FIRST DISTRICT COURT OF APPEALS
HAMILTON COUNTY, OHIO

STATE *ex rel.* BARBARA HOLWADEL, *et al.*,	**:**	**Case No. C-13-00717**
Relators,	**:**	
v.	**:**	
HAMILTON COUNTY BOARD OF ELECTIONS, *et al.*,	**:**	**RELATORS' RESPONSE IN SUPPORT OF ISSUANCE OF WRIT OF MANDAMUS**
Respondents.	**:**	

Relators Barbara Holwadel and Steve Johnson hereby tender the following response: (i) in further support of the Motion for Issuance of a Writ of Mandamus; and (ii) in opposition to the Board of Election's Cross-Motion for Summary Judgment.

RESPONSE MEMORANDUM

In considering the arguments and the undisputed facts developed at the protest hearing before the Board of Elections (such that this case involves a purely legal question of applying the law to such facts), this Court must appreciate and proceed from the basic legal proposition that "a court considering an action in mandamus need accord no special deference to a board of elections' interpretation of state election law." *State ex rel. Scott v. Franklin Cty. Bd. of Elec.*, 2014-Ohio-1395 ¶13 (10th Dist. 2014); *accord State ex rel. McCord v. Delaware Cty. Bd. of Elec.*, 106 Ohio St.3d 346, 835 N.E.2d 336, 2005-Ohio-4758 ¶30 n.2 (2005)("we need accord no deference to a board of elections' interpretation of state election law").

Because the comments and rationale by the plurality of the Board of Elections focused more upon whether Mr. Simes had a generalized intent or plan to return to Chicago versus Cincinnati (and not necessarily to 1343 Main Street #9) some two years down the road when his

job assignment to South Korea was completed, they did not even consider or assess the evidence and its application to the actual legal standard, *i.e.*, whether, at the time that Mr. Simes registered to vote at that address on July 12, 2013, the residence at 1343 Main Street #9 was (i) the "fixed habitation" of Mr. Simes (ii) to which he had "the intention of returning".[1] And Respondents, in their filings, continue to ignore this legal standard. Accordingly, this Court must undertake a plenary review of the proper evidence to ascertain whether these two separate and distinct statutory elements were satisfied when Mr. Simes registered to vote at that address on July 12, 2013. As developed more fully in Relator's Motion for Issuance of Writ of Mandamus (filed on March 21, 2014), as well as below, Mr. Simes, having registered to vote and actually voting in Illinois, lost any claim to any purported residency in the State of Ohio and, in subsequently registering to vote with a claimed residence of 1343 Main Street #9, he has not and did not

[1] The Board inaccurately attempts to characterize Mr. Simes' action as "re-establish[ing] his residence in Cincinnati." (Board's Motion, at 5.) Of course, as even the Board and Mr. Simes recognized, Mr. Simes previously never had or even claimed any residence in Cincinnati; his prior voter registration was not in the City of Cincinnati but in Cleves. (Board's Motion, at 2; Simes' Memo., at 3.) Thus, it is clearly false and misleading when Mr. Simes claims that "he always considered Cincinnati his home." (Simes' Memo., at 3 (citing Simes Aff. ¶4).) For when he lived and voted from his parents' home in Cleves, Cincinnati was not his home. Of course, in light of Mr. Simes having subsequently registered to vote and voting in another state (which cannot be consistent with Mr. Simes' declaration that "he *always* considered Cincinnati his home"), Mr. Simes' historical connection to Hamilton County (not Cincinnati) is not pertinent because, by his own action, he disavowed any claimed residency in the State of Ohio. *See* R.C. § 3503.02(H). The question, as addressed below, is the legal standard Mr. Simes needed to satisfy – "fixed habitation" with the "the intention of returning to that habitation" – in order to establish himself in July 2013 as a voting resident in Ohio, in general, and, specifically, his claimed voting residence of 1343 Main Street #9.

