

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO  
COLUMBUS, OHIO**

**STATE EX REL. GARY D. ZEIGLER,  
STARK COUNTY TREASURER.**

**CASE NO. 10-1570**

**Relator,**

**ORIGINAL ACTION IN  
QUO WARRANTO**

**-vs-**

**JAIME ALLBRITAIN,  
ACTING STARK COUNTY TREASURER,**

**Respondent.**

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**RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

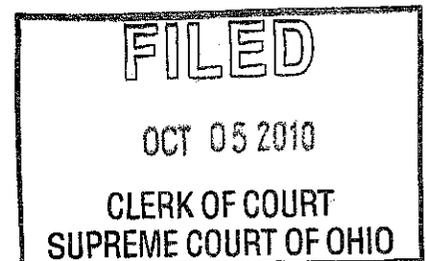
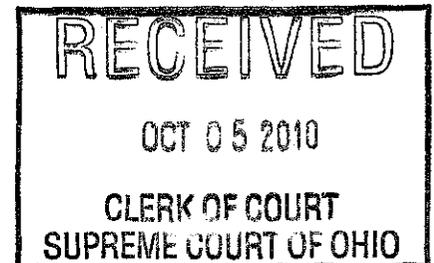
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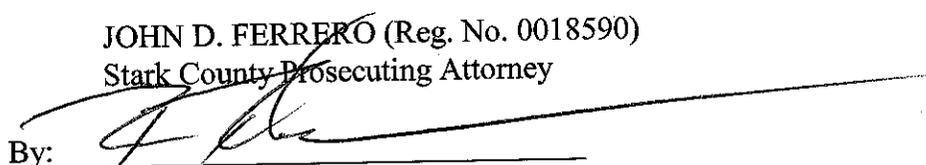
Respondent.

Respondent, the former acting treasurer of Stark County, Ohio, hereby moves this Court pursuant to S.Ct.Prac.R. X, §5 and Civ.R. 12(C), for an order dismissing this action on the grounds set forth in the accompanying memorandum.

Respectfully submitted,

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## MEMORANDUM

### Statement of the Case

Relator Gary D. Zeigler has brought an action in quo warranto pursuant to R.C. 2733.06, alleging that the statutory provisions by which he was removed as treasurer of Stark County, R.C. §§ 321.37 and 321.38, are facially and irremediably unconstitutional as being clearly incompatible and irreconcilable with Article II, §38 of the Ohio Constitution.

This controversy began when it was discovered on or around March 30, 2009 that Vincent J. Frustaci, the Chief Deputy Treasurer in the office of Stark County Treasurer Gary D. Zeigler – Relator herein – had stolen a large sum of money from the Stark County treasury. See Affidavit of Gary Zeigler sworn to August 13, 2010, at ¶3 (attached to Respondent's Answer as part of Exhibit B, at p. B-100). After extensive examination by the Ohio Auditor of State, it was determined that Mr. Frustaci had stolen \$2,734,560 in public monies, and had illegally cashed checks in the amount of \$230,000, for a total theft of \$2,964,560, and a finding for recovery was duly issued. A copy of the Audit Report, issued and filed on June 25, 2010, is attached to Respondent's Answer as part of Exhibit B, at p. B-67.

On July 26, 2010, acting pursuant to R.C. 321.37, the Stark County Auditor demanded that John D. Ferrero, Stark County Prosecuting Attorney, institute suit against Relator and his sureties. A copy of said demand letter is attached to Respondent's Answer as part of Exhibit B, at p. B-84.

After making demand on Relator by letter dated July 27, 2010 (attached to Respondent's Answer as part of Exhibit B, at p. B-85), the prosecuting attorney instituted said suit against

Relator, Stark County Case No. 2010-CV-02773, grounded on R.C. 321.37 and other statutory and common law claims (the "Recoupment Action"). A copy of the complaint in the Recoupment Action is attached to Respondent's Answer as Exhibit A.

Acting pursuant to R.C. 321.38, the Stark County Board of County Commissioners (the "Board") gave notice of a special meeting and hearing to consider the status of the treasurer's office in light of the Recoupment Action. Copies of that notice and subsequent notices are attached to Respondent's Answer as part of Exhibit B, at p. B-95-99.

