Case No. _____

Supreme Court of the State of Ohio

CITY OF CINCINNATI *ex rel.* MARK MILLER,

Relator-Appellant,

v.

CITY OF CINCINNATI, *et al.*,

Respondents-Appellees,

and

OVER-THE-RHINE COMMUNITY HOUSING,

Intervening Respondent-Appellee.

***Hamilton County Court of Appeals, First Appellate District,* Case No. C-23-0683**

APPELLANT'S JURISDICTIONAL MEMORANDUM

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC INTEREST OR GREAT GENERAL INTEREST

In our constitutionally-based governments – be it at the federal, state, or local level – nothing is more foundational and undisputedly in the public interest than ensuring that the officials and bodies of such governments limit the exercise of power only to those powers granted to them by the people acting in their sovereign capacity. *See State ex rel. Garrett v. Van Horne*, 7 Ohio St. 327, 331 (1857)("when public officers exceed the powers vested in them by general laws, their acts are no longer official, but void"). "It is these self-imposed limits on power that distinguish our form of government from the authoritarian rule of monarchies and dictators." *Owens v. Stirling*, 443 S.C. 246, 331, 904 S.E.2d 580 (2024)(Beatty, C.J., concurring in part and dissenting in part). Thus, whenever any governmental body exceeds its power and authority, we no longer have government of and by the people; instead, in such a situation, the government itself has become the sovereign supplanting the people themselves. While such principles most often arise in contexts involving institutions of the federal or state governments, the same overriding principle is no less applicable to local governments and, in particular, municipalities operating under a charter adopted by the people.

The ultimate issue in this case (but not the subject of this appeal) involves a claim that the Cincinnati City Council engaged in an abuse of corporate power when it assumed and exercised a power not granted to it by the Cincinnati City Charter. Stated otherwise, the primary issue in this case goes directly to whether the City Council exceeded the powers granted to it by the people. Pursuant to Article II, Section 1 of the City Charter, "[a]ll legislative powers of the city shall be vested, subject to the terms of this charter and of the constitution of the state of Ohio, in the

council." Yet, notwithstanding this limited grant of power,[1] the City Council engaged in actions which were administrative and/or executive in nature, *i.e.*, non-legislative actions, and, thus, not within the scope of power which the people granted to the City Council under the City Charter. But in this appeal, the Court is not being called upon to decide the question of whether the City Council and its members actually exceeded the power granted to them under the City Charter.

Instead, this appeal involves a more narrow legal issue, *viz.*, when a city council as an institution of a municipal government allegedly engages in an abuse of corporate powers by assuming and exercising a power not granted to it by the city charter, do the taxpayers of the municipality have any redress in the courts pursuant to the municipal statutory taxpayer-lawsuit provisions (R.C. 733.56 *et seq.*) or must such taxpayers sit passively and watch as such alleged abuse of corporate powers continue unabated and *ad infinitum*, free from any judicial review or accountability. Notwithstanding the municipal statutory taxpayer-lawsuit provisions which specifically empower a taxpayer to bring a cause of action on behalf of and in the name of the municipality in order to, *inter alia*, restrain an abuse of corporate powers, the First District has held that the taxpayers of a municipality are essentially powerless to seek judicial relief when a city council assumes and exercises a power the people did not grant it in adopting the city charter.

[1] In contrast, some city charters elsewhere in Ohio do not limit the power of their respective city councils solely to legislative power but, instead, grant their respective city councils broad powers. *See, e.g., Huber Heights City Charter, Section 4.01* ("[e]xcept as otherwise provided under this Charter, all legislative and other powers of the City shall be vested in the Council"); *Steubenville City Charter, Section 7(A)*("[a]ll powers of the City shall be vested in the Council, except as otherwise provided by law or this Charter, and the Council shall provide for the exercise thereof").

In contrast, the Cincinnati City Charter only grants the Cincinnati City Council "[a]ll legislative powers of the city" but no other powers of the City are granted to it. To those familiar with the governmental reform movement in Cincinnati in the 1920s led by Charles P. Taft and Murray Seasongood, such a limitation on the power of the City Council clearly is the result of such reforms which sought to institute a city-manager form of government and to divest power away from a corrupt City Council.

