
IN THE SUPREME COURT OF OHIO
CASE NO.: 2014-1478

STATE OF OHIO EX REL. COMMITTEE FOR CHARTER AMENDMENT PETITION TO
LIMIT THE USE OF PHOTO-MONITORING DEVICES IN THE CITY OF MAPLE
HEIGHTS, OHIO, et al.,

Relators

v.

CITY OF MAPLE HEIGHTS, OHIO, et al.,

Respondents

**MERITS BRIEF OF RESPONDENTS THE CITY OF MAPLE HEIGHTS, OHIO,
ALEX F. ADAMS, ANTOINETTE JONES, ANTHONY CEFARATTI, RONALD C.
JACKSON, WILLIAM CHRISTOPHER BROWNLEE, RICHARD TROJANSKI AND
EDWINA AGEE**

JAMES A. CLIMER (0001532)
JEFFREY T. KAY (0069371)
FRANK H. SCIALDONE (0075179)
Mazanec, Raskin & Ryder Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: jelimer@mrrlaw.com
jkay@mrrlaw.com
fscialdone@mrrlaw.com

JOHN J. MONTELLO (0037909)
303 Columbus
Bedford, OH 44146
(440) 232-2701
(440) 232-7995 – Fax
Email: jmontello@bedfordlawyers.com

Counsel for Respondent

CURT C. HARTMAN (0064242)
Lead Counsel
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
Cincinnati, OH 45230
(513) 752-2878
Email: hartmanlawfirm@fuse.net

CHRISTOPHER P. FINNEY (0038998)
Finney Law Firm LLC
4270 IVY Pointe Blvd., Suite 225
Cincinnati, OH 45245
(513) 943-6655
Email: chris@finneylawfirm.com

Counsel for Relators

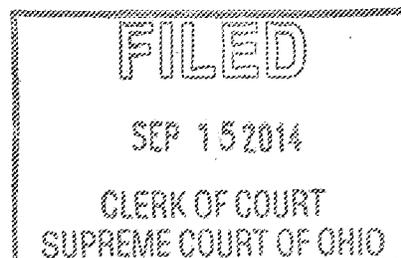


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I. STATEMENT OF THE CASE AND FACTS

On August 5, 2014, the Committee for Charter Amendment Petition to Limit the Use of Photo-Monitoring Devices in the City of Maple Heights, Ohio, et. al. (Relators) submitted to the Clerk of Council of the City of Maple Heights their Petitions in support of a proposed Charter Amendment. (Comp. at ¶15.) The proposed Charter Amendment sought to limit the use of photo monitoring devices within the City of Maple Heights (speed cameras) for the enforcement of traffic laws. (Comp. at ¶15.)

In accordance with the Ohio Constitution, Maple Heights Clerk of Council Katherine M. Unger accepted the Proposed Charter Amendment Petitions, holding the Petitions for 10 days and then forwarding them to the Cuyahoga County Board of Elections. (Comp. at ¶16.) Law Director Montello timely requested that the Board review the validity of the Petitions. (Comp. at ¶16.)

On August 18, 2014, the Director of the Cuyahoga County Board of Elections certified that there were a sufficient number of signatures. (Comp. at ¶17.) Pat McDonald, Director of the Cuyahoga County Board of Elections, verified that there were 722 signatures that were found valid and that those signers were duly registered voters residing in the City of Maple Heights. (Comp. at ¶17, Pltf.'s Ex. B.) The Board's verification occurred on August 18, 2014. (*Id.*)

On August 21, 2014, the Clerk of Council obtained the verification report regarding the signatures from the Board of Elections. Upon receipt of this confirmation, the Clerk put before Council the Committee's Proposed Ordinance (Ordinance 2014-71), which would submit the Proposed Charter Amended to the electors on November 4 election. The Committee did not request an emergency clause in the petition. At Council's next meeting, this Ordinance was

submitted to Council; that is , the Ordinance was submitted to Council at the Maple Heights September 3, 2014 regular meeting. (See Evidence of Respondents, attached Ordinance 2014-71 (Ex. 2-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 2).)

