

**Case No. 2015-1371  
Expedited Election Case**

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**Supreme Court  
of the State of Ohio**

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**STATE OF OHIO *ex rel.* RENEE WALKER,**

**Relator, and**

**JOHN P. REGAN, *et al.*,**

**Putative Relators,**

**v.**

**JON HUSTED, Ohio Secretary of State,**

**Respondent, and**

**JOANNE DOVE PRISLEY, *et al.*,**

**Intervening Respondents.**

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**MERIT BRIEF OF INTERVENING RESPONDENT MARK OVERHOLT**

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*Counsel for*

*Intervening Respondent Mark Overholt*

Curt C. Hartman  
THE LAW FIRM OF CURT C. HARTMAN  
7394 Ridgepoint Drive, Suite 8  
Cincinnati, OH 45230  
[hartmanlawfirm@fuse.net](mailto:hartmanlawfirm@fuse.net)

*Counsel for Respondent Husted:*

Anne Marie Sferra  
Maria J. Armstrong  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215  
[marmstrong@bricker.com](mailto:marmstrong@bricker.com)

*Counsel for Intervening Respondent*

*Joanne Dove Prisley*  
Michael M. Hollingsworth  
P O Box 428  
Athens, OH 45701  
[mike@mmhlaw.us](mailto:mike@mmhlaw.us)

*Counsel for Relators:*

James Kinsman  
P.O. Box 24313  
Cincinnati, OH 45224  
[james@jkinsmanlaw.com](mailto:james@jkinsmanlaw.com)

Terry J. Lodge  
316 N. Michigan St., Suite 520  
Toledo, OH 43604-5627  
[lodgelaw@yahoo.com](mailto:lodgelaw@yahoo.com)

*Counsel for Intervening Respondent  
Fulton County Protestors*

Charles Saunders  
Saunders Law Office LLC  
6772 US Highway 20  
Metamora, Ohio 43540-9739  
[saunderslitigation@gmail.com](mailto:saunderslitigation@gmail.com)

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## **I. STATEMENT OF FACTS**

Respondent Overholt would incorporate by reference the statement of facts as set forth in the Merit Brief of Respondent Husted but with the following supplementation.

In filing a protest against the Medina County Petition, Respondent Overholt not only challenged the validity of the Petition and whether it properly sought to establish an “alternative form of government” but also several deficiencies with the petition. Specifically, the protest of Respondent Overholt also challenged:

- 10 part-petitions on which the circulator statements contained interlineations such that the facts to which the circulator actually attested are undeterminable;
- 22 part-petitions on which the circulator failed to comply with the requirement of R.C. 3501.38(E)(1) that “the circulator shall indicate the number of signatures” contained on each part-petition;
- 30 signatures accepted by the board of election but for which the purported elector did not use “the mark ...as it appears on the elector’s voter registration record”, R.C. 3501.011(C);
- 1 part-petition wherein the circulator failed to include her complete address as required as part of the circulator statement.

With the Secretary of State having resolved the various protests on an alternative ground, these additional matters raised by Respondent Overholt were never addressed or resolved, even though all of them go to the validity of the Medina County Petition.

## II. LAW AND ARGUMENT

***Proposition of Law No. 1: Dismissal with prejudice is warranted when a relator in an original action fails to support the complaint with an affidavit or verification that is based on personal knowledge.***

I would further caution relators, as well as other prospective relators, that future violations of [present S.Ct.Prac.R. 12.02] may be subject to dismissal with prejudice.... This case should provide prospective relators with sufficient warning regarding the potential consequences of not fully complying with the affidavit requirement of [present S.Ct.Prac.R. 12.02]. Much like an umpire giving a pitcher a warning that the next pitch aimed at a batter's head may lead to his ejection, attorneys are similarly warned here.

- *State ex rel. Shemo v. Mayfield Hts.*, 92 Ohio St.3d 324, 325-26, 750 N.E.2d 167, 2001-Ohio-203 (Pfeifer, J., concurring); *accord State ex rel. Comm. for Charter Amendment for an Elected Law Director v. Bay Village*, 115 Ohio St.3d 400, 875 N.E.2d 574, 2007-Ohio-5380.

Despite repeated warnings and admonitions from this Court concerning adherence to the rules of this Court for filing original actions, Relators herein have disregarded one of the clearly-established *sine qua non* requirements of this Court's rules – that the complaint in an original action must be “supported by an affidavit specifying the details of the claim” and that “[t]he affidavit...shall be made on personal knowledge.” S. Ct. R. Prac. 12.02. In light of Relators' disregard of this Court's prior warnings and admonitions, as well as their failure to comply with the rules of this Court, dismissal with prejudice is warranted.