According to the First District, a lawsuit seeking to restrain a city council from assuming and exercising a power not granted to it by the municipal charter, *i.e.*, to restrain an abuse of corporate powers, does not provide a public benefit or vindicate a public right. And, thus, per the First District, actions by a city council which even violate the fundamental and organic law of the municipality, *i.e.*, the city charter, may continue unabated and *ad infinitum*, without any judicial review or accountability, notwithstanding the municipal statutory taxpayer-lawsuit provisions (R.C. 733.56 *et seq.*) which explicitly empower taxpayers to bring such legal actions in order to restrain such abuses of corporate powers.

"[W]hat is a city charter but a city constitution…. [I]t only distributes that power to the different agencies of government, and in that distribution may place such limitation, but not enlargement, upon that power, as the people of the municipality may see fit in such charter or constitution." *Perrysburg v. Ridgway*, 108 Ohio St. 245, 253, 140 N.E. 595 (1923); *accord Cleveland ex rel. Neelon v. Locher*, 25 Ohio St. 2d 49, 51, 266 N.E.2d 831 (1971)("[t]he municipal charter is basically the constitution of the municipality"); *City of North Canton v. Osborne*, 2015-Ohio-2942 ¶13 (5th Dist.)("[a] municipal charter acts as the constitution of the municipality"). Thus, "the charter of a city, as approved by the residents of that city, represents the framework within which the city government *must operate*." *State ex rel. Pell v. Westlake*, 64 Ohio St. 2d 360, 361, 415 N.E.2d 289 (1980)(emphasis added). And, consistent with the constitutional character of a city charter, the people of the city, through such charter, vested certain institutions of the city government with specific powers. *State ex rel. Holloway v. Personnel Appeals Bd.*, 2010-Ohio-4754 ¶7 (2d Dist.)("[a] municipal home rule charter confers power, and one of its functions is the distribution of powers and the establishing of a framework within which substantive powers may be exercised"). This is the fundamental and foundational nature of

constitutional government with the people as the ultimate sovereign and, in turn, the government and its bodies having only those powers the sovereign people granted.

In this case, Relator MARK MILLER, as a taxpayer of the CITY OF CINCINNATI, sought to address the perceived abuse of corporate powers by the Cincinnati City Council by proceeding under and pursuant to the provisions of the municipal statutory taxpayer-lawsuit provisions, *i.e.*, R.C. 733.56 *et seq.* Even though Mr. MILLER complied with *all* the conditions precedent expressly set forth in R.C. 733.59 before commencing this action, the First District concluded that he still "lacked standing to bring his lawsuit both as a taxpayer [under R.C. 733.59] and under the common law." *City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805 ¶27. The First District simply declared, in but a conclusory manner, that, even though Mr. MILLER complied with all of the explicit requirements of R.C. 733.59 and notwithstanding that he sought to prevent the City Council from assuming and exercising a power not granted to it by the City Charter, he was not providing a public benefit or vindicating a public right, *id.* ¶26, and, thus, he lacked standing to pursue the case under R.C. 733.59. *Id.* ¶27.

"If the members of a legislative body can ignore, with impunity, the mandates of a constitution or a city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely." *Neelon*, 25 Ohio St. 2d at 52. Thus, it should be beyond cavil that this appeal, involving the legal question of the ability of a municipal taxpayer to bring an action under the municipal statutory taxpayer-lawsuit provisions (R.C. 733.56 *et seq.*) to challenge an abuse of corporate powers by a city council that is assuming and exercising a power not granted to it, presents a question of public interest and one of great general interest. Faith and confidence in constitutional government, at all levels, militates that this Court accept this appeal, less taxpayers be foreclosed from seeking judicial relief under the

municipal statutory taxpayer-lawsuit provisions when a city council assumes and exercises a power not granted to it by the city charter, *i.e.*, abuses the corporate powers.