In response to the Recoupment Action, Relator commenced an action for declaratory judgment and injunction, seeking a declaration that R.C. 321.38 – a companion statute to R.C. 321.37 – was unconstitutional on its face as violative of Ohio Const. Art. II, § 38; and further seeking to restrain the Stark County Board of County Commissioners from acting pursuant thereto to remove him from office. On August 23, 2010, the trial court issued an order upholding the constitutionality of R.C. 321.37 and 321.38, and denying Relator's request for a preliminary injunction. A copy of said court order is attached to Respondent's Answer as part of Exhibit B, at p. B-58.

Also on August 23, 2010, the Board held a public hearing pursuant to notice. By letter from counsel, Respondent declined to participate in that hearing. A copy of said letter is attached to Respondent's Answer as part of Exhibit B, at p. B-57. That hearing concluded with the Board adopting a resolution removing Relator as Stark County Treasurer, and appointing Respondent to temporarily fill the vacancy. A transcript of the hearing is attached to Respondent's Answer as Exhibit B.

Relator has appealed the trial court's order denying him declaratory and injunctive relief

(see Respondent's Answer at ¶¶22-28), which appeal is presently pending before the Fifth District Court of Appeals, Stark County. Relator has *not* appealed from the action of the Board removing him as county treasurer, and the time for such appeal has passed.

Finally, on September 20, 2010, Kenneth N. Koher duly qualified as Stark County Treasurer to succeed Respondent, so that Respondent no longer holds that office.

As set forth below, based on the pleadings herein Respondent is entitled to judgment dismissing this action and denying the writ of quo warranto.

### **Standard of Review**

A motion for judgment on the pleadings under Civ.R. 12(C) is specifically for resolving questions of law. *State ex rel Midwest Pride IV v. Pontious* (1996), 75 Ohio St.3d 565, 569-570, 664 N.E.2d 932. Dismissal is appropriate where a court 1) construes the material allegations in the action, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and 2) finds beyond doubt that the plaintiff could prove no set of facts in support of the claim that would warrant relief. *Id.*

As discussed below, the allegations of the pleadings in this Action, and the propositions of law upon which they are founded, establish beyond doubt that Relator cannot prove any set of facts in this matter that support his contention that a board of county commissioners is without power to remove a county treasurer pursuant to R.C. 321.37 and 321.38, or that such statutory provisions can never be reconciled with Art. II, §38 of the Ohio Constitution.

## Argument

### **I. RELATOR HAS AN ADEQUATE REMEDY BY WAY OF APPEAL FROM AN ADVERSE RESULT IN HIS ACTION FOR DECLARATORY JUDGMENT, FILED ON AUGUST 17, 2010; AND ALSO BY WAY OF APPEAL FROM THE ADMINISTRATIVE ACTION OF THE BOARD OF COUNTY COMMISSIONERS ON AUGUST 23, 2010.**

Quo warranto will not issue to oust a claimed usurper where the complaining party has a remedy by way of appeal. *State ex rel. Jackson v. Allen*, 65 Ohio St.3d 37, 599 N.E.2d 696, 1992-Ohio-27. In *Jackson*, a defendant sought to challenge the appointment of a special prosecutor by way of a motion to dismiss the indictment, which motion was denied, and then filed his action in quo warranto seeking the same relief. This Court found that the available avenue of an appeal of the dismissal motion precluded issuance of the writ of quo warranto, citing *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d 1, 5, 476 N.E.2d 1019 (allowing extraordinary writ only because administrative appeal was not available).

In the present case, Relator in fact has two independent avenues of appeal by which he can challenge, or could have challenged, the constitutionality of the statutory removal proceedings pursuant to R.C. 321.37 and 321.38. The first avenue is by way of an appeal from an adverse result in his Declaratory Judgment Action that R.C. § 321.37 and .38 are unconstitutional – which is the same position asserted herein. Thus, Relator initially filed his Declaratory Judgment Action on August 17, 2010, in the Court of Common Pleas. That action sought a declaration that R.C. 321.38 was in conflict with Ohio Const. Art. II, § 38 and therefore void; and sought an injunction preventing the Board from holding any hearing that might lead to his removal. Relator's motion for a preliminary injunction was denied by order issued August

23, 2010, and Relator filed a Notice of Appeal from that order in the Fifth District Court of Appeals on August 27, 2010, Stark App. No. 2010-CA-00244. That appeal was pending even as Relator commenced the instant quo warranto action, and it is pending still. Consequently, Relator has a remedy by way of appeal, and so the writ of quo warranto should be denied.

