored a notwithstanding ordinance that would set aside the density regulations and other zoning regulations that presented barriers to the property owner's proposed development. On November 7, 2022, Relator-Appellant Mark Miller ("Miller") sent a taxpayer demand letter to the Cincinnati city solicitor pursuant to Ohio Revised Code 733.56. Despite the broad grant of power to the Cincinnati City Council in Article II, Section 1 of the City's charter, Miller argued that the Council lacked the authority to adopt zoning-related notwithstanding ordinances. The City Solicitor responded the next day, declining to file suit and stating that the Council's use of zoning-related notwithstanding ordinances is a proper exercise of its legislative authority.

On November 9, 2022, the Council passed Ordinance 346-2022. Miller subsequently filed the present lawsuit seeking to invalidate the new law. In simplest terms, he contended that the Council's adoption of Ordinance 346-2022 was an improper exercise of administrative authority by the Council. He sought (i) declarations that CMC § 111-05(d) and Ordinance 346-2022 violate

the City Charter; and (ii) an injunction permanently enjoining the City from adopting zoning notwithstanding ordinances and from implementing or undertaking any action effectuating Ordinance 346-2022.

OTRCH subsequently intervened in the lawsuit. The trial court denied Miller's request for a temporary restraining order, and, on December 18, 2023, granted the City and OTRCH's motions for summary judgment, and denied Miller's motion for summary judgment. Miller appealed the trial court's decision to the First District Court of Appeals.

The issue presented to the First District was whether the trial court properly found that the Council's passage of a zoning-related notwithstanding ordinance is a legislative act within the power granted to it under Section 1 of the Charter of the City of Cincinnati. The First District, however, did not address the merits of the case, and instead vacated the trial court's decision and found that Miller lacked standing because he provided no explanation for how an injunction in this case would benefit the public or vindicate a public right and that it had no potential to affect any of Miller's private rights. *City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805, ¶ 26-27 (1st District).

THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR CONSTITUTE A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Miller's Memorandum in Support of Jurisdiction distorts the well-founded decision of the First District Court of Appeals and reveals a fundamental misunderstanding of taxpayer standing. Because a plain reading of the First District's opinion reveals nothing but a direct application of established law to the facts at issue, this Court should decline jurisdiction.

This case does not involve a substantial constitutional question. *See* S.Ct.Prac.R. 5.02(A)(1). Instead, it simply involves a taxpayer standing issue that this Court has already interpreted and the interpretation of a single municipal corporation's charter, neither of which

implicate any constitutional questions, let alone one that is "substantial." See *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. Of Commrs., 2012-Ohio-1861, ¶¶ 14-16.* (finding that a union was not seeking to enforce a public right where it "merely allege[d] that the existence of a statutorily noncompliant county resolution constitute[d] an injury in and of itself").

Miller argues that the Council exceeded its powers under the Charter by adopting Ordinance 346-2022, but questions of charter interpretation are not constitutional questions. *See Foster v. City of Wickliffe*, 2007-Ohio-7132, ¶¶ 11-12 (11th Dist.) (noting the Supreme Court of Ohio dismissed an appeal concerning a city's charter because the appeal presented "no substantial constitutional question"). The Ohio Constitution makes clear that this Court's jurisdiction extends only to "questions arising under the constitution of the United States or of this state." Ohio Const., art. IV, § 2(B)(2)(a)(ii). Questions regarding the interpretation of a municipal corporation's charter are not constitutional questions for purposes of this Court's jurisdiction.

The issues in this case are also not of great general or public interest. *See* S.Ct.Prac.R. 5.02(A)(3). This is a garden-variety zoning matter, pertaining to a council's ability to set aside zoning laws. The legal issues presented involve a unique municipal corporation charter, not a widespread issue of legislative power that is likely to recur. More specifically, it relates to a taxpayer's ability to force his own policy preferences—here, limited legislative power for the Council—on the rights of unsuspecting property owners to which he has no connection. For those reasons, the issues in this case are of narrow interest, and the Court should decline to exercise jurisdiction.

ARGUMENT CONCERNING PROPOSITIONS OF LAW

Proposition of Law No. 1: Under the municipal statutory taxpayer-lawsuit provisions, a taxpayer may file an action 'on behalf of a municipal corporation,' R.C. 733.59, if the government fails to pursue a lawsuit after a written request from the taxpayer. In such cases, the standing requirement is satisfied because the municipal corporation is the actual party

in interest and the General Assembly has explicitly given the taxpayer authority to sue on the government's behalf.

Miller's argument to eliminate the injury prerequisite to standing would grossly expand the jurisdiction of Ohio courts to include cases without justiciable controversies, wasting valuable judicial resources and opening the proverbial "flood gates" for plaintiffs to file suits against governments and innocent third parties solely because the taxpayer disagrees with legislative decision-making. *See Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970) (noting the "long and well established" principle that courts "decide actual controversies between parties legitimately affected by specific facts"). The Ohio Constitution limits courts to the exercise of "judicial power," which assumes a justiciable controversy. *See M.R. v. Niesen*, 167 Ohio St.3d 404, 406 (2022); *see also* Ohio Constitution, Article IV, Section 1 (limiting courts' authority to the "judicial power").

This case illustrates the importance of these fundamental principles of Ohio law. Ordinance 346-2022 does not concern or affect Miller. The ordinance eliminates the density limitation for a single parcel to which Miller has no perceivable connection.