For this case simply involves the ability and requirements for an out-of-state resident, during a 5-day transient visit to the area, to register to vote in this State. The precedent herein will not only affect Mr. Simes personally, but has the potential to open the flood gates of allowing out-of-state campaign workers and volunteers to come into the State of Ohio to register to vote simply by declaring that wherever they might be staying for the weeks or months while supporting the relevant campaign constitutes their "fixed habitation" (without even discussing the permanency *vel non* of such an arrangement with the owner of the property) and that, someday in the future, they intend to return to Ohio (but not necessarily to the residence where they're staying while supporting the campaign and the address they used to register to vote).

satisfied the legal standard of subsequently establishing that address as his fixed habitation to which he had the intention of returning.

I. Respondents' effort to recast their arguments in the previously denied motions to dismiss are unavailing.

Upon the commencement of this action, Respondents herein separately moved to dismiss, claiming a want of standing and jurisdiction, as well as the failure to exhaust administrative remedies. (Board's Motion to Dismiss, filed on November 21 2013; Simes' Motion to Dismiss, filed on November 26, 2013.) On January 10, 2014, this Court overruled those motions.

Now, the Board and Simes attempt to revisit and reargue issues that have already been reviewed and rejected by this Court. And while their effort is precluded by the law-of-the-case doctrine, *see Thompson v. Burger Chef of Circleville, Inc*., 65 Ohio App.2d 77, 415 N.E.2d 1005 (1st Dist. 1979)(law-of-the-case doctrine applies, *inter alia*, "to subsequent proceedings by different judges or divisions in the same court and in the same case"); *State v. Hayden*, 2012-Ohio-6183 ¶31 (2d Dist. 2012)("[i]n general, the law of the case doctrine requires us to follow prior opinions of our court in the same case"), the Respondents' effort to have a second-bite-of-the-apple is still unavailing on the merits. Of course, to the extent necessary, Relators would incorporate by reference Relators' Memorandum in Opposition to Respondents' Motions to Dismiss (filed on December 2, 2013). The following simply attempts to address the Respondents' latest efforts to recast the arguments already rejected by this Court.

A. Relators still have standing to pursue this mandamus claim.

As before, the Board once again claims that because the Relators herein were not the parties who actually filed with the Board a protest challenging Simes' registration, the Relators lack standing to prosecute this mandamus action. (*Compare* Board's Motion to Dismiss, at 5-6 *with* Board's Cross-Motion, at 7-8.) But the Board simply attempts to recast and reargue its

contention that, in order to have standing, Realtors had to have been the specific individuals to have filed the protest with the Board challenging Simes' voter registration before they could seek review via mandamus. (*Compare* Board's Motion to Dismiss, at 6 ("[a]llowing Holwadel and Johnson to contest the decision of the Board of Elections when they were neither parties nor participants to the original challenge before the Board completely eviscerates the purpose and process set up in the exclusive statutory remedy prescribed by the General Assembly") *with* Board's Motion, at 8 ("where (as here) the General Assembly has provided a statutory protest procedure regarding the relevant issue, a relator must first file a protest before bringing an action for an extraordinary writ on such issue"). But the law and equity does not so require.

At the outset, though, it should be noted that the Board now finally acknowledges that "election matters involve public concerns and an elector generally may seek compliance with election laws through mandamus." (Board's Motion, at 8 (citing to *State ex rel. Barth v. Hamilton Cty. Bd. of Elec.*, 65 Ohio St.3d 219 (1992).) This principle, as well as the consistent application of this principle for over 100 years, was developed more fully in Relators' Memorandum in Opposition to Respondents' Motions to Dismiss (filed on December 2, 2013).

