IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel, DENNIS J. VARNAU,	)	**SUPREME CT. CASE NO. 2011-1414**
Relator-Appellant,	)	On Appeal from the Twelfth District Court of Appeals, Brown County Ohio
-vs-	)	
DWAYNE WENNINGER,	)	Court of Appeals Case No. CA2009-02-10
Respondent-Appellee.	)	

APPELLANT'S MOTION FOR RECONSIDERATION

Now comes the Appellant, Dennis J. Varnau, by and through counsel, pursuant to S. Ct. Prac. R. 11.2(B)(4), and moves this Court to reconsider its January 26, 2012, Decision.

S.Ct. Prac. R. 11.2 allows, or requires, the Court to "correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 541, 697 N.E.2d 181 (1998), quoting *State ex re. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995); *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 5. It is also appropriate to grant a motion for reconsideration that raises an issue that was either *not considered at all*, or *not fully considered*, when it should have been. *Mathews v. Mathews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (1981). Such is the case here, in the following respects, and the Court is respectfully requested to reconsider that Decision; and grant the Appellant's requested relief, or in the alternative set this matter for oral argument so these important distinctions from an otherwise run-of-the-mill *quo warranto* action can be addressed.

I. Introduction

The Court determined that the Relator could not proceed on his *quo warranto* Petition due to laches, referencing opportunities in Respondent's prior terms of office for the challenge. The facts in this Record do not support the findings upon which the Court's Decision is based: that Appellant had any such earlier opportunity. Further, the Court presented that the challenges in this Petition were only to Respondent's lack of qualifications in *prior* terms of office. But it is only the fact that those defects occurred in prior terms, that by Statute make him *currently ineligible* to hold the *current* term. The challenge is similar to any other office required to have a length-of-service requirement (like a judge, required to be a practicing lawyer for some minimum period of time; or a coroner, being required to be a physician for a minimum period of time), and after holding the office, it being determined they did not satisfy the length-of-service requirement by the prior term. That *requirement should not be waived retroactively.*

The Decision also deprives Appellant (and by implication, any citizen in Brown County) of *any remedy at all* for having an unqualified sheriff in office, in that *two prior courts* denied Relator a prior remedy (*mandamus* to a board of elections, to compel a hearing on his earlier protest of Respondent's candidacy), expressly based on *the availability of this quo warranto* remedy, which this Court says he didn't have, either. The Court may not have considered that the Decision in this case establishes that a statutorily unqualified candidate can keep that office, as long as they keep their lack of qualifications secret, or unopposed, long enough.

II. Law and Argument

A. Laches does not prevent a remedy for inaction before there was a right to act.

The Decision was based on specific arguments not raised (at least not in the same manner) by any party or the prior court. Authorities and arguments opposing the Court's reasoning in those regards therefore were not briefed substantially, argument was not held to

address those questions, and therefore the merits of both points were not fully considered by the Court. The facts on which the Decision rests are also not supported by the Record.

The Court stated that Relator should have filed a *quo warranto* action in 2001 or 2004, and because he didn't he is barred from doing so now. Relator *was not even a resident of Brown County* until December 4, 2003. See Relator's Reply, Oct. 14, 2009, Affidavit of Dennis Varnau, par. 3. Although this Court stated that Varnau "waited until 2009," there is nothing in the Record to support any "waiting," other than the mere passage of time, which this Court has said is not in and of itself laches. There is nothing in the Record to support that Varnau even knew who Wenninger was, much less what his qualifications for being Sheriff were. Wenninger was not publicly indicted for falsifying his election forms until December 2002[1], before Varnau was even a resident, much less an opposing candidate. And Relator brought his claim as soon as he had standing to do so, by being an unsuccessful candidate for the office, an essential element of a private party's right to *quo warranto*. Varnau would have been thrown out of court on the pleadings alone if he had brought this Petition before he was an unsuccessful candidate.

From 2001 to December 2003, he was not even a resident of the County, and had no more right to complain about the qualifications of the Brown County Sheriff than this counsel or any member of this Court had. Varnau did not qualify as a candidate for sheriff until he satisfied R.C. 311.01(B)(8)(b), in January 2007 (per his affidavit). The Decision though holds that no one can challenge an unqualified candidate unless they run against them in the very first instance, and must do so even if they have no right to do so. Frivolous conduct is required to preserve a right to later do something.

