ORIGINAL

IN THE SUPREME COURT OF OHIO

The State ex rel. Dick Flanagan, Relator, v. David M. Lucas, Respondent.	:	Original Action in Quo Warranto Case No. 13-0239

RESPONDENT, DAVID M. LUCAS',
MOTION FOR JUDGMENT ON THE PLEADINGS
UPON FILING OF FIRST AMENDED COMPLAINT

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Pursuant to S.Ct.Prac.R. 12.04(B) and Civ.R. 12(C), Respondent, David M. Lucas ("Lucas"), by and through counsel, now moves this Honorable Court for an Order granting him judgment on the pleadings based upon the allegations contained in the first amended complaint, deemed filed via this Honorable Court's order of April 24, 2013. The grounds for this motion are set forth more fully in the memorandum in support, which is attached hereto and incorporated as if fully re-written herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION:

On November 6, 2012, Republican David M. Lucas ("Lucas") defeated Democrat Richard "Dick" Flanagan ("Flanagan") 16,859 to 14,209 (54.26% to 45.74%) to become the next Sheriff of Belmont County, Ohio. Earlier, in the March primary, Flanagan challenged and defeated two-term incumbent Sheriff Fred Thompson in the Democratic primary, while Lucas ran unopposed in the Republican primary. Their respective victories on March 7, 2012, set up Belmont County's highest profile race in the 2012 general election.

Both candidates ran upon their law enforcement records and their vision for protecting the people of Belmont County. Flanagan, at all times relevant, was a Lieutenant with the Village of Bellaire, Ohio Police Department. Lucas, meanwhile, was a twenty-six (26) year veteran of the Belmont County Sheriff's Department, having joined the Department as a road deputy in 1981. He took early retirement on October 31, 2007, at the rank of Major, serving from that time forward as a Special or Reserve Deputy Sheriff with duties including firearm certification supervision and special security details. This fact was well known to all concerned, as it was referenced in media reports about Lucas' candidacy as early as December 4, 2011. *Respondent's Exhibit D, p. 2.*

The Lucas/Flanagan race was hard fought but otherwise clean. There were no personal attacks. No harsh television ads. There were no complaints filed with the Ohio Elections Commission during the campaign. There were no pre-election protests. There was no prohibition action filed against the Belmont County Board of Elections ("BOE") seeking to remove either candidate from the ballot, and Flanagan did not file a post-election contest petition filed pursuant to R.C. §3515.09.

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As a result, the BOE certified the election results to the Ohio Secretary of State on November 27, 2013, and Lucas took office as Belmont County Sheriff on January 7, 2012, pursuant to R.C. §311.01(A).

II. PROCEDURAL HISTORY:

On February 8, 2013, Flanagan filed an original complaint in quo warranto asserting Lucas now unlawfully occupies the office of Sheriff, with Flanagan alleging Lucas failed to meet all qualification requirements set forth in R.C. §311.01(B).[1]

Lucas was served via certified mail on February 14, 2013, and filed his answer concurrently with a motion for judgment on the pleadings. On March 8, 2013, Flanagan filed a memorandum in opposition to the motion for judgment on the pleadings. The memorandum included exhibits not attached to the original complaint. The inclusion of the additional exhibits prompted Lucas to file a motion to strike on March 14, 2013. Thereafter, Flanagan filed a memorandum opposing the motion to strike, as well as a motion for leave to amend complaint, on March 18, 2013. Lucas filed a memorandum in opposition to the motion for leave to amend complaint on March 25, 2013.

On April 24, 2013, this Honorable Court granted Flanagan's motion for leave to amend complaint and denied Lucas' motion to strike without comment. In so doing, the Court ordered Lucas to respond to the amended complaint attached to the motion for leave to amend complaint within fourteen (14) days of the Court's entry. In compliance with the Court's April 24, 2013, order, Lucas has again concurrently filed his answer to the amended complaint along with this motion for judgment on the pleadings pursuant to S.Ct.Prac.R. 12.04 and Civ.R. 12(C).

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[1] This action followed the filing of 'letters of protest,' which Flanagan and another non-party resident of Belmont County, Gary Landers, filed with the BOE during the second week of December, 2012. The BOE dismissed the protests at a public meeting on December 17, 2012.