Relator's second avenue of appeal is by way of administrative appeal from the action of the Board, taken on August 23, 2010, removing him from office. The Board's action, taken after the hearing held on August 23, 2010, was journalized and served on Relator on August 26, 2010. Accordingly, unlike the situation in *State ex rel. Hanley v. Roberts*, supra, in which the administrative action was never journalized, here Relator was presented with a final order of the Board which plainly could have been appealed to the Court of Common Pleas pursuant to R.C. Chap. 2506. See *State ex rel. Fogle v. Village of Carlisle*, 99 Ohio St.3d 46, 788 N.E.2d 1060, 2003-Ohio-2460 (adequate remedy at law where former police sergeant had available civil service appeal).

By either appeal avenue, Relator had available to him regular opportunities to appeal (eventually to this Court) on the same issues of law and fact that are presented by this action in quo warranto. Indeed, Relator is seeking from this Court a ruling on the constitutionality of R.C. 321.37 and 321.38 at the very same time he has invoked the jurisdiction of the Court of Appeals on the same issue. Accordingly, Relator is not entitled to the extraordinary writ of quo warranto.

**II. RELATOR IS BARRED BY RES JUDICATA FROM RELITIGATING THE MATTERS FINALLY DETERMINED AGAINST HIM IN ADMINISTRATIVE PROCEEDINGS BEFORE THE BOARD OF COUNTY COMMISSIONERS.**

As set forth above, Relator had available an administrative appeal pursuant to R.C. Chap. 2506. from the action of the Board removing him as county treasurer, but he has failed to take such an appeal and the time for such an appeal has expired. Accordingly, Relator cannot now collaterally attack the determination of the Board at a time when that action is final. *State ex rel. Meacham v. Preston* (1932), 126 Ohio St. 1, 183 N.E. 777 (final judgment on the merits in prior suit for injunction was a bar to subsequent action in quo warranto).

It is no answer that Relator intentionally failed to take part in the proceeding before the Board, and therefore declined to avail himself of the opportunity to present evidence and argument to the Board. Although the constitutionality of R.C. 321.37 and 321.38 could not be determined by the Board, the issue of constitutionality could have been raised by Relator on an appeal from the Board's action. See *Mobil Oil Corp v. City of Rocky River* (1974), 38 Ohio St.2d 23, 26, 309 N.E.2d 900 (constitutionality of zoning ordinance, not subject to attack before the BZA, may be challenged in common pleas court on administrative appeal). Accordingly, the finality and preclusive effect of the action of the Board in removing Relator as county treasurer is res judicata.

**III. RESPONDENT ALLBRITAIN'S TEMPORARY APPOINTMENT PURSUANT TO R.C. 305.02(F) EXPIRED UPON THE APPOINTMENT OF A PERSON AS INTERIM TREASURER PURSUANT TO R.C. 305.02(C), AND SO THE PRESENT ACTION IS MOOT AS AGAINST RESPONDENT AND FAILS TO JOIN A NECESSARY PARTY AS AGAINST HER SUCCESSOR.**

Quo warranto is an action against a person, not against an office. R.C. 2733.01(A). It is not timely where no person has yet been appointed to the office, *City of Parma v. City of Cleveland* (1984), 9 Ohio St.3d 109, 111-112, 459 N.E.2d 1176; nor where the sought-after term of office has expired, *State ex rel. Paluf v. Feneli* (8<sup>th</sup> Dist. 1995), 100 Ohio App.3d 461, 654 N.E.2d 360. Accordingly, it appears that quo warranto would not lie against a person who no longer claims to hold the subject office.

Relator alleges that Respondent Jaime Allbritain was appointed county treasurer by the Board on August 23, 2010. The Revised Code provides, at § 305.02(F), that upon a vacancy in the office of county treasurer, “[t]he board of county commissioners may appoint a person to hold [that office] as an acting officer and to perform the duties thereof between the occurrence of the vacancy and the time when the officer appointed by the central committee qualifies and takes the office.” The further appointment by the central committee required by this provision, R.C. 305.02(B) through (E), was made in accordance therewith, and the central committee’s appointee, Kenneth N. Koher, was duly appointed acting treasurer and qualified for the office on September 20, 2010. Consequently, Respondent Allbritain is not and does not claim to be Stark County Treasurer and so the writ of quo warranto should be denied.