STATEMENT OF CASE

After the Cincinnati City Solicitor refused a written demand to bring an action to enjoin the abuse of corporate powers by the Cincinnati City Council, Appellant MARK MILLER *qua* a taxpayer of the CITY OF CINCINNATI commenced, on November 9, 2022, this statutory taxpayer action pursuant to the authority of R.C. 733.59. Ultimately, on December 18, 2023, the trial court entered the *Final Judgment, i.e., the Order Granting Respondents' Motions for Summary Judgment and Denying Relator's Motion for Summary Judgment*.

On appeal, the First District Court of Appeals determined that, notwithstanding MARK MILLER having complied with all the requirements specifically set out in the municipal statutory taxpayer-lawsuit provisions, he nonetheless "lacked standing to bring his lawsuit both as a taxpayer [under R.C. 733.59] and under the common law." *City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805 ¶27. Accordingly, on October 4, 2024, the First District vacated the trial court's judgment and remanded with instructions to dismiss the complaint for lack of standing. *Id.* ¶28. On December 4, 2024, the First District denied a timely-filed application for reconsideration. A timely appeal has now been taken to this Court.

STATEMENT OF FACTS

In September 2022, an administrative body of the CITY OF CINCINNATI denied requested variances to the zoning requirements with respect to the property at 2000 Dunlap Street, *i.e.*, the *Property*. Notwithstanding the denial of the requested variances, the Cincinnati City

Solicitor subsequently prepared a *Notwithstanding Ordinance* that would, *inter alia,* grant a "legislative variance" for the density of any development on the *Property.* Ultimately, the Cincinnati City Council adopted the *Notwithstanding Ordinance.* Through the *Notwithstanding Ordinance*, the City Council did not amend the City's zoning resolution or the requirements for any zoning district; instead, the *Notwithstanding Ordinance* simply provided an administrative or executive directive as to how the existing zoning resolution would or would not be enforced vis-à-vis the *Property* and only with respect to the *Property*. *See State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elec*., 148 Ohio St.3d 176, 69 N.E.3d 696, 2016-Ohio-5919 ¶¶13-14 (because "significant portions of [a] proposed ordinance attempt[ed] to govern the execution of existing law rather than enact new law," the ordinance was not legislative, but administrative).

Appreciating that, the people of the CITY OF CINCINNATI expressly granted only legislative powers to the Cincinnati City Council pursuant to Article II, Section 1 of the Cincinnati City Charter, Relator MARK MILLER, as a taxpayer, recognized that the administrative or executive action by the City Council through the *Notwithstanding Ordinances* exceeded the limited power the people granted the City Council under the City Charter. Thus, pursuant to the municipal statutory taxpayer-lawsuit provisions (R.C. 733.56 *et seq.*), Mr. MILLER tendered a written demand to the Cincinnati City Solicitor to bring an action on behalf of the CITY OF CINCINNATI to restrain such abuse of corporate powers by the City Council. When the City Solicitor refused to bring such action, Mr. MILLER then commenced the present action "on behalf of" the CITY OF CINCINNATI. *See* R.C. 733.59 ("[i]f the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any

application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation").[2]

Even though Mr. MILLER complied with all conditions precedent specifically set forth in the municipal statutory taxpayer-lawsuit provisions in order to bring such an action under R.C. 733.59, *i.e.*, (i) a written demand to the city solicitor to bring an action in the first instance to restrain the abuse of corporate power; (ii) the denial by the city solicitor of such a request; and (iii) the posting of security for the cost of the proceedings, the First District concluded that Mr. MILLER still lacked standing. According to the First District, even though the abuse of corporate power at issue involved the Cincinnati City Council assuming and exercising a power not granted to it by the Cincinnati City Charter, Mr. MILLER was not seeking to vindicate the public interest or a public right and, therefore, he lacked standing to bring the action pursuant to the municipal statutory taxpayer-lawsuit provisions (R.C. 733.56 *et seq.*) or the common law.