III. STANDARD OF REVIEW

S.Ct.Prac.R. 12.04(B)(1) expressly authorizes a respondent to file a motion for judgment on the pleadings at the same time as his answer is filed. Thereafter, Civ.R. 12(C) governs a motion for judgment on the pleadings. In its entirety, Civ.R. 12(C) states, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." In *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 664 N.E.2d 931 (1996), this Honorable Court provided the appropriate standard of review for a Civ.R. 12(C) motion.

> [T]he standards for Civ.R. 12(B)(6) and (C) motions are similar, (Footnote omitted.) but Civ.R. 12(C) motions are specifically for resolving questions of law, *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166, 63 O.O.2d 262, 264, 297 N.E.2d 113, 117. Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, 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 his claim that would entitle him to relief. (Citation omitted.) Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. (Citation omitted.) *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d at 569-570, 664 N.E.2d at 936.

However, Civ.R. 12(C) permits the Court to consider the complaint and answer, while a Civ.R. 12(B)(6) motion must be judged on the face of the complaint alone. *Id.* at 569.

To establish entitlement to a writ of quo warranto, this Court has held a relator must establish that an office is being unlawfully held and exercised by respondent, and that relator is entitled to the office. *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405; *State ex rel. Varnau, v. Wenninger*, 131 Ohio St.3d 169, 2012-Ohio-224, __ N.E.2d __. However, where a relator fails to establish entitlement to an office in a quo warranto action, judgment may still be rendered on the

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issue of whether the respondent lawfully holds the office. *State ex rel. Meyers v. Brown*, 87 Ohio St.3d 545, 547, 721 N.E.2d 1053 (2000); *State ex rel. Varnau.*

IV. ARGUMENT

A. *Relator's Original Complaint Is Properly Barred Under The Doctrine Of Laches:*

There exists a threshold question of law in this matter relative to the doctrine of laches. The question before the Court is whether the doctrine of laches bars a losing candidate from filing a quo warranto action when the losing candidate actual, or constructive, knowledge of the victor's alleged disqualification prior to the election but failed to act.

i. *Relator Knew of Allegations in December 2011 – And Did Nothing:*

Though Flanagan seeks to use its contents to establish a time-line for Lucas, the amended complaint actually establishes a time-line as to what Flanagan knew (or should have known), when he knew it and (most importantly) what he did not do about it. Specifically, the Court's attention is directed to paragraph 12 of the amended complaint. In summary fashion, paragraph 12 establishes December 2011 through December 2012 as the applicable timeframe for both Flanagan's knowledge and inaction:

> 12. Previous sheriff of Belmont County, Fred Thompson, filed a protest on December 23, 2011 whereby Mr. Thompson specifically notified the Belmont County Board of Elections that Respondent did not meet the statutory qualification of R.C. §311.01(B)(8) and (B)(9). *Additional filings in December, 2012 have been made with the Board of Elections asserting the same* by Gary Landers and Relator but the Belmont county (sic) Board of Elections has ignored its statutory obligation as required by R.C. 3501.11(J) and (K) and has refused to investigate the qualifications of Respondent, David M. Lucas. (Emphasis added.)

From paragraph 12, two (2) things are clear. First, at all times relevant, Flanagan held actual knowledge of the qualification allegations former Sheriff Thompson leveled against Lucas on or about December 23, 2011. This conclusion is further supported because of the media reports relative to Lucas' retirement in 'October 2007,' which were first published on December

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4, 2011, in connection with his candidacy announcement. *Respondent's Exhibit D.* Second, paragraph 12 establishes that the allegations Mr. Gary Landers and Flanagan made to the BOE in December 2012 were 'the same' allegations Sheriff Thompson made against Lucas in December 2011. In other words, there is nothing in Flanagan's original or amended complaint in quo warranto that was not known to him, or should have been known to him, in December 2011 even though the original complaint was filed over a year later on February 8, 2013.