Now, the Board attempts to distinguish and isolate the 100-plus-years of precedent allowing Relators *qua* electors to bring this mandamus action by claiming that *State ex rel. Shumate v. Portage Cty. Bd. of Elec.*, 64 Ohio St.3d 12, 591 N.E. 2d 1194 (1992), restricts standing to bring a mandamus action in an election matter solely to the individual who actually filed a protest with a board of elections.[2] (Board's Motion, at 8.) However, *Shumate* simply

[2] The Board also cites to *State ex rel. Miller v. Warren Cty. Bd. of Elec*., 130 Ohio St.3d 24, 955 N.E.2d 379, 2011-Ohio-4623, in support of its claim that only the complainant before a board of elections may maintain a mandamus action. But *Miller* simply quoted from *Shumate* and did not analyze or develop the issue. Thus, the Board essentially relies upon *Shumate* to

concerned whether the relator therein had an adequate remedy at law that he failed to pursue. *Shumate*, 64 Ohio St.3d at 15 ("relator did not protest Wilkins's candidacy. Moreover, the issues on which he now challenges Wilkins's candidacy were not raised by Whittington when he protested Wilkins's candidacy before respondent. Accordingly, relator had an adequate remedy at law that he failed to pursue and, consequently, failed to establish a record on which this court may base a decision"). For the filing of a protest and a hearing being held before any person may bring a mandamus action was necessary so that a record could be developed for review by the court entertaining the mandamus action:

> By filing a protest, a relator avoids the charge that he or she has bypassed an adequate legal remedy. Bringing the issues before the board establishes a record from which the court, in a later action for an extraordinary writ, may judge whether the board was affected by fraud or corruption, abused its discretion, or clearly disregarded statutes or other legal provisions. Without the record, there is no basis for a court to decide these issues.

Id. at 14-15. Thus, the issues must simply have been raised before the board and a record developed before a mandamus action can be brought. For the decision in *Shumate* made no mention whatsoever of standing nor did the Court indicate (or even address) the 100-plus-years of precedent clearly enabling Relators to bring the present action.

By its argument relating to *Shumate*, the Board, having already rejected a challenge to Mr. Simes' voter registration, would require the Relators herein to engage in the vain and futile act of repeating that which already occurred. But as Relators already addressed (*see* Relators' Memorandum in Opposition to Respondents' Motions to Dismiss, at 6-8), "[w]hile it is true that mandamus relief will be denied if administrative avenues are not exhausted, it also is true that a person need not pursue administrative remedies if such an act would be futile." *State ex rel.*

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somehow overrule *sub silentio* the 100-plus-years of precedent supportive of Relators bringing and prosecuting this action even after the Board of Elections already rejected a protest.

Cotterman v. St. Marys Foundry, 46 Ohio St.3d 42, 44, 544 N.E.2d 887 (1989), and that "the failure to exhaust administrative remedies may be a defense only if there is an effective remedy to afford the relief sought." *State ex rel. 506 Phelps Holdings, L.L.C. v. Cincinnati Union Bethel*, 986 N.E.2d 1037, 2013-Ohio-388 ¶32 (1st Dist. 2013). Thus, had this mandamus been brought before any challenge to Mr. Simes' voter registration had been filed with and heard by the Board of Elections, then this action would likely be premature. But because there has already been a statutory challenge to Mr. Simes' voter registration before the Board of Elections and a record has been developed from which this Court may assess whether the board was affected by fraud or corruption, abused its discretion, or clearly disregarded statutes or other legal provisions, Relators need not needlessly repeat such a challenge before they may pursue relief in mandamus herein.