ARGUMENT IN SUPPORT OF 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.**

"Under Ohio's 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

[2] Consistent with the requirement in R.C. 733.59 that "[n]o such suit [by a municipal taxpayer] or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding," Mr. MILLER sought confirmation from the trial court that the posting of the initial filing fee was sufficient security for proceeding therein pursuant to R.C. 733.56 *et seq.* Subsequently, the trial court entered an order confirming that the filling fee was sufficient and that "no further security need be posted for the cost of the proceeding."

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." *State ex rel. Martens v. Findlay Muni. Court*, __ Ohio St.3d __, __ N.E.3d __, 2024-Ohio-5667 ¶24. While Mr. MILLER made this precise argument in support of the contention that he had standing to pursue this statutory taxpayer lawsuit, the First District rejected this contention.[3] Instead, the First District imposed an additional extra-statutory requirement before the standing requirement is satisfied, *i.e.*, that the taxpayer must also be seeking to vindicate a public interest. *See City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805 ¶2 ("[h]e has not shown that he is seeking to vindicate a public interest and therefore does not have standing to bring a taxpayer action under R.C. 733.59").

"In addition to standing authorized by common law, standing may also be conferred by statute." *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 13 N.E.3d 1101, 2014-Ohio-2382 ¶17. But under the clear language of R.C. 733.59, the General Assembly has not imposed the requirement that a taxpayer also demonstrate he or she is seeking to vindicate a public interest

[3] While Mr. MILLER made this precise argument to the First District, this Court issued its decision in *Martens* the day immediately *after* the day on which the First District denied Mr. MILLER's application for reconsideration. Thus, there is no procedural mechanism by which Mr. MILLER can now call to the attention of the First District this latest pronouncement by this Court on the standing requirement under the municipal statutory taxpayer-lawsuit provisions.

In order that the First District or trial court be given the first opportunity to consider and apply this standard, this Court should consider accepting this appeal, and summarily vacating the judgment of the First District and remanding the case with instructions to consider the pronouncement of this Court in *Martens*. *See Epcon Cmtys. Franchising, L.L.C. v. Wilcox Dev. Grp., L.L.C.*, __ Ohio St.3d __, __ N.E.3d __, 2024-Ohio-4989 ¶24 ("[r]ather than decide the issue in the first instance, we reverse and vacate the judgments of the courts below and remand the case to the trial court for it to consider whether a contribution claim is available to Epcon under R.C. 2307.25(A) and the other arguments for dismissal asserted below").

in order to have standing under an action brough pursuant thereto.[4] "[T]he proper role of a court is to construe a statute as written without adding criteria not supported by the text." *State v. Taylor*, 161 Ohio St.3d 319, 163 N.E.3d 486, 2020-Ohio-3514 ¶9. Yet, by adding to the standing requirements that a taxpayer proceeding under the municipal statutory taxpayer-lawsuit provisions (R.C. 733.56 *et seq.*) must also be vindicating a public interest/public right, the First District has imposed an additional criterium not support by the text of the statute.

In support of imposing this extra-statutory requirement to the standing requirements for a taxpayer bring a municipal statutory taxpayer lawsuit, the First District relied upon a few cases from this Court which characterized a "taxpayer" under R.C. 733.59 to be limited and constrained only to one is who "is an individual who volunteers to 'enforce a right of action on behalf of and for the benefit of the public.'" *City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805 ¶21 (quoting *Ohioans for Concealed Carry, Inc v. City of Columbus*, 164 Ohio St. 3d 291, 172 N.E.3d 935, 2020-Ohio-6724 ¶23 (quoting State ex rel. White v. Cleveland, 34 Ohio St. 2d 37, 40, 295 N.E.2d 665 (quoting *State ex rel. Nimon v. Springdale*, 6 Ohio St.2d 1, 215 N.E.2d 592 (1966)(syllabus ¶2)))). But the imposition of such an additional requirement upon a taxpayer