Flanagan's second affidavit, Relator's Exhibit 2, is an obvious attempt to use word-play to conceal his actual knowledge. A close reading of ¶1 of Exhibit 2 illustrates this fact. There, Flanagan states, "I never ***saw*** the complaint filed by former Sheriff Fred Thompson until on or after about the first week of December 2012 after receipt of documents obtained from the Belmont County Board of Elections in response to an open records request." Assuming this assertion is true for purposes of this motion, this statement does not state that Flanagan was without knowledge of Sheriff Thompson's complaint, or without knowledge of the underlying facts (i.e. Lucas' October 2007 retirement) that prompted the challenge. The statement only pertains to the asserted fact that Flanagan did not physically see the actual document Thompson filed with the BOE.

In fairness, until Flanagan secured the Democrat nomination for Sheriff, he was unable to protest Lucas' candidacy. As the Court well knows, R.C. §3513.05 limits those who may lawfully challenge a candidate filing a declaration of candidacy for party nomination or election to office to persons who are members of the same political party and eligible to vote in the primary election, or the controlling committee of that political party. It was for this reason that former Sheriff Thompson's protest was rejected. As a member of the Democrat Party, R.C. §3513.05 barred then-Sheriff Thompson from challenging Republican Lucas' qualifications

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under R.C. §311.01(B). Likewise, as a fellow Democrat, Flanagan was also barred from challenging Lucas prior to the primary election.

However, there were 244 days between the primary election on March 7, 2012, and the November 6, 2012, general election. Once Flanagan secured the Democrat nomination, he held both the right and duty to address the Lucas qualification issue(s) with the utmost diligence, as he knew, or should have known, of them at all times relevant. Actions in either prohibition and/or mandamus were available to Flanagan against the BOE to prevent Lucas' name from appearing on the ballot in November.

Yet, Flanagan took no action at all. As his amended complaint clearly states, Flanagan waited until the second week of December 2012. Only then – nearly a year after Sheriff Thompson first raised the issue and over 270 days after he was nominated - did Flanagan (and Mr. Gary Landers) file letters of protest with the BOE. Stated differently, as his amended complaint lays bare, the first time Flanagan ever questioned the BOE about Lucas' qualifications to run for Sheriff was more than a month after his general election loss and well after the BOE completed its canvass and certified Flanagan's electoral loss pursuant to R.C. §3505.32 and §3505.33.

ii. The Doctrine of Laches in Election-Related Cases v. Quo Warranto:

If permitted to proceed, the factual allegations in Flanagan's complaint will effectively eviscerate this Court's mandate in a long line of election-related cases. This Court has flatly cautioned, "Relators in election cases must exercise the utmost diligence." *State ex rel. Fuller v. Medina Cty. Bd. Of Elections*, 97 Ohio St.3d 221, __2002-Ohio-5922, 778 N.E.2d 37; *Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff,* 101 Ohio St.3d 256, 2004-Ohio-812, 804 N.E.2d 419; *State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88

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Ohio St.3d 187, 724 N.E. 775 (2000); *State ex rel. Varnau*, 131 Ohio St.3d at 172, __ N.E.2d ___.

It is acknowledged that this matter is not an expedited election case, governed by S.Ct.Prac.R. 12.08, though this is most definitely an election-related matter. And, Lucas is mindful of the Court's comments on quo warranto timeliness in *Varnau,* this Court's most recent quo warranto case involving a county sheriff. There, as the Court will recall, the relator in *Varnau* sought a writ of quo warranto to remove a sheriff elected to his third term because of facts that would have allegedly disqualified him from becoming a candidate prior to his first term. This Court denied the writ indicating that to be timely, a writ of quo warranto must be directed to challenge a current term of office rather than an expired one. *State ex rel. Varnau,* at ¶15. In reaching that result, the Court distinguished *State ex rel. Huron Cty. Prosecutor v. Westerhold, 72 Ohio St.3d 392, 650 N.E.2d 463 (1995)* from the facts in *Varnau*, noting that a prosecutor's quo warranto challenge to a veterans service commission appointment 'only' a month and a half after the appointment constituted prompt action. *State ex rel. Varnau*, 131 Ohio St.3d at 172-3, __ N.E.2d ___. Lucas, therefore, is mindful that this action otherwise comports with general requirement that a quo warranto claim must challenge a current term of office. *Zeigler*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶14; *State ex rel. Varnau*, at ¶15.