Miller additionally argues that the First District should be given the opportunity to reconsider this case in light of this Court's decision in *State ex rel. Martens v. Findlay Municipal Court*, 2024-Ohio-5667. But *Martens* is no help to Miller here. In *Martens*, a taxpayer had sued a writ of mandamus against judicial defendants presiding over cases involving unpaid municipal taxes. *See Id.* ¶ 5. The appeals court dismissed the case because the taxpayer lacked standing. Before this Court, the taxpayer argued that he had taxpayer standing because the courts wrongfully expend money when they hear cases without jurisdiction. *See id.* ¶ 25. But this Court affirmed, holding that the taxpayer lacked taxpayer standing because "*he has not asserted any special interest in the courts' funds*." *Id.*

Martens counsels in favor of the same outcome here. Miller argues that government defendants are acting wrongfully but, just like the *Martens* taxpayer, he has no personal stake in the subject of the official action (here, the zoning requirements for an unrelated person's property). *Martens* did not open the courthouse doors to taxpayers seeking only to address personal grievances. *See State ex rel. Phillips Supply Co. v. City of Cincinnati*, 2012-Ohio-6096, ¶ 17 (1st District) ("To have standing to pursue a taxpayer claim under R.C. 733.59, a party must not only satisfy the statutory requirements prior to initiating his action . . . but he must also demonstrate that he is enforcing 'a right of action on behalf of and for the benefit of the public.").

Miller suggests that the approach taken by the First District is novel. But this Court has long held that to pursue a taxpayer action under R.C. 733.59, the "aim must be to enforce a public right, regardless of any personal or private motive or advantage." *State ex rel. Caspar v. Dayton*, 53 Ohio St.3d 16, 20; *see also State ex rel. Fisher v. City of Cleveland*, 2006-Ohio-1827, ¶ 12. This Court has also made clear that a plaintiff who attempts to invalidate a local ordinance "merely upon the ground that [it is] unauthorized and invalid" is not seeking to enforce a public right and fails to meet the requirements of taxpayer standing. *State ex rel. Teamsters Local Union No., 132 Ohio St. 3d at ¶¶ 14-16.*

Miller also argues that this Court should assume jurisdiction because courts have held that taxpayers lack standing even when there is some public benefit to the action. But cases such as *Home Builders Ass'n of Dayton v. City of Lebanon*, 2006-Ohio-595, simply stand for the proposition that it is too vague to simply say the public has an interest in preventing cities from enforcing illegal ordinances. *See Home Builders Ass'n of Dayton*, 2006-Ohio-595, ¶ 54. That is precisely the argument Miller makes here. Creative definition of the public's interest does not

overcome the Ohio Constitution's justiciability requirement. *See M.R. v. Niesen*, 167 Ohio St.3d at 406; *see also* Ohio Constitution, Article IV, Section 1.

Proposition of Law No. 2: To the extent the vindication of the public interest or providing a public benefit is required before a taxpayer has standing to proceed under the municipal statutory taxpayer-lawsuit provisions, when a city council has allegedly assumed and exercised a power not grant to it under the city charter, a taxpayer has standing to challenge such action under the municipal statutory taxpayer-lawsuit provisions as the effort to restrain such abuse of corporate power actions by the city council vindicates the public interest and/or provides a public benefit.

As explained above, this Court has already determined that a plaintiff who attempts to invalidate a local ordinance "merely upon the ground that [it is] unauthorized and invalid" is not seeking to enforce a public right and fails to meet the requirements of taxpayer standing. *State ex rel. Teamsters Local Union No., 132 Ohio St. 3d at ¶¶ 14-16.* This is because "[a]lthough a [local government's] failure to comply with a statute would certainly not benefit the public, allowing constant judicial intervention into government affairs for matters that do not involve a clear public right would also not benefit the public." *Id*. at ¶17.

Miller's reliance on *State ex rel. Cater v. City of N. Olmsted*, 69 Ohio St.3d 315 is misguided. There, the chair of a city's civil service commission was removed from his position for failing to disclose certain public records. A relator sought to have him reinstated. *Id.* at 318. This Court held that the public has a "right to the services of a public official who is purportedly performing in accordance with charter provisions." *Id.* at 323. In other words, by failing to disclose the records, the removed chair was engaged in nonfeasance. *Id.* at 321. This case, on the other hand, is about whether an uninterested taxpayer has the right to intervene in a zoning matter by arguing that the Council exceeded its powers in deciding a matter that does not affect the taxpayer or most any member of the general public for that matter. It is not about whether government

officials are performing their job at all, but rather whether they are performing them to the liking of Miller. There is no public interest here.

Miller maintains that courts have no guidance to determine whether a public right is being enforced. *See* Brief of Relator-Appellant at 14 n.5. But a robust dichotomy has developed between instances where the taxpayer's motive was public versus private. *See Home Builders Ass'n of Dayton*, 2006-Ohio-595, ¶ 51-52 (collecting cases). And Miller states in conclusory fashion that he is enforcing the public interest here.

CONCLUSION

The Court of Appeals properly held that Miller lacked standing in this case. There is no substantial constitutional question before the Court that has not already been answered by the Supreme Court itself, and there is no issue of public or great general interest that merits further review by this Court. The Court should decline to accept Miller's appeal, and the Court of Appeals' decision should stand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 49

I certify that the foregoing filing was reviewed and approved by the undersigned counsel. No portion of the foregoing was drafted by generative artificial intelligence. Any use of artificial intelligence by the undersigned attorney was limited to the capabilities embedded in the search functions of LexisNexis, WestLaw, or similar legal research database or the use of standard grammar or spell check in the Microsoft Office Suite.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by electronic mail this 6th day of January 2025:

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