[4] The lengthy history of statutory taxpayer actions provides that the existence of a public benefit/public interest goes to the discretion of a court in awarding attorney fees at the end of the case pursuant to R.C. 733.61, not a *sine qua non* for the standing of the taxpayer at the outset of the case. *See Billington v. Cotner*, 37 Ohio St.2d 17, 305 N.E.2d 805 (1974)(syllabus ¶l)("a prerequisite to the allowance of attorney fees in a taxpayer's action is the bestowal of a benefit upon the public through the efforts of the taxpayer"); *State ex rel. Committee for Charter Amendment Petition v. Avon*, 81 Ohio St.3d 590, 693 N.E.2d 205 (1998)(in an municipal statutory taxpayer lawsuit, "[a]n award [of attorney fees] requires a public benefit"); *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 58, 641 N.E.2d 1075 (1994)("[t]he allowance of attorney fees in a taxpayer action requires a resultant public benefit"). If a public benefit/public interest is a *sine qua non* for bringing a statutory taxpayer action in the first instance, then, *a fortiori*, it would be a non-issue by the time the case had progressed to awarding attorney fees. But caselaw of this Court considers the public benefit/public interest at the end of a case when the issue is whether attorney fees should be awarded, not at the outset of the case in a standing analysis.

seeking to proceed under R.C. 733.59 has no basis in the language of the statute itself nor in other precedent of this Court spanning the 150 years in which the municipal statutory taxpayer-lawsuit provisions have been on the books. *See Martens*, __ Ohio St.3d __, __ N.E.3d __, 2024-Ohio-5667 ¶24 ("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. Ohio has recognized such actions for over 150 years").

In 1860, the Ohio General Assembly enacted, in language very similar to that which is codified today at R.C. 733.56 *et seq.*, the first statute that provided for municipal taxpayer's actions. *See* 57 Ohio Laws 16, 18 (1860). And since that time, this Court has repeatedly recognized the broad array of municipal actions that may by challenged through taxpayer lawsuits and the standing of taxpayers who simply needed to comply with the explicit language of the statute. For example, in *Parks v. Cleveland Ry. Co*., 124 Ohio St. 79, 177 N.E. 28 (1931), this Court addressed and resolved a standing challenge comparable to that in the present case:

> First of all, a procedural question is submitted. The railway company challenges the right of a taxpayer to bring this suit under and by virtue of Section 4314, General Code.…
> …
> We are of the opinion that *the legislative intent* is not to be narrowed to the mere matter of waste or unlawful diversion, but *that the statute was intended* to cover the execution or performance of *ultra vires* contracts by municipal officers, and *to prevent usurpation by public bodies or agents of powers not granted, the exercise of which may imperil the public interest*. The statute, being remedial in nature, should be construed liberally.

Id. at 85-86 (emphasis added); *accord Butler v. Karb*, 96 Ohio St. 472, 485-86, 117 N.E. 953 (1917)("it is urged that the plaintiff is not a proper party to make such complaint, and that it not appearing that he suffers any injury by reason of the wrongful practices charged, he cannot maintain the action. We think that contention is unsound…. If upon the request of a taxpayer the city solicitor refuses to institute the action, the taxpayer may do so by virtue of [statutory

provisions]. He then represents the public just as would the solicitor had [the solicitor] exercised the power conferred upon him and brought the suit"); *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, 384, 49 N.E. 335 (1898)(taxpayer could maintain action challenging proceedings of city council to issue and sell bonds as a means of raising funds; "the abuse of corporate powers within the purview of the statute, includes an unauthorized or unlawful exercise of the powers possessed by the corporation, as well as the assumption of powers not conferred. We have not considered the question whether the plaintiff, as a taxpayer, independent of the statute, might not maintain the action, for we think it was authorized by the statute to bring the suit, and is entitled to the injunction prayed for"). Such cases are consistent with the clear and unambiguous language of the municipal statutory taxpayer-lawsuit provisions (R.C. 733.56 *et seq.*), as this Court just recognized in *Martens* and which Mr. MILLER clearly satisfied in this case.