However, this complaint is distinguishable from *Varnau*, and this fact pattern must give the Court pause to examine the relationship of quo warranto and election-related cases. Here, the Court is faced with a losing candidate who held actual (or at the very least constructive) knowledge of the issues he now raises in quo warranto – but did nothing - for a full year before filing a legal challenge of any kind. In this case, specifically because Flanagan failed to assert a challenge prior to the election when he both could have and should have, the Court cannot

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properly say that, "quo warranto is truly the exclusive remedy by which one's right to hold a public office may be litigated." *State ex rel. Battin v. Bush* (1988), 40 Ohio St.3d 236, 238-239, 533 N.E.2d 301; see also *State ex rel Varnau v. Wenninger,* 128 Ohio St.3d 361, 2011-Ohio-759, 944 N.E.2d 663, ¶ 9.

Flanagan could have, and should have, presented the exact same factual case had he timely sought a writ of prohibition or mandamus against the BOE *prior to* the general election. As will be argued more fully below, allowing Flanagan to wait until after the election results were known to assert his challenge allows this losing candidate to dictate terms, and possible outcomes to his victor, as well as the people of Belmont County.

As a matter of law, and to ensure the utmost diligence, laches must properly bar a losing candidate's quo warranto action where that candidate knew, or should have known, of the (alleged) disqualifying facts sufficiently prior to an election to seek a writ of prohibition and/or mandamus. Without such a requirement, why would any candidate for office, who holds knowledge that his opponent may not possess the statutory qualifications necessary to hold office, ever file an expedited election case and subject themselves to the time, expense, political consequence or laches argument inherent in such an action prior to a general election?

If Flanagan's action is allowed to proceed, this Court will immediately serve as chief political strategist to untold numbers of future candidates who will 'hold their fire' until after an election's results are known. If they are victorious, they will simply assume office without incident. However, if they lose, they will suddenly spring quo warranto upon their victorious opponent, as well as the general public, in an effort overturn the voter's will and take the office through judicial action.

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Importantly, such an extension of the laches doctrine would not have a chilling effect on judicial review of a candidate's qualifications, where necessary. Indeed, such an extension would squarely comport with the General Assembly's determination that a county board of elections undertake the review of a candidate's qualifications for the office of sheriff pursuant to R.C. 311.01(F)(2).

The statutory framework strongly suggests the General Assembly intended for a pre-election challenge via prohibition or mandamus when a challenger holds actual or constructive knowledge of an alleged deficiency in a candidate's qualifications. It is beyond question that all candidates for the position of County Sheriff in Ohio understand and know of the qualification mandates contained in R.C. 311.01(B). Indeed, the statute *requires* a candidate to fully disclose his or her qualifications to the BOE and general public as a condition precedent to their appearance on a primary ballot. In this way, the statue encourages early qualification challenges from either a primary opponent or from a general election opponent. In this way, the statute is designed to ensure not only qualified individuals stand for election for the office of sheriff but the statute also ensures those individuals (and their qualifications) are scrutinized, and challenged if need be, well before their candidacies are put to a public vote.

Of course, quo warranto would remain both appropriate and available to a losing candidate who learns of disqualifying facts only *after* an election or the time for filing prohibition/mandamus has passed. This framework properly positions the extraordinary writ of quo warranto as a true remedy of last resort, rather than one of convenience, choice and advantage as Flanagan now seeks its employment.

Such an extension would also be entirely consistent with this Court's repeated directives to candidates for sheriff in the State of Ohio. As the *Varnau* Court reminded:

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> This result comports with our consistent requirement in election-related cases that relators "act with the utmost diligence." *Blankenship v. Blackwell,* 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 19. "If relators in election cases do not exercise the utmost diligence, laches may bar an action for extraordinary relief" *State ex rel Craig v. Scioto Cty. Bd. of Elections,* 117 Ohio St.3d 158, 2008-Ohio-706, 882 N.E.2d 435, ¶ 11. We have previously held that extraordinary-writ actions challenging a sheriff candidate's R.C. 311.01(B)(9) qualification may be barred by laches. See *Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff,* 101 Ohio St.3d 256, 2004-Ohio-812, 804 N.E.2d 419; *State ex rel Landis v. Morrow Cty. Bd. of Elections* (2000), 88 Ohio St.3d 187, 724 N.E.2d 775.