For this Court has “long held that affidavits required in original actions...must be based on personal knowledge.” *State ex rel. Comm. for Charter Amendment for an Elected Law Director v. Bay Village*, 115 Ohio St.3d 400, 875 N.E.2d 574, 2007-Ohio-5380 ¶10. And this same precedent has clearly established that the “personal knowledge” requirement of S.Ct. R.

Prac. 12.02(B) is not met or satisfied when an affidavit or verification simply attests to facts based upon knowledge, information or belief. *E.g.*, *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St.3d 131, 876 N.E.2d 953, 2007-Ohio-5699 ¶¶15 & 16 (“Eсарco specifies in his verification that the facts in his complaint are based simply on the ‘best’ of his knowledge, information, and belief.... This affidavit is insufficient.... Therefore, dismissal is warranted”); *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 857 N.E.2d 88, 2006-Ohio-5439 ¶32 (mandamus action in expedited election case dismissed because, “[i]n the notarized affidavit, Evans’s counsel stated that the factual allegations set forth in the complaint ‘are true and correct to the best of his knowledge.’ This verification, however, does not comply with the S.Ct.Prac.R. X(4)(B) personal-knowledge requirement”); *Bay Village*, 115 Ohio St.3d 400, 875 N.E.2d 574, 2007-Ohio-5380 ¶¶1 & 13 (in expedited election case, “[b]ecause relators failed to comply with the personal-knowledge requirement of S.Ct.Prac.R. X(4)(B), we dismiss the cause”).

In this case and despite explicit warnings from this Court, Relators have failed to comply with the personal-knowledge requirement for the verification of a complaint in an original action as now required by S. Ct. R. Prac. 12.02. In fact, all of the verifications attached to the Complaint herein are executed based only upon the declaration that certain facts are “true to the best of my knowledge, information, and belief.” Based upon well-established precedent of this Court, such verifications do not satisfy the personal-knowledge requirement and, accordingly, the Complaint must be dismissed

***Proposition of Law No. 2: As the parties to an action are as designated in the caption of the complaint and a mandamus action must be brought in the name of the state on relation to the person applying, any claim of those putative relators who fail to bring a mandamus action in the name of the state must be dismissed.***

R.C. § 2731.04 specifies that actions for a writ of mandamus must be brought “in the name of the state on the relation of the person applying.” And “[this] court has dismissed petitions for writs of mandamus when, *inter alia*, the action was not brought in the name of the state on the relation of the person requesting the writ.” *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 817 N.E.2d 382, 2004-Ohio-5596 ¶34. For “[the] failure to properly caption a mandamus action is sufficient grounds for denying the writ and dismissing the petition.” *Hammons v. Chisholm*, 150 Ohio App.3d 252, 780 N.E.2d 617, 2002-Ohio-6337 ¶9 (8th Dist. 2002).

Ohio R. Civ. P. 10(A) mandates that the caption of every complaint “shall include the names and addresses of all the parties.” In this case, a review of the caption of the complaint reveals that only one individual brought this action “in the name of the state on the relation of the person applying,” *viz.*, Renee Walker. All other putative relators have failed to comply with the mandate of R.C. § 2731.04, for they bring this action in their own name not in the name of the state. Thus, at best (and if this Court should, for some reason, excuse the lack of personal knowledge in all the verifications), the only issue before this Court would concern Ms. Walker’s claim for a writ of mandamus as it relates to the Fulton County Petition. (See Complaint ¶6 (identifying Ms. Walker as a resident of Fulton County that signed the petition therein).) For all other putative relators have not properly brought their mandamus claim such that the Medina County Petition and the Athens County Petition are not even properly before this Court; accordingly, the claims of those putative relators must be dismissed. *See Shoop v. State*, \_\_\_ Ohio St.3d \_\_\_, \_\_\_ N.E.3d \_\_\_, 2015-Ohio-2068 ¶10 (“a petition for a writ of mandamus may

be dismissed for failure to bring the action in the name of the state. Shoop's complaint was not brought in the name of the state, and therefore his claims for a writ of mandamus were properly dismissed").