**IV. RELATOR’S CLAIM THAT CONST. ART. II, § 38 REQUIRES FACIAL CONFORMITY MUST FAIL ON THE AUTHORITY OF *STEBBINS V. RHODES*. RELATOR WAS REMOVED FOR CAUSE UPON COMPLAINT AND AFTER NOTICE AND HEARING, AND SO WAS FULLY ACCORDED HIS RIGHTS WITH REGARD TO ARTICLE II, SECTION 38 OF THE OHIO CONSTITUTION.**

- A. Article II, section 38 of the Ohio Constitution requires due process, not a formulation of words, and a statute will not be declared unconstitutional where a complainant is fully accorded his rights thereunder.**

“Our inquiry begins with a fundamental understanding: a statute enacted in Ohio is presumed to be constitutional.” *State v. Ferguson*, 120 Ohio St.3d 7, 9, 896 N.E.2d 110, 2008-Ohio-4824 ¶ 12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161, 224 N.E.2d 906. “[E]very reasonable presumption will be made in favor of its validity. Accordingly, any doubt as to constitutionality is resolved in favor of the validity of the statute.” *State ex rel. Haylett v. Ohio Bur. of Workers Comp.*, 87 Ohio St.3d 325, 328, 720 N.E.2d 901, 1999-Ohio-134 (citations omitted). The party seeking to overcome this presumption of validity must show a clear constitutional infirmity beyond a reasonable doubt. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147, 128 N.E.2d 59. Because Relator cannot meet this burden, his challenge must be rejected.

This Court has held that Const. Art. II, § 38 requires the substance of due process notice and opportunity to be heard, but does not dictate the form of any removal proceeding. In the case of *Stebbins v. Rhodes* (1978), 56 Ohio St.2d 239, 242, 383 N.E.2d 605, 10 O.O.3d 387, the governor sought to remove a member of the Industrial Commission of Ohio pursuant to R.C. 3.04, which provides for the removal of a gubernatorial appointee with the advice and consent of

the senate on the basis of inefficiency or dereliction in the discharge of the appointee's duties, but which does not make express provision for any complaint or hearing.<sup>1</sup>

This Court found no constitutional error, as follows:

Appellant urges primarily that R.C. 3.04 must be struck down because it fails to explicitly provide that actions for removal shall be upon complaint and hearing ....

We decline to reach appellant's contention concerning constitutional due process because the record unequivocally establishes that he was fully accorded his rights in that regard. Appellant was removed for cause upon complaint and after notice and hearing, and he was not prejudiced by that which he argues is a flaw in the statute.

*Stebbins*, 55 Ohio St.2d at 242. Accordingly, Relator's argument that R.C. 321.38 is irremediably void on its face solely because the legislature did not use the words "complaint" and "hearing" is without merit. Article II, § 38 of the Ohio Constitution provides for notice in the form of a complaint, and a hearing, and any removal proceeding providing that type of due process is fully constitutional. See *Cleveland Bd. of Education v. Loudermill* (1985), 470 U.S. 532 (constitutional due process requirements of notice and opportunity for hearing would be read into statute, but statute would not be declared void on its face for failure to so specify).

In the present case, shortly after the Recoupment Action was filed, the Board set meeting times "[t]o consider the status of the Treasurer's Office in light of pending action by the Stark

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<sup>1</sup>Section 3.04 provided, in pertinent part, that "an officer who holds his office by appointment of the governor with the advice and consent of the senate may be removed from office by the governor with the advice and consent of the senate, if it is found that such officer is inefficient or derelict in the discharge of his duties, if the ethics commission ... has found, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitutes a violation of Chapter 102 of the Revised Code, if the officer fails to file or falsely files a statement, required by section 102.02 of the Revised Code, or if it is found that he has used his office corruptly." *Stebbins*, 56 Ohio St.2d at 242 n.

County Prosecutor pursuant to ORC § 321.37,” and these notices were delivered to Relator. Copies of the notices of the August 2 and August 12 scheduled meetings are attached to Respondent’s Answer as part of Exhibit B, at B-84-85. On August 18, 2010, the Board adopted a formal and detailed recitation of the legal basis for the hearing to be held on August 23, 2010, and the matters to be considered at that hearing. *Id.* at B-88, 95-96. The August 18 resolution and notice makes explicit what was previously implied – that a “consideration” of the Treasurer’s Office in light of the filing of the complaint pursuant to R.C. § 321.37 would be by way of a hearing at which Relator would be entitled to appear, with or without counsel. Under the broadest view of Relator’s “rights,” he is not entitled to more than this.