From the time he became aware of, or should have become aware of, the allegations – which can be pinpointed to the media reports of December 4, 2011, set forth in *Respondent's Exhibit D* - to the time he became the Democrat nominee for sheriff, Flanagan's amended complaint conclusively establishes a delay of over 270 days prior to his *initial* challenge to the BOE's determination, and the amended complaint further conclusively establishes that Flanagan never raised the matter through prohibition or mandamus or even a letter of protest to the BOE prior to the general election. And, yet, Flanagan's amended complaint goes to great lengths to set forth details of the BOE's alleged failure to properly investigate Lucas's qualifications.

Whether his delay in challenging the BOE's determination was the result of Flanagan's hubris that he would not, or could not lose, in November, or whether he simply chose not to do anything for other reasons, the fact remains Flanagan now seeks to overturn an otherwise valid election result upon allegations that both could have, and should have, been raised well prior to the general election via prohibition and/or mandamus.

With this proposition in mind, the Court is respectfully reminded of the elements of laches: 1) an unreasonable delay or lapse of time in asserting a right, 2) the absence of an excuse for the delay, 3) knowledge, actual or constructive, of the injury or wrong, and 4) prejudice to the other party. *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656

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N.E.2d 1277, 1279 (1995); *State ex rel. Superamerica Group v. Licking Cty. Bd. of Elections*, 80 Ohio St.3d 182, 186, 685 N.E.2d 507, 510 (1997).

The applicability of the laches doctrine to the facts set forth in the complaint is undeniable. As this Court oft cites in its expedited election cases, a delay as short as nine (9) days has precluded the Court's consideration of a case's merits. *Paschal v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 141, 656 N.E.2d 1276 (1995). Here, a delay of over 270 days, or 30 times greater, in a non-expedited election case constitutes a grossly unreasonable delay. Moreover, as demonstrated above, Flanagan's amended complaint establishes his actual knowledge, or at the very least his constructive knowledge, of the allegations he now asserts against Lucas, and Flanagan can provide no reasonable excuse for his failure to press his claim over the seven (7)-plus months between his primary victory in March and the general election in November 2012. Thus, the first laches prong is easily satisfied.

As to the second prong, in this era of abundant 'opposition research,' where the facts to support a candidate challenge are readily available and within the public domain, should not an opposing candidate be fundamentally required to undertake his due diligence relative to his opponent's qualifications for office *prior to* the general election? Again, there may be instances where knowledge of such operative fact(s) may be unknowable prior to the general election because of a candidate's active concealment. However, such is clearly not the case in this matter. Here, all of the operable facts were either publicly disclosed via Lucas's candidacy application or were published and in the public domain *prior to* the statutory "Qualification date," as set forth in R.C. §311.01(H)(1). Thus, Flanagan is without a reasonable excuse for his failure to act, thereby satisfying the second laches prong.

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The timeline set forth above easily satisfies the third laches prong. Lucas' retirement was readily announced on December 4, 2011, and former-Sheriff Thompson's BOE challenge was undertaken shortly thereafter in December 2011 asserting allegations identical to those now before the Court through this action. And, Lucas had his candidate qualification application on file with the BOE long before the December 7, 2011, deadline. Thus, there is no question that Flanagan knew, or should have known all the operable facts necessary to assert a challenge equal to the one he now brings before this Honorable Court, thereby satisfying the third laches prong.

Finally, as to the fourth laches prong, there is little question that Lucas has suffered prejudice because of Flanagan's delay, as Lucas has had to run and fund a campaign for office he allegedly may not qualify for, and must now deal with the time and expense associated with defending this matter as the sitting Sheriff of Belmont County, Ohio, with all the pressures and responsibilities that come with that office. Everything before this Court could have, and should have, been brought well before the general election.