Varnau also did not have standing to protest before then, *by Statute*, because of his party affiliation. See Appellant's Merit (First) Brief, Oct. 3, 2011, p. 4; R.C. 3513.05(G); *State ex rel.*

Hoag v. Lucas County Bd. of Elections, 125 Ohio St.3d 49, 2010-Ohio-1629, 925 N.E.2d 984. See also, *State ex rel. Varnau v. Wenninger,* 128 Ohio St.3d 361, 2011-Ohio-759, 944 N.E.2d 663, ¶ 5. Nonetheless, as opposed to "waiting," he filed a protest anyway, on April 11, 2008, less than two weeks after he (Varnau) was certified as a candidate; he filed a *mandamus* action to challenge that refusal to hear the protest; and he appealed the denial of that, too, which was affirmed October 29, 2009. See Appellant's Merit (First) Brief, Oct. 3, 2011, p.4-5. All of that was because, as two courts told him, his remedy was in *quo warranto*.

But by this Court's own precedents, and the conclusions of two Courts directly, Varnau had no standing to challenge the Respondent's qualifications until he stood for election, and the results certified (November 25, 2008). R.C. 2733.06; *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 583, 651 N.E.2d 995 (1995); *State ex rel. Hayburn v. Kiefer*, 68 Ohio St.3d 132, 624 N.E.2d 699 (1993). Varnau filed this Petition February 27, 2009, *within months* after the election results were certified. This Court though bars Relator from ever challenging Respondent, due to not doing so when he clearly had no right or standing to do so.

The Court has therefore placed the burden on a first-time candidate – not only Varnau but all others – to challenge a potentially unqualified official before the relator is even a candidate – maybe not even a resident of the county. This Court has "consistently held, for persons other than the Attorney General or a prosecuting attorney, 'an action in *quo warranto* may be brought by an individual as a private citizen *only when he is personally claiming title to a public office*.' " *State ex rel. E. Cleveland Fire Fighters' Assn v. Local 500,* 96 Ohio St.3d 68, 70, 2002-Ohio-3527, 771 N.E.2d 51, ¶ 10 (emphasis added). To quote this Court (although adding the editing): "Varnau could [not] have raised his claims by filing an action for *quo warranto* during Wenninger's first four-year term of office beginning in January 2001 [when he was not even a

[1] See *State v. Wenninger*, 125 Ohio Misc.2d 55, 2003-Ohio-5521 (C.P.).

resident, much less a candidate] . . . ." Decision, ¶ 17.

Laches, per this Court's precedent, doesn't apply. To establish laches – generally a fact issue (this case was resolved on summary judgment) – a relator must have "*knowledge, actual or constructive, of the injury or wrong*," and there must be the "*absence of an excuse for such delay*, ..." *State ex rel. Cater v. City of North Olmstead*, 69 Ohio St.3d 315, 325, 631 N.E.2d 1048 (1994) (emphasis added). The relator must have allowed an unreasonable amount of time to elapse before bringing the action, *and the delay must have materially prejudiced the rights of the respondent* (in this case there was never such an argument, much less a supporting fact presented). *State, ex rel. Caspar v. City of Dayton*, 53 Ohio St.3d 16, 20, 558 N.E.2d 49 (1990). In this case this Court's Decision necessarily finds, as a matter of law, that Varnau, before he was even a County resident, had actual or constructive knowledge that the County Sheriff was unqualified for the office; *and* that not being a resident or a candidate for the office was not an excuse for not filing sooner; *and* that Wenninger was materially prejudiced by the delay. There are no facts in this Record supporting such findings or conclusions.

Laches occurs when *unreasonable* and *inexcusable* delay in asserting a *known* right causes *material prejudice*. *State ex rel. Carver v. Hull*, 70 Ohio St.3d 570, 577, 639 N.E.2d 1175 (1994); *State ex rel Cater*, 69 Ohio St.3d at 325. As one court put it:

> "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. * * * It is lodged principally in equity jurisprudence." *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 35, 15 Ohio B. 134, 472 N.E.2d 328, quoting *Smith v. Smith* (1957), 107 Ohio App. 440, 443-444, 77 Ohio Law Abs. 195, 146 N.E.2d 454, affirmed, (1959), 168 Ohio St. 447, 156 N.E.2d 113. "[T]o have any standing to successfully assert an equitable defense, *i.e.*, laches, one must come with clean hands, and if he has violated conscience or good faith or has acted fraudulently, equitable release in defenses are not available to him." [Citations omitted in part]. See, also, *Brown v. Ohio Bur. of Emp. Serv*. (1996), 114 Ohio App.3d 85, 92, 682 N.E.2d 1033, dismissed, appeal not allowed (1997), 77 Ohio St.3d 1543, 674 N.E.2d 1183 (stating that "[t]he doctrine of laches *was formed to prevent inequities, not to allow one to escape the consequences of one's bad acts*").

Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Service, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶ 38 (emphasis added). See also, *Lordstown ex rel. Valley v. Barnhart*, 11th Dist. No. 90-T-4494, 1992 WL 192001 (Feb. 21, 1992) ("As appellees are either conducting activities which violate Lordstown zoning ordinances, or are refusing to enforce those ordinances, we find that there certainly is an issue of fact as to whether they lack the "clean hands" necessary to take advantage of the equitable doctrine of laches."). In this case it is asserted that Respondent has knowingly been breaking the law for years.

There is no evidence in this record, which was a summary judgment, that Varnau even had the right to challenge Wenninger before he did, much less knew of it; or that there was any prejudice asserted to Wenninger by the timing. This Court in fact has in the past rejected claims of laches without proven prejudice – particularly where the respondent is also not without blame (such as by knowing he was not qualified for the office):

> Approximately *sixteen years elapsed from the time appellant was first employed with the FCPDO to the time that appellant requested that PERS grant her service credit for her FCPDO employment*. However, the Franklin County Commissioners and the Franklin County Public Defender lack standing to raise the equitable, affirmative defense of laches because they have unclean hands. [Citations omitted]. The minutes from the commission's meetings indicate that the commission and the Franklin County Public Defender knew that they were operating the FCPDO illegally as a "private" unincorporated organization before 1984. Laches is an equitable doctrine and it is fundamental that he who comes into equity must come with clean hands. [Citations omitted]. *A knowing violation of applicable law would certainly preclude a party from asserting the affirmative, equitable defense of laches.*
>
> Assuming, however, that appellees do have standing to raise the issue, the elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party [Citations omitted]. *Prejudice is not inferred from the mere lapse of time* and " 'in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim.' " [Citations omitted].

* * *

> This court, however, rejected similar claims in *State ex rel. N. Olmstead Fire Fighters Assn. v. N. Olmstead*, (1992), 64 Ohio St.3d 530, 537, 597 N.E.2d 136, 142, where we stated that "where no evidence of material prejudice is presented, * * * a court of appeals properly rejects laches as a defense." Here, there is an absence of evidence in the record of prejudice, budgetary or otherwise. There is also no evidence or argument that appellant's delay in asserting her rights under PERS prejudiced appellees' ability to defend against her claim. [Citations omitted]

State ex rel Mallory v. Public Empl. Ret. Bd., 82 Ohio St.3d 235, 243-245, 694 N.E. 2d 1356 (1998) (emphasis added).

This Court also cited R.C. 2733.35, which allows a full three years to bring a *quo warranto* action, after "the cause of such ouster, *or the right to hold the office, arose*." (Emphasis added). Varnau's right to hold the office did not arise until he ran for it and the results were certified, and this case was brought within three years – a few days over three months – of that. See *State ex rel. E. Cleveland Fire Fighters'*, 96 Ohio St.3d 68, 2002-Ohio-3527, 771 N.E.2d 51, at ¶ 10 (*quo warranto* dismissed, when filed more than three years after relator became eligible for the challenged office).

This Court relied upon *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. That was a pre-election expedited case seeking to control who could go on a ballot, not a post-election challenge to the qualifications of the prevailing candidate. *State ex rel. Landis v. Morrow Cty. Bd. Of Elections*, 88 Ohio St.3d 187, 724 N.E.2d 775 (2000), was another pre-election expedited case, subject to this Court's own expedited briefing schedule (which that petitioner didn't comply with). In those cases, the petitioners were trying to, and entitled to (as Varnau wasn't, although he tried) to control who was placed on an upcoming ballot, and within the short time of allowed protests. That is not the case here. Varnau was barred, statutorily, from taking those actions.