B. Respondents mistakenly claim an administrative appeal available when the Ohio Supreme Court has ruled otherwise.

And in a continuation of their efforts to repeat their previously rejected arguments (apparently, in the hope of eliciting a different disposition), both the Board and Simes claim that an administrative appeal under R.C. Chapter 2506 constitutes an adequate remedy at law so as to preclude this mandamus action. (*Compare* Board's Motion to Dismiss, at 5-6 *with* Board's Motion, at 8-9 *and* Simes' Memo., at 8.) In opposing the issuance of a writ of mandamus, Respondents initially claim that an administrative appeal from the decision of the Board of Elections was available to the complainant (Ms. Siegel but not Relators herein) and, thus, constitutes a plain and adequate remedy at law so as to preclude the issuance of an extraordinary writ. (Board's Motion for Judgment, at 8-9; Simes' Memo. Opposing Issuance of Writ, at 8.) However, Respondents fail to consider, let alone appreciate, that the statutory provision providing for administrative appeals (R.C. § 2506.01 *et seq.*) and related court decisions

expressly recognize that R.C. § 2506.01 *et seq*. is not even applicable to decisions of boards of election.

R.C. § 2506.01 provides for an appeal to the common pleas court from every final order, adjudication, or decision of any officer, tribunal, authority, board, *etc.*, "of any political subdivision of the state." However, it is well established that a board of election is *not* a political subdivision. *State ex rel. Columbus Blank Book Mfg. Co., v. Ayres*, 142 Ohio St. 216, 51 N.E.2d 636 (1943). Thus, when directly called upon to decide the issue now raised by the Respondent, the Tenth District in *State ex rel. Moss v. Franklin Cty. Bd. of Elec.*, 69 Ohio App.2d 115, 432 N.E.2d 210 (10th Dist. 1980), expressly concluded that that "the action of the respondent Board [of Elections] is not appealable pursuant to R.C. Chapter 2506 and that relator has no adequate remedy by way of appeal." *Id.* at 116-17. And subsequently, the Ohio Supreme Court expressly "adopt[ed] [the] reasoning" of *Moss* because "under prior decisions of this court, boards of elections are not 'political subdivisions' under R.C. Chapter 2506." *State ex rel. Brown v. Summit Cty. Bd. of Elec.*, 46 Ohio St.3d 166, 167, 545 N.E.2d 1256 (1989). And, thus, the Ohio Supreme Court in *Brown* rejected the claim that an administrative appeal was available and constituted an adequate remedy in the ordinary course of the law so as to preclude a claim for mandamus.

II. Respondents ignore Simes' action of registering to vote and voting in Illinois such that, before he could validly become a valid voter anywhere in Ohio (let alone in Cincinnati), he had to establish and maintain (1) a fixed habitation and (2) the intention of returning to that habitation.

The Respondents, in opposing the issuance of a writ of mandamus herein, continue to conveniently focus upon everything except the basic legal standards by which a non-resident of this State establishes residency within this State so as to be able to vote in this State. For the Ohio Supreme Court, as well as the Ohio Attorney General, has declared that, in order to

establish oneself as a resident of the State of Ohio so as to be entitled to vote, there are "two elements which are determinative of residency – (1) fixed habitation and (2) the intention of returning to that habitation." *Kyser v. Board of Elec. of Cuyahoga Cty.*, 36 Ohio St.2d 17, 22, 303 N.E.2d 77 (1973); *see* Ohio Att'y Gen'l Opin. No. 1993-055 ("[a]s summarized by the Ohio Supreme Court, '[t]he essence of that statutory definition of residence [R.C. 3503.02] is 'fixed habitation'" (quoting *Kyser*, 36 Ohio St.2d at 21).) But in his memorandum, Mr. Simes failed to even acknowledge, let alone address, that the law requires that Mr. Simes have satisfied these two separate and distinct elements in order to establish a valid legal residence from which he could register to vote.[3] And the Board bemoans that Relators are "laser-focused" on these explicit legal requirements. (Board's Cross-Motion, at 12.) Of course, this simply reinforces that, as it did before, the Board wants to ignore the legal requirements– (1) *fixed habitation* and (2) the *intention of returning to that habitation*.