There are also a number of public policy interests in such an extension of the laches doctrine. Assume, *arguendo*, that Flanagan prevails. Lucas is removed from office, and Flanagan takes office.[2] In such a scenario, the Court is asked to consider the public harm. First, an otherwise fair and free election is tossed aside, and the majority of Belmont County voters are denied the individual they selected to be their Sheriff all because Flanagan chose not to timely act. Such a result would severely damage voter confidence in the finality of elections in Ohio.

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[2] Though beyond the scope of this motion as it requires additional evidence, Flanagan's own ability to meet the qualification requirement of R.C. §311.01(B)(3) is questionable, as there is a strong likelihood that Flanagan, as a Lieutenant at all times relevant in the Village of Bellaire, Ohio Police Department, violated either, or both, the Hatch Act, 5 U.S.C. §§ 7321-7326 and/or 5 U.S.C. §1501-1508, and/or R.C. §124.57, by becoming a candidate for a partisan election without resigning from the force. As such, he potentially failed to comply with all applicable election laws as R.C. §311.01(B)(3) mandates, which would prohibit him from taking the office he seeks.

Second, there is the fundamental denial of the electoral process. Candidates like Flanagan can effectively deny the public a meaningful choice at the polls if they are not required to bring qualification challenges at the earliest possible opportunity. With an election over, and holding the unassailable right to seek the victor's removal through a quo warranto action which only ripens upon the victor's assumption of office, the losing candidate effectively denies the opposing political party and/or public with the opportunity to find a replacement, or write-in, candidate thereby doing great harm to the integrity of a voter's choice, which the elections process is designed to foster.

Third, there is the destruction of the public's confidence in its elected officials. As in this case, the public is left to wonder, "Who's our sheriff?" The people of Belmont County have heard very public allegations that their newly elected sheriff – a man with twenty-six (26) years of experience with the Belmont County Sheriff's Department – is 'unqualified' to hold the office of Sheriff. This state of 'limbo' damages the office itself, as well as the man who now holds the office under a cloud of doubt. The public has a right to know that the men and women presented to them on a given ballot have met all necessary criteria to run for office, and the winner will serve them in the office they seek, if elected. Candidates like Flanagan seek to usurp the power that naturally flows from the people to their elected representatives, substituting election by judicial ambush for the popular mandate the people refused to grant them.

Fourth, a simple reading of the amended complaint clearly indicates Flanagan's true target is the BOE. Allegations of the BOE's failure to investigate and/or negligence – while unfounded – are rife within the amended complaint, as well as his affidavits. Yet, the BOE is not a party to this matter, nor can it be in a quo warranto action. Through a much delayed action in quo warranto, this Court is effectively denied the BOE's process in determining a given

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candidate's qualification. Such would not be the case in either an action in prohibition or mandamus.

And, finally, there is the potential burdensome cost of a special election to the public. In the event that a writ of quo warranto issues, but the relator is also not qualified to hold the office challenged (as may be the case herein), the public must pay for an expensive special election once a replacement sheriff is appointed to complete the unexpired term.

All of these very real, very public harms will be avoided if this Court holds firm to its bright-line mandate that relators with actual, or constructive, knowledge of qualification deficiencies must bring the challenge with the utmost diligence, i.e. prior to the general election.

The extraordinary writ of quo warranto should remain an action of last resort, rather than a tool of political gamesmanship. Yet, Flanagan's amended complaint was precisely timed and played to seize an office a sizable majority of Belmont County's voters did not want him to hold. For these reasons, Lucas respectfully requests a judgment on the pleadings which dismisses this action under the doctrine of laches.

B. Factually, Relator Can Establish No Set of Facts to Entitle Him to Relief:

In the event, this Court declines to apply the doctrine of laches to bar consideration of the amended complaint, Flanagan can prove no set of facts to support his claim of entitlement to relief.

i. Primary Factual Error – State of Residency:

Viewing his complaint in its entirety, it is clear Flanagan believes that Lucas moved to the State of Florida between 2007 and 2011. *See Amended Complaint ¶¶ 11, 32, 33 and 34.* From this, Flanagan draws the clear inference that Lucas could not have undertaken any supervisory or full-time law enforcement activities because he was living outside the State of

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Ohio. To drive this point home, Flanagan goes so far as to allege that Lucas, "...established a residency in Florida during the period from 2007 through 2011 and therefore, paid no Ohio State Income Tax during said period." *Amended Complaint, ¶ 34.*

Succinctly stated, Flanagan's allegation is as absurd as it is false. Filed concurrent with this motion, Lucas' answer to paragraph 34 of the amended complaint includes redacted copies of his 2007-2011 Ohio Income Tax forms attached as Exhibit C. As Exhibit C clearly proves, at all times relevant in 2007 – 2011, Lucas was a resident of the State of Ohio and paying his fair share of Ohio income taxes.