***Proposition of Law No. 3: A writ of mandamus will be denied when a relator in a mandamus action fails to identify and establish a clear legal duty on the part of the respondent.***

As is well-established, a writ of mandamus is "an extraordinary remedy" such that to be entitled to the issuance of such a writ, a relator must establish, *inter alia*, "a clear legal duty to perform the requested act on the part of the respondent." *State ex rel. Haylett v. Ohio Bur. of Workers' Comp.*, 87 Ohio St.3d 325, 334, 720 N.E.2d 901, 1999-Ohio-134. But a writ of mandamus "will not issue to command performance of 'implied or cognate power.'" *State ex rel. Welsh v. State Medical Board*, 145 Ohio St. 74, 75, 60 N.E.2d 620 (1945). Furthermore, the writ "will not issue to compel the observance of law generally, but will be confined to commanding the performance of specific acts specially enjoined by law to be performed." *State ex rel. Foster v. Miller*, 136 Ohio St. 295, 306, 25 N.E.2d 68 (1939); *accord State ex rel. Bar Realty Corp. v. Locher*, 30 Ohio St.2d 190, 193, 283 N.E.2d 164 . For "[t]he duty to be enforced by a writ of mandamus must be specific, definite, clear and unequivocal." *State ex rel. Karmasu v. Tate*, 83 Ohio App.3d 199, 205, 614 N.E.2d 827

In the complaint, the Relator (and putative Relators) posit the specific relief they seek, citing to R.C. § 307.95, as an order compelling the Secretary of State "to certify three certain 'Petitions for Submission of Proposed County Charter,' ...to the ballots in Fulton, Medina and Athens counties, respectively for the November 3, 2015 general election." (Complaint ¶1.) Yet, in their brief, at one point they change the characterization of the relief they seek to being an order compelling the Secretary of State "to validate the petitions" (Relators' Merit Brief, at 5),

while elsewhere claiming they seek an order directing the Secretary to “to certify the Petitions for placement on the November 3, 2015 general election ballot.” (Relators’ Merit Brief, at 11 n.6.)

Of course, S Ct. R. Prac. 12.02(B)(3) mandates that “[a]ll relief sought...shall be set forth in the complaint.” And the relief sought therein was for an order compelling the Secretary “to certify” to the ballot the three petitions and that the putative duty underlying the claim for mandamus. While the Respondent, as Secretary of State, is the chief election officer of the State charged generally with duties relating to, *inter alia*, the conduct of elections as prescribed in Title 35 of the Revised Code, there is no statutory provision explicitly directing or obligating the Respondent “to certify” anything to the ballot relating to the proposed charter petitions as sought in the Complaint herein.

Upon a protest being filed against any county charter petition, the local board of elections transmits the protests to the secretary of state who, in turn, “shall determine the validity or invalidity of the petition and the sufficiency or insufficiency of the signatures.” R.C. § 307.95(C). Upon making that determination, the secretary of state “shall notify the board of elections of the determination of the validity or invalidity of the petition and sufficiency or insufficiency of the signatures.” R.C. § 307.95(D). “If the petition is determined to be valid and to contain sufficient valid signatures, the charter shall be placed on the ballot at the next general election. If the petition is determined to be invalid, the secretary of state shall so notify the board of county commissioners and the board of county commissioners shall notify the committee.” *Id.* Thus, under the clear and unambiguous language of R.C. § 307.95, the secretary of state simply determines, based upon protests being filed, the validity *vel non* of the petition itself, as well the validity *vel non* of the signatures on the petition and, then, in turn, apprizes the board of

elections and/or the board of county commissioners of this determination. However and most significantly, nothing within R.C. § 307.95 imposes the “specific, definite, clear and unequivocal” duty upon the secretary of state “to certify” to the ballot the county charter petition as is specifically sought in the Complaint herein. *Cf.* R.C. § 3501.05(I)(duties of secretary of state include to “certify to the several boards the forms of ballots and names of candidates *for state offices*, and the form and wording of *state referendum questions and issues*, as they shall appear on the ballot” (emphasis added).)

“It is axiomatic that in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty.” *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 767 N.E.2d 719, 2002-Ohio-2219 ¶18. In this case, the specific relief that Relator (and putative Relators) seek in their Complaint against the Secretary of State is not mandated by state law; they are simply seeking to have this Court add to the legal duties of the secretary of state above and beyond that contained in R.C. § 307.95. Based upon the relief sought in the Complaint, Relator (and putative Relators) have not established a “clearly legal right to the relief requested and the mandamus action must be dismissed. *See State ex rel. Corona v. Harris*, 63 Ohio St.2d 95, 406 N.E.2d 1120 (1980).