The selective imposition of the extra-statutory requirement to the municipal statutory taxpayer-lawsuit provisions that a taxpayer must also be vindicating a public interest/public right in order to have standing is a recent phenomenon in the over 150-year history of the municipal statutory taxpayer-lawsuit provisions. The genesis of such an extra-statutory requirement was this Court's decision in *Nimon* in which, instead of utilizing the plain and ordinary meaning of "taxpayer", *see State ex rel. Mobley v. Franklin Cty. Bd. of Comm'rs*, 173 Ohio St. 3d 568, 231 N.E.3d 1146, 2023-Ohio-3993 ¶10 ("[w]hen a statute does not define the words used in the statute, we give them their plain and ordinary meaning"), this Court described a "'taxpayer,' as used in Section 733.59" as contemplating and including any person who "volunteers to enforce a right of action on behalf of and for the benefit of the public." *Id.* (syllabus ¶2). From that non-dictionary definition of "taxpayer", certain cases have now constrained municipal statutory taxpayer lawsuits only to those lawsuits involving a public interest/public right. And certain appellate courts have

now, premised upon such extra-statutory requirement, precluded taxpayer lawsuits even when there is a public interest involved because the taxpayer also has a private interest in the lawsuit. *See Home Builders Ass'n of Dayton v. Lebanon*, 167 Ohio App.3d 247, 854 N.E.2d 1097, 2006-Ohio-595 ¶¶53-54 (12th Dist.)(even though there was "some consequential public benefit" to taxpayer lawsuit, including a "general benefit to the public in preventing the city from enforcing an unconstitutional ordinance," taxpayer still lacked standing because "[t]he rights sought to be enforced by the [taxpayers] were essentially private in nature"). But such an ever narrowing and constraining of the standing of taxpayers to bring municipal statutory taxpayer lawsuits as provided for under R.C. 733.59 not only is contrary to the directive of this Court that the municipal statutory taxpayer-lawsuit provisions are "remedial statutes" which, thus, must be "liberally construed," *Parks*, 124 Ohio St. 79 (syllabus ¶1), but also contrary to the intent of the General Assembly as demonstrated in the explicit language of R.C. 733.59 and long-standing precedent of this Court. *Cf. Brauer v. Cleveland*, 7 Ohio St. 2d 94, 95-96, 218 N.E.2d 599 (1966)(even though "the rights protected were private rights as opposed to public rights [as] []the action [was] filed was primarily for the benefit of the plaintiff's own interests," statutory taxpayer lawsuit properly brought and proceeded to trial on the merits); *Parks*, 124 Ohio St. at 85-86 (taxpayer had standing to bring suit consistent with requirements set forth in the statute); *Butler*, 96 Ohio St. at 485-86 (even though taxpayer did not "suffer[] any injury by reason of the wrongful practices charged," taxpayer still had standing to bring municipal statutory taxpayer lawsuit as the city solicitor refused request to initiate the action); *Elyria Gas & Water*, 57 Ohio St. at 384. The result of the imposition of this extra-statutory requirement for standing under the municipal statutory taxpayer-lawsuit provisions has been confusion, direct conflicts with clear precedent of this Court, uncertainty in the realm of

statutory taxpayer lawsuit and, most significant, a negating of the legislative intent in enacting the municipal statutory taxpayer-lawsuit provisions over 150 years ago.

In recent years, this Court has properly refocused upon its obligation to construe statutes as written and to not impose extra-statutory requirements. Even in instances when some recent precedent of this Court may have wandered outside the plain language of a statute, this Court has ultimately returned proper statutory construction, *i.e.*, to apply as statute as written so as to effectuate the intent of the General Assembly. *See Stingray Pressure Pumping, L.L.C. v. Harris*, 172 Ohio St. 3d 130, 222 N.E.3d 597, 2023-Ohio-2598 ¶20 ("[i]t is true that in the past we have sometimes said that tax exemptions must be construed against the taxpayer. But such statements are in tension with our often-expressed commitment to apply the plain and ordinary meaning of statutory text" (internal citations omitted)). With respect to the municipal statutory taxpayer-lawsuit provisions, as recently acknowledged by this Court in *Martens*, a taxpayer may file an action on "behalf of a municipal corporation" if the city solicitor fails to pursue a lawsuit after a written request from the taxpayer and, 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.