The best falsehoods, of course, are those which hide in the shadow of truth. In this case, Lucas and his wife own vacation property in Florida, which was purchased on or about June 30, 2010. For the Court's convenience and in answer to paragraph 11 (as well as paragraphs 32, 33 and 34) of the amended complaint, Lucas has attached a copy of his Florida deed as Exhibit B. Lucas has never hidden the fact that he owns vacation property in Florida, but he has never used his vacation property to establish a residence within the State of Florida – as his Ohio tax returns for 2007-2011 conclusively prove.

Moreover, because his Florida vacation property was never his lawful residence, Lucas was not required to list the property on his candidate qualification application, as Flanagan mistakenly alleges in paragraph 31 of the amended complaint. Lucas properly listed his actual, lawful *Ohio* residences as required. It must be noted that the candidate qualification application is not an asset disclosure form, and even then, R.C. Chapter 102 requires an elected county official to disclose only specified Ohio real property.[3] Thus, the allegation that Lucas signed a

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[3] R.C. 102.02(A)(2)(4) requires County elected officials to disclose: "All fee simple and leasehold interests to which the person filing the statement holds legal title to or a beneficial

false candidate application because Lucas failed to disclose a Florida vacation home is, again, patently absurd.

As such, there is no set of facts Flanagan can establish to prove that Lucas was *ever* a resident of the State of Florida. Thus, the central premise of Flanagan's amended complaint is false, and there exist no set of facts upon which Flanagan can establish otherwise relative to Lucas's residency or the filing of a false candidate qualification application. Indeed, given the false, frivolous, harassing and continuing nature of Flanagan's allegations – allegations that his amended complaint continues his assertion that Lucas failed to pay Ohio income tax even AFTER Lucas attached his 2007-2011 Ohio Tax Returns to his original answer - the Court is asked to consider appropriate sanctions for both Flanagan and Flanagan's counsel of record pursuant to S.Ct.Prac.R. 4.03(A).

ii. Factual Error – Supervisory Role and Work History:

Likewise, Flanagan's complaint contains allegations that Lucas lacks both the requisite supervisory and work history for the period comprising 2007-2011. *Complaint, ¶¶ 22-30.*

In paragraph 10 of the complaint, Flanagan asserts that Lucas retired from the Belmont County Sheriff's Department on October 31, 2007. That is factually accurate. After twenty-six (26) years as a deputy, Lucas retired holding the rank of Major. *Answer, ¶¶ 10 & 18.*

However, Lucas continued to serve the Belmont County Sheriff's Department as a special or reserve deputy sheriff. *Answer, ¶ 18.* A Special Deputy Sheriff is a 'peace officer' as defined in R.C. §109.71. 1998 Ohio Atty.Gen.Ops. No. 1998-93 considered the nature of a special deputy sheriff:

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interest ***in real property located within the state, excluding the person's residence and property used primarily for personal recreation***;" (Emphasis added).