Respondents attempt to find support in three cases addressing the appropriate voting location for an undisputed Ohio resident. (Board's Motion for Judgment, at 9-12.) But in *Husted*, *Klink* and *Robinson-Bond*, there was no issue or dispute as to whether the subject voters already were and had been residents and citizens of the State of Ohio; the question was simply whether the subject voters (having already met the legal standard to be valid voters in the State of Ohio) had gone from one county to another county within the State and, in so doing, gained an exclusive voting residence in the latter county.

For example, in *Husted*, the subject voter had indisputably been a resident with a fixed habitation in Montgomery County for over 24 years. *Husted*, 123 Ohio St.3d 288, 915 N.E.2d

[3] Again, it is very revealing that, in his memorandum, Mr. Simes, other than simply quoting R.C. § 3503.02(A), makes no mention, discussion or argument concerning of the explicit requirements of establishing a "fixed habitation" with the "the intention of returning to that habitation."

1215, 2009-Ohio-5327 ¶¶2&3 (after cataloging then-State Senator Husted's service representing all or part of Montgomery County in the General Assembly since 2001, the court recognized that "Husted testified that he has lived in the Dayton area for the past 24 years, including the past 14 years at his home in Kettering"). And the question simply was whether Senator Husted could *continue to claim* Montgomery County as his voting residence even though he also lived at a house in the Columbus area owned by his wife though "his presence in Franklin County [was] primarily because of his employment as a state legislator." *Id.* ¶29.[4] Due to the applicability of different provisions of R.C. § 3503.02 concerning residency and the loss of one's residency, the Court in *Husted* concluded Senator Husted never lost a voting residence where he already had a fixed habitation to which he had the intention of returning.

Similarly, *Klink* also involved the question of whether a voter, "still hav[ing] a place of habitation at his Cincinnati address", *Klink*, 157 Ohio St. at 341-42, 105 N.E.2d at 401 (Taft, J., concurring), no longer could claim Hamilton County as his voting residence because his wife lived in Franklin County. But the subject voter had "at one time fixed his habitation in Cincinnati" coupled with "substantial evidence of [his] intention eventually to return from Franklin county to Cincinnati. Also, there is evidence that he has not gone to Franklin county for permanent purposes." *Klink*, 157 Ohio St. at 342, 105 N.E.2d at 401 (Taft, J., concurring). Thus, like *Husted*, the issue in *Klink* was not whether the voter had even established a fixed habitation in this State with the intention of returning to that habitation; instead, *Klink* also involved the issue of whether a voter could *continue to claim* one county versus another county as his voting residence.

[4] The Supreme Court Court found Section 3, Article II of the Ohio Constitution to be relevant and applicable in light of the case involving a member of the General Assembly. "This constitutional provision ensures that a state legislator's absence from the district on official duties does not jeopardize his or her right to claim a full year's residence in the district." *Id.* ¶29.

And Simes' reliance upon the Second District decision in *Robinson-Bond* similarly involved the question resolving in which of two counties an undisputedly-qualified Ohio voter could vote.[5] As with *Husted* and *Klink*, the issue in *Robinson-Bond* also involved the implication of R.C. § 3503.02(D) which provides "[t]he place where the family of a married person resides shall be considered to be the person's place of residence." Relying upon *Husted*, the Second District in *Robinson-Bond* simply concluded that R.C. 3503.02(D) was not dispositive of voting residence to the exclusion of other divisions of that section. *Robinson-Bond*, 2011-Ohio-6127 ¶23 ("[w]hile it is undisputed that Robinson-Bond's husband and children reside in Franklin County, R.C. 3503.02(D), that fact, standing alone, is not substantial evidence from which the Board could find that Robinson-Bond is not a resident of Champaign County"). Instead, the issue concerned that which the Board ignored with respect to Mr. Simes – fixed habitation with the present intention of returning to that habitation. *See id*. ¶19 ("Robinson-Bond offered extensive evidence demonstrating that Champaign County is the place where her habitation is fixed and to which, whenever she is absent, she has the intention of returning").