As this Court stated, in another case it cited:

> Moreover, "we generally require a showing of prejudice before we apply laches to bar a consideration of the merits of an election case." [Citations omitted]. "Normally, this prejudice in expedited election cases occurs because relators' delay prejudices respondents by making the case an expedited election case under S.Ct.Prac.R. X(9), which restricts respondents' time to prepare and defend against relators' claims, or impairs boards of elections' ability to prepare, print, and distribute appropriate ballots because of the expiration of the time for providing absentee ballots." [Citation omitted].
>
> Any delay by Craig in filing his protest did not prejudice the board and its members. The board does not assert any prejudice. And even if Craig had filed his protest within a week after Reed filed his declaration of candidacy and nominating petition, this case would still have been an expedited election case, and the absentee-ballot deadline would still have passed before this case had been fully briefed. [Citations omitted]. Therefore, neither the elections board's ability to prepare and defend against Craig's prohibition claim nor its duty to make election ballots available to the electorate has been compromised by Craig. This is thus a case in which the statutory time limits would have expired even 'under the best of circumstances.'" [Citations omitted].

State ex rel. Craig v. Scioto Cty. Bd. of Elections, 117 Ohio St.3d 158, 2008-Ohio-706, 882 N.E.2d 435, ¶ 14-15. As pointed out in 52 Ohio Jurisprudence 2d, Taxpayer's Actions, Section 27, "Personal laches will not defeat a taxpayer in a suit brought to vindicate the rights of all taxpayers." Although this is not a taxpayer suit, it is to "vindicate" the rights of all citizens who are subject to a sheriff that is, or at least may be, unqualified for the office.

Laches was not intended to bar valid claims just because they didn't make the claims before they had standing to do so. That though is the effect and precedent this Decision sets.

B. The lack of qualifications is for the current/present term, because of defects caused by deficiencies in a former term that are specific to the office of county sheriff, and therefore in this case is not moot.

From the beginning, Relator has only challenged the validity of the term Respondent currently holds. It just happens that the invalidity of the current term is because Respondent is unqualified, by statute, from holding the office due to never having taken the office legally to start with. If he is not qualified now to hold the office, *quo warranto* mandates removal, even if

proof that he is now not qualified depends on discussing history, even from a prior term.

Under this Court's precedents, if an unqualified candidate wins an election, he has to remove any disqualification he may have had immediately upon assuming the office, or he forfeits the office. Even though elected sheriff, he forfeited the seat upon its assumption, yet submitted an Ohio Peace Officer Training Commission form declaring that he was appointed sheriff of Brown County. He did not have a valid legal appointment according to the strict compliance election laws that dictated he could not be appointed or elected.

R.C. 311.01(B) provides that an unqualified person "shall not be elected or appointed unless they meet *all* the following requirements." (Emphasis added). See also, *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 724 N.E.2d 771 (2000). If as Relator here has proven he did not then or thereafter attain the minimum educational qualifications, he had no valid appointment, and his peace officer certificate became "invalid." O.A.C. 109:2-1-12(D)(1), (F). This occurred for Wenninger as early as January 1, 2002, or no later than January 2005. Wenninger never legally held the office of Sheriff, beginning in 2001 due to the lack of educational credentials, and he therefore *forfeited the office* on January 1, 2001, after failing to remove his disqualification "immediately upon assuming the office" as required at that time under R.C. 311.01(B)(9)(b). See *State ex rel. Vana v. Maple Heights City Council*, 54 Ohio St.3d 91, 94, 561 N.E.2d 909 (1990); *State ex rel. Fisher v. Brown*, 32 Ohio St.2d 23, 289 N.E.2d 349 (1972). See also, *State ex rel. Grimshaw v. Atkins*, 56 Ohio St.2d 97, 382 N.E.2d 215 (1978) (writ of *quo warranto* allowed, after council member moved out of the ward). He currently unlawfully holds the office without a valid peace officer certificate.

To hold that Respondent lawfully holds the office now, because his only opponent didn't challenge him in a prior term for which he was not even his opponent, is to render the strict-

compliance election laws dictating specific qualifications moot. They don't have to be met as long as one can conceal the lack thereof for more than one term in office. Contrary to decades of this Court's precedent, *an unqualified candidate is permitted to use time in a forfeited office, to justify keeping the office.* Those violations of law become legal and remain legal ever after. The passage of time alone trumps strict compliance with election laws in Ohio, per this Decision.

The Decision has the practical effect of insulating an unqualified candidate from ever being challenged. Someone could run against him in the next election, who has never heard of him before, and this Court's Decision bars a challenge merely because the official kept their lack of qualifications secret long enough.

And the lack of ever having proper educational qualifications (even if true in a first term), that all other sheriffs in Ohio are required to have, is not *exclusive* to a prior term.