> [A] deputy sheriff appointed by the county sheriff pursuant to R.C. 311.04(B)(1) may be either a regular deputy sheriff or a special deputy sheriff. 1992 Op. Att'y Gen. No. 92-024 at 2-83; 1991 Op. Att'y Gen. No. 91-037 at 2-199. A special deputy sheriff serves on terms that are different from those on which a regular deputy sheriff serves. "For example, his duties may be limited, he may be employed only intermittently as needed, or he may serve without compensation." 1989 Op. Att'y Gen. No. 89-071 at 2-326; *accord State ex rel. Geyer v. Griffin,* 80 Ohio App. 447, 457, 76 N.E.2d 294, 300 (Allen County 1946); 1991 Op. Att'y Gen. No. 91-037 at 2-199; 1968 Op. Att'y Gen. No. 68-112 at 2-160 and 2-161. 1977 Op. Att'y Gen. No. 77-027 at 2-102 states that all requirements for regular deputy sheriffs apply to special deputy sheriffs:
>
> The term "special" relates not to an individual's qualification as a deputy but to the nature of his assignment as a deputy and to the fact that his commission and powers may be limited consistent with such assignment. Once he meets the general requirements of a deputy the special deputy may be required by the sheriff to perform any or all of the duties required of regular deputies. In law, the special deputy thus appointed and approved is deemed a "deputy;" there is no distinction. Nor should there be any distinction made for purposes of R.C. 311.04 and R.C. 325.17. I must conclude that a special deputy sheriff is a "deputy" within the purview of R.C. 311.04 and R.C. 325.17 [appointment of deputy sheriffs].
>
> *See* 1989 Op. Att'y Gen. No. 89-071 at 2-327. (Original citation).

As such, at all times relevant, Lucas met the same general requirements as any regular deputy within the Belmont County Sheriff's Department.

As a special deputy, Lucas had two (2) primary roles – range instructor and sniper/tactical consultant as a member of the Belmont County Sheriff's Department Special Operations Branch.

Respondent's Exhibit B provides the Court with records from May 9, 2007, (prior to Lucas' retirement) through to June 13, 2012. These records include Lucas' signature as a supervising, certifying range instructor and include records from 2007, 2008, 2009, 2010, 2011 and 2012. In that capacity, Lucas worked full-time,[4] eight (8) hour days and was among those who supervised firearm requalification certification for the Sheriff's Department. And, as set

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[4] As the Court is aware, R.C. §311.01 does not define the term "full-time."

forth in Lucas' Affidavit, which is attached to his answer to Relator's First Amended Complaint as Respondent's Exhibit E and incorporated as if fully re-written herein, Lucas was paid the sum of $595.10 for Range Instruction services rendered in May 2010.

Likewise, as his Affidavit establishes, Lucas remained an active member of the Belmont County Sheriff Department's Special Operations Branch. This elite unit is more popularly known as Belmont County's S.W.A.T. unit, with tactical law enforcement deployment responsibilities on a county-wide basis. Lucas helped found the unit in 1994 and was its first commanding officer. Following his retirement in October 2007, Lucas remained an active team member, serving as a sniper, weapons training as well as providing tactical support to the unit's commanders.

As a Special Operations Branch team member from October 2007-2012, Lucas was an active participant with the team's training and call-out missions even after his retirement. As his Affidavit makes clear, Lucas continued to provide pistol, shotgun, sub-machine gun, select fire rifle and long rifle training and certification to team members for a few years after October 2007, as he was the only Ohio Police Officer Training Academy (OPOTA) certified instructor on those weapons during that time period. He remains the only certified long rifle instructor within the Belmont County Sheriff's Department to this day.

As part of his membership within the Special Operations Branch, Lucas deployed in Spring 2011 to a possible barricaded gun-man callout on Blaine-Barton Road in Belmont County as a Sniper/Counter Sniper. And, in Summer 2012, he was again used as a Sniper/Counter Sniper in the security detail for Vice President Biden and Republican Presidential Candidate Mitt Romney.

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In short, because Lucas can establish both his supervisory and full-time activities with the Belmont County Sheriff's Department through Exhibit B and his Affidavit, Flanagan can prove no set of facts to entitle him to the relief he requests.

V. CONCLUSION:

For the foregoing reasons, Respondent respectfully requests this Honorable Court dismiss Relator's original complaint pursuant to the doctrine of laches and/or Civ.R. 12(C), as the answer and Exhibits attached thereto prove that Relator can prove no set of facts in support of his claim that would entitle him to relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of Respondent's Answer was served via electronic mail upon Relator's Counsel of Record, Mark E. Landers, Esq., at *mark.landers.esq.@gmail.com*, pursuant to S.Ct.Prac.R. 3.11(B), on this 7TH day of May, 2013.

Respectfully submitted,

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