The Clerk's actions complied with Article XIII of the Maple Heights Charter which requires the Clerk to submit to Council the Proposed Ordinance to amend the Charter at its next regular council meeting upon verification of the number of signatures required. (See Evidence of Respondents, attached Charter (Ex. 1-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 1).) Article VII, Section Six, of the Charter provides:

SECTION 6. HEARING BY COUNCIL COMMITTEE When the certificate of the Clerk shows the petition to be sufficient in valid signatures, the Clerk shall submit the proposed ordinance to the Council at its next regular meeting, and the Council shall at once read and refer the same to an appropriate committee, which may be the committee of the whole. Thereafter, the committee shall report the proposed ordinance to the Council with its recommendations thereon not later than the third regular meeting of the Council following that at which the proposed ordinance was submitted to the Council by the Clerk.

Article VIII, Section Six, of the Charter; see also Sections Seven, Eight and Nine. (See Evidence of Respondents, attached Charter (Ex. 1-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 1).)

In accordance with Article XIII of the Charter, City Council did give the Ordinance a first reading and Council President submitted the matter to a Committee of the whole so that the council may accept or reject the Proposed Ordinance. (See Evidence of Respondents, attached Ordinance 2014-71 (Ex. 2-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 2).) This is in accord with the established Charter provision that requires Council to review the ordinance and Ohio law on passing this legislation. *Id.*; see also R.C. § 731.17(requiring the

reading of ordinances as mandatory, and failure to comply renders the ordinance invalid and inoperative).

Based on speculation that the City would not process the ordinance in accord with its Charter and Ohio law, Relator Celestine Wilburn by way of letter on August 18, 2014 made a written demand to Law Director John Montello to commence an action in a court of competent jurisdiction to compel the City Council “to enact the requisite enabling ordinance in order to place the proposed charter amendment on the ballot for consideration by the electorate.” (Comp. at ¶21.) While Law Director Montello refused to bring such action, the City fully processed this request. The City, in fact, put the Ordinance before Maple Heights Council as requested by the Relators at the earliest opportunity under the Charter, the Sept. 3, 2014 Council meeting. (See Evidence of Respondents, attached Charter, at Art. XIII, § 6 (Ex. 1-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 1).)

Notwithstanding the foregoing, on August 25, 2014 Relators filed this Original Action as a taxpayer action pursuant to R.C. Sec. 733.59 seeking a writ of mandamus ordering Maple Heights to provide by ordinance for the submission of the initiative petition to the electors. Relators also seek attorneys fees and other unstated relief. (Comp.) Upon proper service, the Respondents answered on September 8, 2014.

Relators have not filed a verified petition in support of their mandamus action as required by this Court’s rules. A review of the Court’s docket reveals that Relators did not post security for costs under R.C. § 733.59. (See generally docket.) Finally, Relators’ action fails on the merits.

II. LAW AND ANALYSIS

- A. Proposition of Law No. 1: To survive dismissal, an original action in mandamus must be supported by an affidavit, specifying the details of the claim, made on personal knowledge, setting forth the facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit.**

This Court should dismiss this original mandamus action because Relators' Complaint fails to comply with the mandatory affidavit requirements of Rule 12.02(B) of the Supreme Court Rules of Practice. Rule 12.02(B) unequivocally mandates that an affidavit in support of a complaint for an original action must expressly specify the details of the claim. See S.Ct.Prac.R. 12.02(B). It must also be made on personal knowledge, setting forth facts that are admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters in the affidavit:

All complaints shall contain a specific statement of facts upon which the claim for relief is based, shall be supported by an affidavit of the relator or counsel specifying the details of the claim, and may be accompanied by a memorandum in support of the writ. The affidavit required by this division shall [1] be made on **personal knowledge**, [2] setting forth facts **admissible in evidence**, [3] and showing affirmatively that the affiant is **competent to testify** to all matters stated in the affidavit. All relief sought, including the issuance of an alternative writ, shall be set forth in the complaint.

S.Ct.Prac.R. 12.02(B)[emphasis added].