***Proposition of Law No. 4: When a protest to an election-related petition includes other dispositive challenges not specifically ruled upon or addressed by a respondent, a relator must also refute these other challenges in the underlying protest in order to establish a clear legal duty on the part of the respondent.***

As noted above, one of the requirements that a relator must demonstrate in order to be entitled to the issuance of a writ of mandamus is “a clear legal duty to perform the requested act on the part of the respondent.” *Haylett v. Ohio Bur. of Workers’ Comp.*, 87 Ohio St.3d at 334.

Yet, in his protest with respect to the Medina County Petition, Mr. Overholt directly challenged the validity of numerous signatures and part-petitions:

- 10 part-petitions on which the circulator statements contained interlineations such that the facts to which the circulator actually attested are undeterminable;
- 22 part-petitions on which the circulator failed to comply with the requirement of R.C. 3501.38(E)(1) that “the circulator shall indicate the number of signatures” contained on each part-petition;
- 30 signatures accepted by the board of election but for which the purported elector did not use “the mark ...as it appears on the elector’s voter registration record”, R.C. 3501.011(C);
- 1 part-petition wherein the circulator failed to include her complete address as required as part of the circulator statement.

Although Secretary Husted relied upon an alternative basis to reject the Medina County Petition, these challenges raised and asserted by Mr. Overholt provide separate and distinct grounds by which Secretary Husted could also have rejected the Medina County Petition. Yet, in claiming entitlement to a writ of mandamus, Relators are noticeably silent as to these deficiencies; instead, Relators essentially call upon this Court to ignore this aspect of the protest yet they still claim entitlement to the issuance of the requested writ of mandamus.

Whether the foregoing challenges by Mr. Overholt would be sufficient for Secretary Husted to have reject the Medina County Petition is not directly before this Court; but the issue that is before the Court concerns, *inter alia*, whether Relators have established by clear and convincing evidence that Secretary Husted had a clear legal duty to perform the act for which they seek relief in the complaint. But with issues concerning the part-petitions, the circulator statements and/or signatures still outstanding and with Relators not offering any evidence or argument going to these additional bases for Mr. Overholt’s protest, Relators have not and cannot satisfy their burden of demonstrating entitlement to the extraordinary remedy sought

herein. For that reason alone, Relators are not entitled to the issuance of any writ of mandamus at least as it relates to the Medina County Petition.

***Proposition of Law No. 5: When the Secretary of States interprets and applies a provision of state law within his bailiwick and such interpretation and application is not demonstrated to be unreasonable, unconscionable or otherwise unfounded, a writ of mandamus will not issue compelling the implementation of an alternative interpretation or application.***

Finally, even if the Court should ignore or excuse the numerous deficiencies addressed above, the ultimate decision of Secretary Husted to invalidate the Petitions does not rise to the level of constituting a clear failure to comply or perform a mandated legal duty. For the reasoning and analysis of Secretary Husted was not so unreasonable, unconscionable or otherwise unfounded so as to constitute either an abuse of discretion or an action done in clear disregard of applicable legal provisions by which the extraordinary relief of a writ of mandamus may arguably issue. *See Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 778 N.E.2d 32, 2002-Ohio-5923 ¶11. In fact, Secretary Husted’s analysis was consistent with constitutional provisions allowing for the adoption of a charter for county government.

“A county in Ohio has historically been regarded as a political subdivision of the state.” *Greene v. Cuyahoga Cty.*, 195 Ohio App.3d 768, 961 N.E.2d 1171, 2011-Ohio-5493 ¶7 (8th Dist.). For “[c]ounties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them.” *Schaffer v. Board of Trustees of Franklin Cty. Veterans Memorial*, 171 Ohio St. 228, 230, 168 N.E.2d 547 (1960). Thus, any diminution or divesture of such sovereign control and authority over counties by the State must be clear and unambiguous. *See Cleveland Telephone v. Court of Common Pleas, Cuyahoga Cty.*, 98 Ohio St. 164, 120 N.E. 335 (1918)(state control “may, it is true, divest itself of this sovereign function and yield it to a

community therein, but its divestiture must be expressed in no uncertain terms, and must be clear and unambiguous. The rule of liberal construction does not apply”).