In contrast, when Mr. Simes registered to vote in Cook County, Illinois, and actually voted there in November 2012, he lost any prior claim to being a resident of the State of Ohio. None of the voters in *Husted*, *Klink* or *Robinson-Bond* had taken the affirmative and deliberate action of disavowing and repudiating all residences within this State. For as R.C. § 3503.02(H) declares unequivocally, by "go[ing] into another state and while there exercise[ing] the right of a

[5] In *Robinson-Bond*, an appeal was taken to the Ohio Supreme Court. Within that appeal, the parties filed a joint motion for vacatur indicating that the matter had been resolved at mediation. But it is noteworthy that with that joint filing (a copy of which is available from the website of a governmental agency so that judicial notice may be taken of it), the following characterization was given of the *Robinson-Bond* decision by all parties thereto: "The parties also agree that it is appropriate to vacate the Second District's opinion since it, too, was based on incomplete facts and, as such, provides little or no guidance for future actions." (Motion, at 2, available at http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx? pdf=705648.pdf.)

citizen by voting," Mr. Simes was "considered to have lost [any claimed] residence in this state."[6] Thus, before he could subsequently claim the right to vote anywhere in Ohio, Mr. Simes first had to meet and satisfy the residency requirements of R.C. § 3503.01 and R.C. § 3503.02 which, once again, requires two separate and distinct legal requirements– (1) *fixed habitation* and (2) the intention of returning to *that habitation*. And with respect to 1343 Main Street #9, the two elements were not satisfied when Mr. Simes registered to vote on July 12, 2013.

Furthermore, in addition to *Husted*, *Klink* and *Robinson-Bond* involving voters who already had fixed habitations in this State and the intention to return to that habitation (so that the issue was simply in which county the individual could vote), *Husted*, *Klink* and *Robinson-Bond* also involved voters who were married and whose spouses lived in a different county within Ohio so that the principle issue in the cases involved the application of R.C. § 3503.02(D).[7] But as Mr. Simes is not married, those cases and the impact of R.C. § 3503.02(D) are not even relevant which further distinguishes those cases.

[6] It is very revealing that, in him memorandum, Mr. Simes conveniently ignored the dictate of R.C. § 3503.02(H) that, through his action of registering to vote and voting in Illinois, he lost any claim to being a resident of the State of Ohio.

[7] The Board also cited to *State ex rel May v. Jones*, 16 Ohio App.3d 140, 242 N.E.2d 672 (11th Dist. 1968), for the proposition that the residency rules are flexible enough "to permit college students to register to vote at either their parents' address or their campus residence." (Board Motion, at 10.) Of course, *May* did not address that issue. *See id.* at 141 ("Relator Charles D. May's parents are both deceased" and, thus, there was no parents' residence at which to register). Instead, *May* simply found unconstitutional a state statute which declared that a college student could not claim a voting residence the college town even in situations where the student's actions and conduct in the town manifested an intent to make that place his new home.

III. Respondents ignore that the law requires testimony before the Board be under oath and that Simes' statement tendered to the Board did not satisfy that legal requirement or the statutory requirements of the election falsification statute.

In attempting to justify the consideration by the Board of Elections of the unsworn statement tendered on behalf of Mr. Simes (who did not even attend the hearing and, thus, was not subject to cross-examination), the Respondents conveniently ignore that R.C. § 3503.24 mandates that "[a]ll witnesses [at the quasi-judicial hearing challenging a voter registration] shall testify under oath" and which is reiterated by Ohio Secretary of State Directive 2012-30 (with respect to a hearing held pursuant to a challenge filed pursuant to R.C. 3503.24, "[a]ll witnesses must testify under oath"). And just as the Respondents ignored the law with respect to establishing a voting residence – (1) *fixed habitation* and (2) the *intention of returning to that habitation* – they have also elected to ignore the legal requirements with respect to permissible type of evidence.