Relators' Complaint is accompanied by an affidavit from Relators' counsel, Curt Hartman, and Relator Celestine Wilburn. These affidavits, however, fail to comply with S.Ct.Prac.R. 12.02(B) in several material respects. First, the affidavits do not properly or adequately specify "the details of the claim" and do not set forth "facts that are admissible in evidence" upon which the claim for relief is based. Second, the affidavits do not comply with S.Ct.Prac.R. 12.02's personal-knowledge requirement. The affidavits do not attempt to specifically incorporate the allegations of the Complaint or the exhibits into the affidavits by

reference, let alone expressly specify the details of the claim and set forth facts that are admissible in evidence as Rule 12.02 mandates. (See Complaint, and attached Affidavits.)

The affidavit of Curt Hartman is not based on personal knowledge and does not constitute admissible evidence. For instance, Hartman's affidavit is based on inadmissible hearsay in many critical respects. (See, e.g., Hartman Aff. at ¶ 4, relying on statements "relayed" to him by "Mr. Lawler" in a phone call.) Similarly inappropriate, Wilburn's affidavit refers to "receiving various reports indicating that the City of Maple Heights would not proceed to place the initiative proposal on the ballot." (Wilburn Aff. at ¶ 5, attached to Comp.) These allegations regarding alleged statements by "reports", fit within the classic definition of hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evidence Rule 801(C). They are simply not admissible in evidence under Evidence Rule 802. See Evid.R. 802 (providing that hearing "is not admissible" absent specific exceptions, none of which exists here).

Furthermore, the allegations in the affidavits contain legal conclusions that are also inappropriate and not admissible as evidence. Wilburn alleges that the City did not "proceed" to process the ordinance (Ordinance No. 2014-71) required to put the charter amendment on the ballot. Not only an improper legal conclusion, this allegation is not correct. Law Director John Montello did, in fact, properly facilitate the ordinance to be reviewed by City Council in compliance with the City Charter. (See Evidence of Respondents, attached Ordinance 2014-71 (Ex. 2-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 2).) Relator Wilburn's claim is a pure legal conclusion that the City has refused to process the ordinance regarding the amendment; the allegation is based on conjecture and belied by the City's actions. Wilburn has no personal knowledge that the enabling ordinance was not going through the proper Charter

process, because such contention is false. (See Evidence of Respondents, attached Charter, Art. XIII, § 6 (Ex. 1-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 1).) Wilburn also claims that the city did not put it on the agenda on August 20 but offered no evidence, let alone clear and convincing evidence, that the city had had the opportunity to place it on the agenda or even received the verified signatures back from the elections board. (See Aff. of Wilburn at ¶ 8.) This also is an improper legal conclusion. The City put the ordinance before Council at the Sept. 3 Council meeting. This belies any purported second-hand “report” that the City would not “proceed” to process the request in accordance with its Charter.

The lack of personal knowledge on critical facts is fatal to Relators’ complaint. Indeed, this Court has mandated strict compliance with the “personal knowledge requirement.” “ [W]e have routinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant’s personal knowledge.” “ *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 31, quoting *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050, ¶ 24. This Court has repeatedly warned that dismissals may be with prejudice if the relator does not “fully compl[y] with affidavit requirement of S.Ct.Prac.R. X(4)(B) [i.e., S.Ct.Prac.R. 12.02(B)].

Hartman’s affidavit and Wilburn’s affidavit do not comply for the additional reason that they did not properly testify in their affidavits that their statements were based on “personal knowledge.” (See Hartman Aff. at ¶ 1, referring to “person,” not “personal knowledge;” see Wilburn Aff. at ¶ 1, referring to “person,” not “personal knowledge.”) Again, and moreover, the testimony was not based on personal knowledge, but reliance on inadmissible statements from other people or legal conclusions that have no basis in fact. (See e.g., Hartman Aff. at ¶ 4.)

Additionally, the Complaint contains many alleged legal conclusions that are not facts at all and are not admissible in evidence and cannot be included in an affidavit. (See, e.g., Complaint, ¶ 12-13(alleged legal conclusions regarding initiatives); ¶ 17-19(alleged legal conclusions regarding number of petitions); ¶ 27-38(alleged legal conclusions regarding constitutional law); ¶¶ 43-45 (alleged legal conclusions regarding mandamus law).