This Court's precedent is entirely consistent with Appellant's claims that the facts of Respondent's lack of qualifications can be proven, even if partially a result of factors from a prior term; but this Court's Decision appears to contradict its own precedent. "To be entitled to the writ of *quo warranto*, the relator must establish that the 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, ¶ 23 (emphasis added). Relator's case is not and never has argued that Respondent should be removed from a prior term, but that he can't hold the current term. The office, presently, "is being unlawfully held."

Although it is true that proving a prior term was invalid is used to show why the current term is also invalid, that is because continuous appointment is required to maintain peace officer status, a requirement for a sheriff that is different from most elected offices. For most elected offices, the validity of a prior term is irrelevant. Here though, Wenninger depends on the

validity of a prior term, to meet the continuous service requirement of a peace officer certificate, which is required to be sheriff. Relator's *quo warranto* claim *is* "directed to challenge [the] current term of office rather than an expired one." See *Zeigler*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶ 14. It just happens the current qualifications are not met in part because during a prior term he lost what qualification he ever had. If continuous peace-officer status is not maintained, that status lapses. One is not a peace officer anymore. And therefore one can't be, or run for sheriff. That disqualification didn't exist until the certification lapsed. At that point, if not before, and forever thereafter, he is *presently* unlawfully holding the office.

This Court's opinion in *Ziegler v. Zumbar* supports this point, in that the impropriety was three terms removed:

> The fact that there have been *three successors since Zeigler's removal* does not bar his *quo warranto* claim. If this were true, an appointing authority could insulate its improper removal of a public officer by appointing multiple persons to the office in quick succession. *We decline to interpret the pertinent law to sanction such an unreasonable result.*
>
> ¶ 13 (emphasis added).

In each case where the "mootness" of a prior term was raised as a defense to *quo warranto*, it was because the challenged office holder was no longer holding the office, or the defect was in the selection (election or appointment) process, superseded by a new appointment. See Appellant's Brief, October 3, 2011, p. 37-41. In *State ex rel. Zeigler v. Zumbar* there had been three other office holders between the relator and the respondent, and still this Court granted the writ removing the current office holder, due to improper usurpation of the office, rejecting the mootness argument, upholding instead the integrity of the process for obtaining the office. *Id.* at 248-249, ¶ 44. The integrity of an election is not upheld by allowing an unqualified office holder to keep the office, merely because of a calendar. Counsel has not found one case where "mootness" has ever defeated a

quo warranto action where a prior term, alleged to have been *taken unlawfully*, was used, as it is here, to justify *continuing* to hold the office, by the same person, unlawfully. Even where the *quo warranto* remedy as to *those prior terms* are moot, the continuing qualifications to hold that office are not, and can still be enforced as to a current office holder.

This Court long ago rejected such a notion, although in a slightly different context (the challenge being the unconstitutionality of a law creating the particular office). In *State ex rel. Wilmot v. Buckley*, 60 Ohio St. 273, 54 N.E. 272 (1899), the Court was addressing the respondents' argument in an action to remove them from the board of elections (in the context of a demurrer to a limitations defense), that they could not be ousted from the current term, because the defect putting them in office (the unconstitutional statute) happened in a prior term -- and the prior term "tacked" onto the current term to protect them from the limitations defense. The argument, essentially the result of the present Decision, was rejected:

> *If it were otherwise* the statute of limitations would run, not in favor of the officer, but in favor of the office, and *after three years the constitutionality of the statute creating an office could not be questioned*. The right of the people to protect themselves against unconstitutional laws *would thus become barred within three years after the passage of an act creating an office*.
>
> The statute of limitations in question applies expressly to the officer and not to the office, and when the office is in conflict with the constitution this statute does not prevent the court from so declaring.
>
> It is urged that while the members of the board have not been in office under *their present terms* for three years that *the same board of elections has been in existence more than three years, and that therefore the board cannot be ousted*. *This is not sound*, for the reason that the statute is by its express terms for the protection only of officers, and says nothing about the ouster of the board of election or other boards. The board of elections is not an officer, but the men composing the board are the officers.

Id. at 276-277 (emphasis added).

Here Relator is not seeking to invalidate a present term in office based on an alleged prior disqualification from an expired term of office, but rather seeking to invalidate his present term

in office based upon a violation of strict compliance election laws and administrative code provisions that culminated in a complete loss of his peace officer certificate, although *during his* first term in office, which is still true in his current term of office.