Thus, it appears plainly that the Board always intended to give Relator more than the due process protections enunciated by the U.S. Supreme Court in *Loudermill* or this Court in *Stebbins*. The transcript of the hearing held on August 23, 2010 shows that the Board duly considered all of the circumstances of Relator’s failure to account for the county funds in his custody, and after due deliberation exercised their authority to remove the treasurer. Their procedure fully comported with the due process requirements of Ohio Const. Art. II, § 38. Accordingly, “the record unequivocally establishes that [Relator] was fully accorded his rights” and that he “was removed for cause upon complaint and after notice and hearing, and he was not prejudiced by that which he argues is a flaw in the statute.” *Stebbins*, 55 Ohio St.2d at 242.

**B. The statutory scheme of R.C. 321.37 and 321.38, providing for removal of a county treasurer upon institution of suit followed by deliberation of the county commissioners does not conflict with the Ohio Constitution.**

Relator relies heavily on the case of *State ex rel. Hoel v. Brown* (1922), 105 Ohio St. 479, 138 N.E. 230. However, that case examined a very different statutory scheme than the law in effect today and at issue in this action. The present statutory scheme for removal of a county treasurer for failure to account for public money dates from 1951, when the legislature enacted Revised Statutes §§1126 and 1127. Even a cursory examination of the changes made by the legislature show that the Supreme Court's concerns as expressed in *Brown* were addressed very specifically:

Prior law, R.S. §2713

On examination of the county treasury, if it appears by the report of the examiner or examiners that an embezzlement has been committed by the county treasurer, the county commissioners shall forthwith remove the treasurer from office, and appoint some person to fill the vacancy thereby created. The person so appointed shall give bond, and take the oath of office prescribed for county treasurers.

Current law, R.C. §§321.37 & 321.38

321.37 If the county treasurer fails to make a settlement or to pay over money as prescribed by law, the county auditor or board of county commissioners shall cause suit to be instituted against such treasurer and his surety or sureties for the amount due, with ten per cent penalty on such amount, which suit shall have precedence over all other civil business.

321.38 Immediately on the institution of the suit mentioned in section 321.37 of the Revised Code, the board of county commissioners may remove such county treasurer and appoint some person to fill the vacancy created. The person so appointed shall give bond and take the oath of office prescribed for treasurers.

The *Brown* Court first found the prior law deficient because there was no provision for a complaint. However, whereas the prior law was triggered by “the report of the examiner or examiners” (former R.S. § 2713), the present law is triggered by “the institution of the suit mentioned in section 321.37 of the Revised Code” (R.C. § 321.38). Institution of a suit “against such treasurer and his surety or sureties” (R.C. § 321.37) must, of course, be accomplished by the filing of a complaint. Civ.R. 3(A) (“A civil action is commenced by filing a complaint with the court”). Consequently, the present scheme cannot be invoked or utilized except upon complaint, and therefore complies with Ohio Const. Art. II, sec. 38.

The *Brown* Court next found the prior law deficient because there was no provision for a hearing. However, whereas the prior law directed that “the county commissioners shall forthwith remove the treasurer from office” (former R.S. § 2713), the present law allows such removal only upon institution of suit. (R.C. § 321.38).

Additionally, the current version of the statute allows for discretion by the Board. “In statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.” *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, syllabus par. 1, 271 N.E.2d 834. Thus, R.C. § 321.38 merely gives the Board of Commissioners the permission to remove the treasurer at their discretion once suit has been filed on the treasurer’s bond pursuant to R.C. § 321.37. It does not, as Relator contends, make such a removal automatic. Further, the fact that the removal is discretionary, rather than mandatory, implies that the board must engage in some form of deliberative process in order to take action under R.C. § 321.38.

The board's proceedings in this regard are quasi-judicial in nature, not legislative and not ministerial. See *State ex rel. Bowman v. Bd. of Comm'rs of Allen County* (1931), 124 Ohio St. 174, 190, 177 N.E. 271; *Lima v. McBride* (1878), 34 Ohio St. 338, 349 ("The proceedings of the board are, in many respects, those of a court of special and inferior jurisdiction."). Consequently, the present scheme permits a hearing, and therefore complies with Ohio Const. Art. II, sec. 38. Accordingly, *Brown* is neither direct authority nor controlling law. *Brown* dealt with an entirely different statute.