Ultimately, Hartman's and Wilburn's affidavits are fatally flawed and dismissal is required. Even assuming they are not -- which they are -- they do not and cannot meet the stringent burden on Relator to show "by clear and convincing evidence" that Respondents had a clear duty that authorized a clear legal right to put the petition on the ballot. *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441, ¶ 14.

B. Proposition of Law No. 2: Relators do not establish a clear legal right for the City of Maple Heights to override its Charter provisions, which allows Council appropriate review of the Petitions and Ordinance No. 2014-71, when they have made an untimely request to get their proposed amendment on the Nov. ballot.

For a writ of mandamus to issue, Relators must establish a clear legal right to compel the City to "provide by ordinance for the submission to the electors ... the charter amendment," (Comp. at ¶45(a)) a corresponding clear legal duty on the part of the City, and the lack of an adequate remedy at law. *State ex rel. Allen v. Warren Cty. Bd. of Elections*, 115 Ohio St.3d 186, 2007-Ohio-4752, 874 N.E.2d 507, ¶ 8. Relators must prove these requirements by clear and convincing evidence. *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441, ¶ 14.

Relators have to establish that the City has a clear legal duty to disregard Article XIII of the Maple Heights Charter that reasonably requires City Council to evaluate the petition before

submitting it to the electors. (See Evidence of Respondents, attached Charter, Art. XIII, §§ 6-9 (Ex. 1-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 1).)

Relators argue that their Petition was “timely” presented. It was not. Relators seek to circumvent the City’s Charter and effectively argue that there is a clear duty for a city council to simply put any charter amendment on the ballot without adequate Council review and without following mandatory procedures for the passage of municipal legislation. Alternatively, Relators seem to be arguing that the Law Director has refused to allow the City Council to review the ordinance or petition. This is not correct as the Petition is in the process of being reviewed and acted upon. While the Law Director expressed his opinion about the signatures, Council forthwith received the ordinance and petition for review.

“Forthwith” does not mean that the Charter review process does not exist. It means that that process must be done forthwith within that framework. When Council is otherwise immediately reviewing this matter under the terms of the Charter and in accordance with the Constitutional requirements, mandamus relief cannot be granted. That is exactly what has occurred here.

Relators want to ignore their failure to timely file their petition with Council, and argue that even if they are well beyond the constitutional deadline (i.e., Sept. 5, 2014) for placing the charter amendment on the Nov. 4, 2014 ballot that it does not matter. This is not the law. And Relators cannot show a clear legal duty for the City to disregard its Charter and state law in this instance. *State ex rel. Vickers v. Summit County Council*, 97 Ohio St.3d 204, 2002-Ohio-5583 at ¶ 24. “Petitioners must comply with statutes that do not conflict with the Ohio Constitution and the city charter before the county council has a duty to submit a charter amendment to the voters [emphasis added].” *State ex rel Vickers*, supra, at ¶ 24, citing *State ex rel. Hackworth v. Hughes*,

97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050, at ¶ 31. Further, the Maple Heights Council does not have a clear legal duty to override state law requirements on properly reading this Ordinance (or any ordinance) before passage. Indeed, “council had no duty to submit the proposed charter amendment to the electorate unless all applicable statutory requirements were met.” *State ex rel. State ex rel Vickers*, supra, at ¶ 24, citing *Semik v. Cuyahoga Cty. Bd. of Elections* (1993), 67 Ohio St.3d 334, 335–336, 617 N.E.2d 1120. A statutory requirement as to the reading of ordinances is mandatory, and the failure to comply renders the ordinance invalid and inoperative. See generally R.C. § 731.17.

Relators’ argument is incorrect. To support this incorrect position, Relators rely on various distinguishable cases that all involved manufactured delays of the submission time of a charter initiative beyond the sought election date. See e.g., *State ex rel. Citizens for a Better Portsmouth v. Syndor*, 61 Ohio St.3d, 572 N.E.2d 649 (1991) (where council improperly tabled the ordinance to put the proposal on the ballot simply because it did not like the content of the proposal); *State ex. rel. Concerned Citizens for More Professional Government v. City of Zanesville*, (where council improperly tabled consideration of proposed ordinance until day less than 60 days before general elections to thwart effort to have on ballot); *State ex rel. Committee For Charter Amendment Petition v. Avon*, 81 Ohio St.3d 590, 1998-Ohio-598 (1998) (delayed by one day where Council could have --and had done in the past -- call a meeting).