C. Failure of any person to challenge an unqualified person in their first term cannot waive statutory qualifications for the office for any subsequent term.

By not allowing Relator to challenge the legal title to the office Respondent claims, after he was denied the right to protest to a board of elections because of party affiliation; and then denied a writ of *mandamus* to compel the board of elections to hear his protest, all as stated *because* he had a remedy in *quo warranto*, and then deny the *quo warranto* remedy, not on the merits but because of time, the Court has denied both Federal and State constitutional due process and equal protection rights. If Varnau were of the same party as Respondent, he could have instituted a formal protest before a board of elections, and enter the exact same evidence before the BOE as is presented in this case (or more, due to different evidence standards). But Relator was denied that right only because of party affiliation.

The Court's Decision, as to Relator and as to the public in general, has the practical although unintended effect of sanctioning election fraud, particularly if a board of elections won't act. Arguably, using this precedent no one could ever challenge an incumbent, even after first discovering the incumbent does not have the qualifications for the office, if the incumbent has been in office for at least one full term. This is unique in the context of county sheriff, because to be a sheriff one has to maintain a peace officer certificate, and a peace officer certificate's validity depends on being continuously and lawfully appointed to a peace officer position; but administratively the "certificate" is not revoked, but by operation of law it isn't valid. But if that lapse, or "break in service," is not discovered until after the term is up, per this Decision the incumbent is immune from challenge, even though never having qualified for the elected office.

It is no different than being a judge, which requires a minimum number of years as a lawyer, and if one is elected to or is appointed to the judicial office, and serves those minimum years, and then it is discovered they did not have the required years to start with – it is too late to challenge that office holder – as by staying in office they have rendered the deficiency, upon which the continued viability of holding the office depends, "moot."

This Decision nullifies the Administrative Code provisions with respect to the validity and expiration of OPOTA certificates, and without ever looking at the merits of whether Brown County has a sheriff that has ever met the qualifications for the office. Only because he went more than four years in a term of office, his loss of lawful peace officer certification, due to an invalid appointment to start with, doesn't matter anymore.

III. Conclusion

> The public has a keen interest in the proper execution of the laws. It has a right to have its mayor and its council obey its charter. The Ohio Supreme Court confronted an improper removal of an official in *Gerhardt, supra*. In restoring the official to his office, the court observed: "If the members of a legislative body can ignore, with impunity, the mandates of a . . . city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely." [Citation omitted]. Although in *Gerhardt* the public official, and not a taxpayer, had commenced a *quo warranto* action, the court sufficiently enunciated the public's interest. That same public interest is the gravamen of this case and sufficiently supports the taxpayer's action.

State ex rel. Cater v. City of North Olmstead, 8th Dist. No. 60689, 1992 WL 80044 (April 14, 1992), *31, affirmed, *Cater*, 69 Ohio St.3d 315, and quoting, *State ex rel. Gerhardt v. Kreihbiel*, 38 Ohio St.2d 90, 94, 310 N.E.2d 251 (1994), and *Cleveland ex rel. Neelon v. Locher*, 25 Ohio St.2d 49, 52, 266 N.E.2d 831 (1971).

Similarly, county sheriffs and boards of elections are expected by the public to also obey the law, including the requirements for being a sheriff. Not allowing, now in three different forums, this sheriff's qualifications to hold the office to be questioned on the merits, due only to

the one leading that challenge not having done so before they had any right to do so, could also rightfully undermine, if not erode completely, the faith of the citizens in the rule of law. It may be for this reason – the public's interest in elected officials that meet *all* statutory requirements for the office, even if someone doesn't challenge them – that even "[i]f a relator in a *quo warranto* proceeding fails to establish entitlement to the office, judgment may still be rendered on the issue of whether respondent lawfully holds the disputed office." *State ex rel. Myers v. Brown*, 87 Ohio St.3d 545, 547, 721 N.E.2d 1053 (2000). As a result, the time of bringing the challenge, and a relator's personal timing, should not be controlling.

It is respectfully suggested that the Court did not fully consider these implications in its Decision, and the Decision is in error. It is therefore requested that the Court reconsider its Decision in these respects, vacate its Decision, and grant the Appellant's requested relief; or in the alternative vacate the Decision and Judgment, and set this matter for full oral argument so each of these issues and this Court's precedent can be appropriately addressed.

Respectfully submitted,

THOMAS G. EAGLE CO., L.P.A.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this _____ day of February 2012.

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Thomas G. Eagle (#0034492)