It should also be noted that the prior law and the *Brown* decision addressed the question of wrongdoing by the treasurer, specifically embezzlement by the treasurer. Thus, the prior law, R.S. § 2713, was effective "[i]f ... it appears ... that an embezzlement has been committed by the then county treasurer ...." The *Brown* court understandably viewed this as "a condemnation for a crime, followed by a penalty" (*Brown*, 105 Ohio St. at 487). This is also the principal thrust of the constitutional provision, which is addressed to "any misconduct involving moral turpitude or for other cause provided by law" (Ohio Const. Art. II, sec. 38). The present scheme, by contrast, does not require or even contemplate any finding of moral turpitude or embezzlement or any other human failing. It purely and simply addresses the bedrock issue of accounting for money: if the county treasurer cannot account for county money, he may be removed - the very facts here. The Board does not allege that Relator embezzled any funds or engaged in any act of malfeasance, but that he failed unequivocally and demonstrably to account for the public money with which he was entrusted. This is sufficient under the statute and sufficient under the Ohio Constitution.

**V. RELATOR HAS NO PROPERTY RIGHT OR INTEREST IN MAINTAINING HIS POSITION AS COUNTY TREASURER, AND THEREFORE HE HAS NO FEDERAL CONSTITUTIONAL CLAIM.**

To the extent Relator's Complaint in quo warranto seeks to raise a more general right of due process, this Court has held that Ohio law does not create any property right or expectation on behalf of elected officials with respect to their tenure in office. In *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 239, 631 N.E.2d 582, the Court held as follows:

We hold that relator's due process argument is totally without merit on the authority of our decisions in *State ex rel. Herbert v. Ferguson* (1944), 142 Ohio St. 496, 27 O.O. 415, 52 N.E.2d 980, and *State ex rel. Trago v. Evans* (1957), 166 Ohio St. 269, 2 O.O.2d 109, 141 N.E.2d 665. In *Herbert*, we defined "public office" as "a charge or trust conferred by public authority for a public purpose, with independent and continuing duties, involving in their performance the exercise of some portion of the sovereign power." *Id.*, 142 Ohio St. at 501, 27 O.O. at 417, 52 N.E.2d at 983. In *Trago*, we held that "[p]ublic offices are held neither by grant nor contract, and no person has a vested interest or private right of property in them." *Id.*, quoting, *City of Steubenville v. Culp* (1882), 38 Ohio St. 18, 23.

Accordingly, "[i]n Ohio, the incumbent of an office has no proprietorship, or right of property, therein." *State ex rel. Trago v. Evans* (1957), 166 Ohio St. 269, 274, 141 N.E.2d 665. Where state law does not vest elected officials with an individual right of property in their elected office, the Fourteenth Amendment is not implicated. *Oregon v. Hass* (1975), 420 U.S. 714, 719, 95 S.Ct. 1215, 1219 (state may impose restrictions, but not as a matter of federal constitutional law).

Article II, Section 38 of the Ohio Constitution does not create a property right on behalf of elected officials. The provision makes no mention whatsoever of granting elected officials a property interest in their office. It merely requires the legislature to pass laws which provide for the prompt removal of elected officials upon complaint and hearing. While this requirement may

overlap with Fourteenth Amendment Due Process requirements of notice and opportunity to be heard, it does not grant Fourteenth Amendment protection.

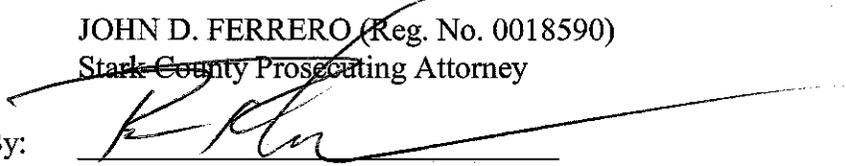
**Conclusion**

For the foregoing reasons, this Court should deny the writ of quo warranto, and grant Respondent's motion for judgment on the pleadings, and dismiss this proceeding.

Respectfully submitted,

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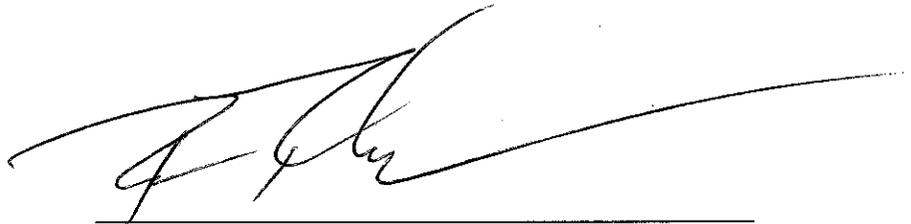
Attorneys for Respondent

**Proof of Service**

I hereby certify that a true copy of the foregoing Respondent's Motion for Judgment on the Pleadings was served this <sup>4th</sup> 1 day of October, 2010, by regular U.S. mail, on the following persons:

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