Unlike the circumstances in the preceding cases, Maple Heights City Council followed and is following its established Charter to consider the proposed amendment. The Council must review the Petition, evaluate the recommendations of the Law Director and otherwise review the sufficiency of the petition. This is reasonable and required under the Charter and Ohio law. Even cases cited by Relators recognize that it is reasonable for Council to conduct a proper review.

See e.g., *Avon, supra* at 595 (“each case must be considered separately based on the particular facts involved. There may be circumstances where a charter amendment petition filed on the sixtieth day before the special election would not afford an adequate opportunity for council to determine the sufficiency of the petition and enact an ordinance on the same day.”)

Ohio Constitution Article XVIII, Section 8 requires submission to the electors at the next regular election if one occurs not less than 60 or more than 120 days after its passage. On August 21, 2014, the Clerk of Council obtained the verification report regarding the signatures from the Board of Elections. Upon receipt of this confirmation, the Clerk put before Council the Committee’s Proposed Ordinance (Ordinance 2014-71), which would submit the Proposed Charter Amended to the electors on November 4 election. The ordinance was prepared to submit the petition to the electors and placed on Council’s agenda for its regular meeting of Sept. 3, 2014, the next regular meeting after receipt of the Board of Elections report. (See Evidence of Respondents, attached Ordinance 2014-71 (Ex. 2-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 2).) City Council did not fail to take immediate action on Sept. 3, 2014, as Relators suggest. Instead, Council performed a first reading on the Ordinance and sent it to Council as a Whole for review as required by the City Charter, Article XIII and the Ohio Constitution Article XVII, Section 8 requiring submission to the electors by Ordinance. (See Evidence of Respondents, attached Ordinance 2014-71 (Ex. 2-A) and attached Aff. of Clerk of Council Katherine M. Unger (Ex. 2).)

Relators ignore the Charter requirements of Council review, suggesting that Council should have passed the ordinance immediately to meet the Constitutional deadline that they could have submitted earlier to allow for Council review. There is no requirement that Council must completely override its Charter and consequently meaningful review, to facilitate a

untimely petition. Further, Relators did not submit the ordinance as an emergency measure. Council acted within the proper Charter process and proper review of the measure. Council also is following state law on the required readings before passage of an ordinance.

Relators claim that they had a clear legal right entitling them to have the petition put on the Nov. 4, 2014 ballot has no merit. There is no evidence to support Relators' position that Council did not handle the proposed charter amendment in a timely manner and, more importantly, within the parameters required by the Ohio Constitution, Ohio law, and Maple Heights City Charter.

C. Proposition of Law No. 3: Attorney fees are not appropriate.

Relators' complaint is meritless. Therefore, attorney fees are not appropriate. Even if Relators' complaint had merit -- which it does not -- Relators would not be entitled to attorney fees. The Legislature has expressly provided that in taxpayer actions, "No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding." R.C. § 733.59.

This Court has expressly held that attorney fees under R.C. 733.59 are precluded when no security is given. *State ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 572 N.E.2d 649 (1991). This Court explained:

Relators have not given security for costs in this case, as required by R.C. 733.59, yet they request attorney fees under R.C. 733.61. We denied this request because R.C. 733.59 unequivocally withholds jurisdiction to bring a statutory taxpayer action unless such security is given. Since it was not given, the instant action was not a proper statutory taxpayer action. See *State, ex rel. Houghton, v. Pethtel* (1941), 138 Ohio St. 20, 19 O.O. 479, 32 N.E.2d 411. Therefore, we allow the writ as a proper common-law taxpayer action for which security is not required. See *Trustees of Prairie Twp. v. Garver* (1931), 41 Ohio App. 232, 180 N.E. 747; *Walker v. Dillonvale* (1910), 82 Ohio St. 137, 92 N.E. 220, but deny attorney fees pursuant to R.C. 733.61 because all statutory prerequisites for a taxpayer action were not complied with.