Instead and initially, Mr. Simes falsely claims that no objection to the unsworn statement was made to the propriety of the Board considering the statement. (Simes' Memo., at 17 & 19.) But at the outset of the hearing, when the first objection to testimony was lodged [10/14/13 Hearing Transcript, at 24-25], the Board indicated that, instead of various objections being lodged throughout and interrupting the hearing, it would afford a "standing objection for whatever issue" so that there would be no waiver of any such issue:

> MR. HARTMAN: But along that line, I also don't want to be – if we do end up in the Court of Common Pleas, to waive any objection either. That's – if I don't object [it is] waived, I don't know.
>
> MR. TRIANTAFILOU: We can allow a standing objection, can't we, as a body, something we [can] ordinarily do.
>
> MR. HARTMAN: Okay.

> MR. TRIANTAFILOU: So we will note your standing objection for whatever issue, any objection to that?
>
> CHAIRMAN BURKE: No, that's fine.

[10/14/13 Hearing Transcript, at 25-26.] Thus, the Board granted and invited a "standing objection for whatever issue". Thus, any claim that such objection was waived is invalid. Additionally, though, the specific lack of the declaration not being an affidavit or under oath was specifically raised and pointed out to the Board in closing argument – "it's either live testimony or via affidavit." [10/14/13 Hearing Transcript, at 123.]

Mr. Simes attempts to excuse the lack of an affidavit by relying upon the fact that the unsworn statement was supposedly made under penalty of election falsification. (Simes' Memo., at 17-18.) Relators would agree with the proposition posited by Mr. Simes that "[a] statement made 'under penalty of election falsification' with potential criminal penalty" would be sufficient. (Simes' Memo., at 18.) However, the requirements for an unsworn statement to be made under penalty of election falsification (so as to impose the potential for criminal sanction) are set forth in R.C. § 3599.36; and the unsworn statement tendered to the Board by Mr. Simes did not satisfy the explicit statutory requirements.

While Mr. Simes selectively quotes a portion of the election falsification statute (Simes' Memo., at 18 n.6), he conveniently failed to include the portion of the statute that his unsworn statement didn't satisfy:

> Every paper, card, or other document relating to any election matter that calls for a statement to be made under penalty of election falsification *shall be accompanied by the following statement in bold face capital letters: "Whoever commits election falsification is guilty of a felony of the fifth degree."*

R.C. § 3599.36 (emphasis added). The unsworn statement tendered to the Board did not contain the mandatory statement, let alone such a statement in bold face capital letters. R.C. § 3599.36

does not "expressly permit[] merely substantial compliance, so [it] require[s] strict compliance." *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 204, 777 N.E.2d 830, 2002-Ohio-5583 ¶32. The lack of such statement in the style mandated by the statute means that Mr. Simes' statement was not, in fact, submitted under penalty of election falsification and any falsehood therein would not subject him to even the potential of criminal liability.

Thus, the consideration and reliance upon the unsworn statement of Mr. Simes also constitutes an abuse of discretion and only further militates in favor of the issuance of the requested writ of mandamus.

IV. Conclusion

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." *John Adams.* And the undisputed facts and proper evidence developed at the hearing before the Board of Elections clearly established that, during his 5-day transient visit to the area when he also registered to vote, Mr. Simes did not satisfy the legal standard to claim a voting residence of 1343 Main Street #9. The two separate and distinct elements which are determinative of voting residence – (1) fixed habitation and (2) the intention of returning to that habitation – were not and have not been satisfied with respect to Mr. Simes' voting registration at that address. Accordingly, the actions of the Hamilton County Board of Elections and its individual members in rejecting the challenge to the voter registration of Randy Allen Simes and not striking the name of Mr. Simes from the voting registration rolls was in clear disregard of applicable legal provisions, as well as being the result of an abuse of discretion, such that the requested writ of mandamus should issue.

Respectfully submitted,

/s/ Curt C. Hartman

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following via e-mail on the 21st day of May 2014:

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