Article X, Section 1 of the Ohio Constitution provides, in part, that “[t]he General Assembly shall provide by general law for the organization and government of counties.” “Pursuant to [this] constitutional grant of authority, the General Assembly passed laws, codified under Title III of the Ohio Revised Code, that prescribe a general structure of county governance for those counties without a charter. The offices created by the General Assembly include the board of county commissioners, prosecuting attorney, sheriff, coroner, engineer, recorder, auditor, treasurer, and the clerk of court.” *Greene*, 195 Ohio App.3d 768, 961 N.E.2d 1171, 2011-Ohio-5493 ¶9.

However, in addition to requiring the General Assembly to “provide by general law for the organization and government of counties,” Article X, Section 1 of the Ohio Constitution also allows the General Assembly to “provide by general law alternative forms of county government.” This provision, thus, “permits the voters to adopt home rule and change the form of county governance through the adoption of a charter.” *Greene*, 195 Ohio App.3d 768, 961 N.E.2d 1171, 2011-Ohio-5493 ¶10.

Thus, under Article X, Section 1 of the Ohio Constitution, there are two options as to the form of county government in Ohio that the General Assembly must or may provide for: (i) the statutory form which has been established by the General Assembly wherein the elected nonjudicial officers of the county consist of the auditor, recorder, treasurer, clerk of court, sheriff, coroner, engineer, prosecuting attorney, and three county commissioners; and (ii) a county charter government which establishes an “alternative form of county government”, *i.e.*, some form of government other than the statutory form.

Such an alternative form of county government can be seen in how the residents of Cuyahoga County recently “abolished the existing statutory county governance and adopted a new architecture of county government” through the adoption of a county charter. *Id.* ¶13. In Cuyahoga County, the county charter “replace[d] the county’s statutory form of government with a new governing structure anchored by an elected county executive and an elected 11-member council. The county executive and county council have the duties and responsibilities previously performed by county commissioners. The county executive appoints individuals, subject to council confirmation, to perform the duties previously performed by certain elected officeholders.” *Id.* ¶4. Additionally, “the charter abolished the elected nonjudicial county offices – with the exception of the county prosecutor – when the new county executive, the council members, and the Article X appointees assumed their offices....” *Id.* ¶15. Such governmental structure clearly constitutes the “alternative form[] of county government” provided for and authorized by Article X, Section 1 of the Ohio Constitution.

In sharp contrast, the Proposed County Charter for Medina County does not propose any “alternative form of county government.” Instead, it simply maintains the county’s statutory form of government. As such, the Petition for Submission of Proposed County Charter does not present a proper issue for consideration by the voters and, thus, Secretary Husted properly upheld the various protests.

### **III. CONCLUSION**

Stated simply, in addition to their repeated failures to properly present and prosecute this mandamus action in conformity with the rules of this Court and state law, even on the merits, Relators have not demonstrated by clear and convincing evidence their entitlement to the

extraordinary relief they seek herein. For the various reasons set forth above, the complaint herein should be dismissed.

Respectfully submitted,

/s/ Curt C. Hartman  
Curt C. Hartman (0064242)  
The Law Firm of Curt C. Hartman  
7394 Ridgepoint Drive, Suite 8  
Cincinnati, Ohio 45230  
(513) 379-2923  
[hartmanlawfirm@fuse.net](mailto:hartmanlawfirm@fuse.net)

*Counsel for Intervening Respondent Mark Overholt*

### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing will be served, via e-mail, upon the following on the 4th day of September 2015:

*Counsel for Respondent Husted:*

Anne Marie Sferra  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215  
[marmstrong@bricker.com](mailto:marmstrong@bricker.com)

*Counsel for Intervening Respondent*

*Joanne Dove Prisley*  
Michael M. Hollingsworth  
P.O. Box 428  
Athens, OH 45701  
[mike@mmhlaw.us](mailto:mike@mmhlaw.us)

*Counsel for Relators:*

James Kinsman  
P.O. Box 24313  
Cincinnati, OH 45224  
[james@jkinsmanlaw.com](mailto:james@jkinsmanlaw.com)

Terry J. Lodge  
316 N. Michigan St., Suite 520  
Toledo, OH 43604-5627  
[lodgejlaw@yahoo.com](mailto:lodgejlaw@yahoo.com)

*Counsel for Intervening Respondent  
Fulton County Protestors*

Charles Saunders  
Saunders Law Office LLC  
6772 US Highway 20  
Metamora, Ohio 43540-9739  
[saunderslitigation@gmail.com](mailto:saunderslitigation@gmail.com)

/s/ Curt C. Hartman