Id.

Relators' position is that the deposit for the original action under S.Ct.Prac. R. 3.05 satisfies R.C. § 733.59. Relator cites no case that supports that proposition. And, the Legislature was quite clear -- as well as this Court -- that compliance with R.C. § 733.59 is mandatory. Further, Relators have not posted a deposit, so Relators' citation to the dockets of other cases where security was posted make them entirely unlike this case.

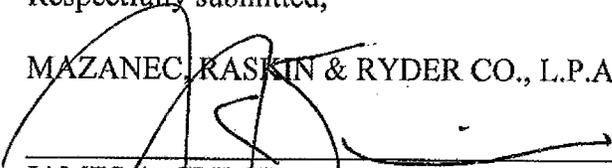
Even in appropriate cases, the decision to award attorney fees to a successful relator in a R.C. 733.59 taxpayer suit lies within the court's discretion. *State ex rel. Commt. for Charter Amendment Petition v. Avon* (1998), 81 Ohio St.3d 590, 595, 693 N.E.2d 205, 209. Relators' position is that City Council did not act "forthwith" to authorize an ordinance. To do so, however, would require the City defy the establish procedures outlined in the Charter, which could have been complied with if the Relators timely submitted their petition. The City followed the express terms of the Charter. This is certainly reasonable, and, in the City's view, is correct as a matter of law. See *State ex rel. Miles v. McSweeney*, 96 Ohio St.3d 352, 2002-Ohio-4455, 775 N.E.2d 468, ¶ 29 ("In exercising this discretion, courts consider whether the case resulted in a public benefit and if respondents had a reasonable basis to support their position."). Attorney fees are inappropriate in this circumstance.

III. CONCLUSION

This Court should deny the requested writ, dismiss Relators' Complaint with prejudice in favor of Respondents and award them attorney fees and costs.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.



JAMES A. CLIMER (0001532)
JEFFREY T. KAY (0069371)
FRANK H. SCIALDONE (0075179)
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: jclimer@mrrlaw.com
jkay@mrrlaw.com
fscialdone@mrrlaw.com

/s/John J. Montello

JOHN J. MONTELLO (0037909)
303 Columbus
Bedford, OH 44146
(440) 232-2701
Email: jmontello@bedfordlawyers.com

Counsel for Respondents The City of Maple Heights, Ohio,
Alex F. Adams, Antoinette Jones, Anthony Cefaratti,
Ronald C. Jackson, William Christopher Brownlee,
Richard Trojanski and Edwina Agee

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2014, a copy of the foregoing Merits Brief of Respondent City of Maple Heights, Ohio has been sent vial facsimile and email to the following:

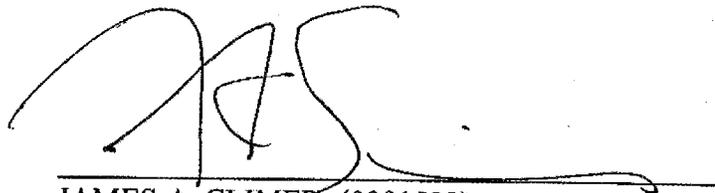
Curt C. Hartman, Esq.
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
Cincinnati, OH 45240
Email: hartmanlawfirm@fuse.net

John J. Montello, Esq.
303 Columbus Road
Bedford, OH 44146
Email: JMontello@bedfordlawyers.com

Co-Counsel for Respondents

Christopher P. Finney, Esq.
Finney Law Firm LLC
4270 Ivy Pointe Blvd., Suite 225
Cincinnati, OH 45245
Email: chris@finneylawfirm.com

Counsel for Relators



JAMES A. CLIMER (0001532)
JEFFREY T. KAY (0069371)
FRANK H. SCIALDONE (0075179)

Counsel for Respondents The City of Maple Heights, Ohio, Alex F. Adams, Antoinette Jones, Anthony Cefaratti, Ronald C. Jackson, William Christopher Brownlee, Richard Trojanski and Edwina Agee