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 by the city council vindicates the public interest and/or provides a public benefit.**

Even if the vindication of the public interest or providing a public benefit is a *sine qua non* before a taxpayer has standing to proceed under the municipal statutory taxpayer-lawsuit provisions, when a statutory taxpayer lawsuit is brought to challenge the action of a city council

assuming and exercising a power the people did not grant it through the city charter, a public interest/public benefit is certainly being asserted and advanced.[5]

As developed more fully above, in our constitutionally-based governments, nothing is more fundamental of a public right and for a public benefit than ensuring the institutions of government limit the exercise of power only to those powers granted to them by the people. Thus, in *City of Cincinnati v. State*, 2022-Ohio-1019 (1st Dist.), a taxpayer could properly bring an action under R.C. 733.59 and seek injunctive relief so as to restrain a municipal officer to exercising only those powers such officer possessed under the municipal charter. Similarly, in *State ex rel. Cater v. City of N. Olmsted*, 69 Ohio St. 3d 315, 631 N.E.2d 1048 (1994), this Court concluded that asserting "the public's right to the services of a public official who is purportedly performing in accordance with charter provisions" represents "action taken on behalf of the public, and is a sufficient basis upon which to institute a taxpayer action." *Id.* at 324. Essentially, that is the same in this case as Mr. MILLER is simply asserting the public's right to the services of a public body, *i.e.*, the Cincinnati City Council, and to ensuring that such services and its actions are undertaken in accordance with (but not beyond) provisions of the Cincinnati City Charter.

"No ordinance [adopted by a city council] can conflict with the provisions of a city charter and be effective." *Reed v. Youngstown*, 173 Ohio St. 265, 181 N.E.2d 700 (1962)(syllabus ¶2). Thus, as in this case, when a municipal statutory taxpayer lawsuit claims an ordinance adopted by a city council conflicts with a provision of the city charter, *i.e.*, the "constitution" of the city, such

[5] It should be noted that, in those cases imposing the extra-statutory requirement of a public benefit/public interest before a taxpayer has standing under the municipal statutory taxpayer-lawsuit provisions, none of the cases provide any clarity or standards by which litigants and the courts can determine what constitutes a public benefit/public interest. Instead, a public benefit/public interest is often pronounced by a court in a conclusory, *ad hoc* and *ipse dixit* pronouncement. Such a standardless methodology does not advance nor is consistent with the principle that the law should provide clarity and predictability.

ordinance is void, *i.e.*, of no legal effect, and the public interest is clearly being served and advanced when a taxpayer challenges such illegal action by the city council under the municipal statutory taxpayer-lawsuit provisions.

CONCLUSION

Based upon the foregoing, this case involves a matter concerning fundamental public interests that go to the core of our representative government. It is a basic principle of our republic that governmental officials and bodies are limited to exercising only those powers granted to them by the people through the adoption of the organic document of the respective government, be it a constitution or a city charter. And, in this appeal, the more narrow legal question presently before the Court goes to whether the taxpayers of a city have any redress in the courts pursuant to the municipal statutory taxpayer-lawsuit provisions when a city council abuses the corporate powers by engaging in actions in violation of the city charter, or must such taxpayers sit passively without legal recourse so that such illegal actions continue unabated and *ad infinitum*, free from judicial review or accountability. As this case raises a matter of public interest and/or great general interest, indeed those that are fundamental and critical to our whole form of governance, this Court should accept jurisdiction on the issues set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served via email on the 6th day of December 2024, upon the following counsel of record:

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APPENDIX

Judgment Entry, Hamilton County Court of Appeals,
First Appellate District, Case No. C-23-0683 (October 4, 2024)

Opinion, *City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805
Hamilton County Court of Appeals, First Appellate District,
Case No. C-23-0683 (October 4, 2024)

Entry Denying Application for Reconsideration, Hamilton County Court of Appeals,
First Appellate District, Case No. C-23-0683 (December 4, 2024)