Case No. 2017-315

In the
Supreme Court of Ohio

STATE EX REL. ANDREA F. ROCCO,
Relator,

v.

CUYAHOGA COUNTY BOARD OF ELECTIONS, *et al.*,
Respondents.

Original Action in Mandamus

REPLY BRIEF OF RELATOR ANDREA F. ROCCO

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A. Respondent Board Erred in Superimposing a Charter Qualification for Holding the Office of Law Director Upon the Charter's Requirements to Appear on the Ballot as a Candidate.

Respondent Board first contends that Relator waived her argument that Respondent Board improperly applied a Westlake Charter provision regarding a qualification for holding the office as a qualification to run for the office by not raising it at the Protest Hearing. But this contention ignores the fundamental principle that challenges to subject-matter jurisdiction cannot be waived and may be raised at any time. [*See Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶ 45 quoting *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992 ("Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time")].

Relator does not contest the Board's authority to hold protest hearings in order to determine the qualifications for candidates to *run* for Director of Law for Westlake. As Respondents correctly note by citing *State ex rel. Kelly v. Cuyahoga Cty. Bd. of Elections*, 70 Ohio St.3d 413, 414, 639 N.E.2d 78 (1994), the Board is authorized to determine a person's qualifications to be a candidate. The qualifications to run for Director of Law are established by Article VII, Section 3 of the Charter. Under this provision, candidates are required to: (1) file a nominating petition containing the signatures of at least 500 qualified Westlake electors by 4:00 p.m. on the 90th day before the primary election day; and (2) file a written acceptance of the nominee along with the nominating petition. The nominating petition itself establishes an additional requirement that the candidate (3) be a qualified elector of Westlake at the time they sign the nominating petition. The Board can certainly hear protests about any of these three issues.

Relator contests the Board's imposition of a requirement to hold an office as a requirement to run for the office; *Kelly* does not address this issue. As explained more fully in Relator's Merit Brief, there is nothing in Article VII, Section 3's requirements to run for Westlake Director of Law that incorporates the requirements to hold the position of Westlake Director, found in Article IV, Section 4. Provisions incorporating requirements to hold the office as a requirement to run for the office are common as demonstrated by one of the cases Respondents cite in their Brief, *State ex rel. Shumate v. Portage Cty. Bd. of Elections*, 64 Ohio St.3d 12, 591 N.E.2d 1194 (1992). The statute at issue in *Shumate*, R.C. 311.01, establishes the qualifications for sheriffs and expressly requires candidates for sheriff to have the qualifications to hold the office of sheriff: "Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements* * *" [R.C. 311.01(B)]. The Westlake Charter contains no similar language incorporating the qualifications to hold the office of Director of Law as the qualifications to run for the office, and in the absence of such a provision, Respondent Board was not authorized to interpret the Charter's requirements to hold the position of Westlake Director of Law as the requirements to hold the position.

The proper mechanism to challenge whether Relator satisfies the Westlake Charter's legal practice requirement would be through a quo warranto action, if Relator wins the election. [*See, State ex rel. Flanagan v. Lucas*, 139 Ohio St.3d 559, 2014-Ohio-2588, 13 N.E.3d 1135, ¶ 12 ("Quo warranto is the exclusive remedy to litigate the right of a person to hold a public office")]. Respondents do not claim to have jurisdiction over quo warranto actions, but instead attempt to distinguish *Flanagan* by alleging that the relator in that case had not filed a protest before the election alleging that the eventual winner of the election was not qualified to hold the office.

However, this distinction has no bearing on whether Respondent Board has jurisdiction in the first instance to determine whether a candidate has the qualifications to hold the office or only jurisdiction to determine the qualifications required to be a candidate for election.

Respondent Board has failed to establish that Article IV's requirements to hold the position of Westlake Director of Law are also requirements imposed by the Charter to be a candidate on the ballot.

B. Respondent Board failed to consider Relator's legal practice experience beyond the six years immediately preceding the November 7, 2017 election.

1. If the drafters of the Westlake Charter had intended the Director of Law to have been engaged in the practice of law for "the" period of six years "immediately" preceding the election, as Respondents allege, then they would have said so.

The language of the Westlake Charter's legal practice requirement provides that the Director of Law "shall have been engaged in the active practice of law for a period of six years next preceding [her] election." Respondents' argument focuses on "next preceding" meaning "immediately preceding," even though "immediately preceding," not "next preceding," is used elsewhere in the Westlake Charter, including in the same Section of the Charter as the legal practice requirement.[1] But the first operative word in this provision is "a" period of six years, which signifies an unspecified or undetermined period of six years. i.e., any period of six years.[2] [*See, Judy v. Bur. Of Motor Vehicles*, 100 Ohio St.3d 122, 2003-Ohio-5277, 797 N.E.2d 45, ¶ 19 quoting Webster's Third New International Dictionary (1986) 1 ("the word 'a' is an indefinite

[1] As explained more fully in Relator's Merit Brief, the use of different language in the same provision "gives rise to a presumption that different meanings were intended." [Rel. Merit Br. 13-14 citing *State v. Herbert*, 49 Ohio St.2d 88, 113, 358 N.E.2d 1090 (1976); *Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) ("Having used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended")]. Thus, the drafters of the Charter presumably intended "next preceding" to mean something different than "immediately preceding."

[2] In addition, "been engaged" is a past participle, indicating at some point in the past. In other words, the active practice of law had been engaged in at some point in the past, previous, prior to the election, and not immediately up to the election which would have been indicated by the present participle "has been engaging."

article used to denote a [noun] that is 'undetermined, unidentified, or unspecified")]. Respondents' interpretation of the Charter does not account for this indefinite article. Instead, and as the Board freely concedes, their interpretation replaces "a" with "the" in order to contend that the provision refers to "the" period of six years next preceding the election. [Resp. Br. at 10 ("The Respondents correctly read Westlake's Charter as requiring a candidate for Director of Law to have been engaged in the active practice of law for the six (6) year period immediately preceding the election") (emphasis added)].

Whether the Charter requires "a" period of six years of legal practice or "the" period of six years of legal practice is the key factor in determining the meaning of "next preceding". If the Charter actually required the Director of Law to have been engaged in the active practice of law for "the" period of six years next preceding the election, then the Charter would clearly be referring to the six years immediately preceding the election. This point is illustrated by 1951 Ohio Atty. Gen. Op. No. 151, which Respondents cite in their brief. There, the Attorney General advised that the phrase "the next preceding federal census," as used in a statute setting the compensation for members and staff of county boards of elections, is definite in nature and clearly refers to the latest census. In contrast to the statute at issue in 1951 Ohio Atty. Gen. Op. No. 151, and in contrast to the Board's interpretation of Westlake's legal practice requirement, the Charter does not refer to "the" period of six years, it refers to "a" period of six years. This renders the rest of the phrase "period of six years next preceding the election" indefinite and unspecified.

Respondents also concede that their interpretation of the Charter replaces "next preceding" with "immediately preceding." [*See*, Resp. Br. at 10 ("The Respondents correctly read Westlake's Charter as requiring a candidate for Director of Law to have been engaged in the active practice of law for the six (6) year period immediately preceding the election") (emphasis added)]. The

flaw in doing so is illustrated by 2002 Ohio Atty. Gen. Op. No. 20, which Respondents cite to in their brief. There, the Attorney General was advising on the legal practice requirement for common pleas judges which requires judges to have been engaged in the practice of law "for a total of at least six years preceding the judge's appointment or commencement of the judge's term." The Attorney General declined to adopt an interpretation of the provision as requiring a judge to have practiced law for the six years *immediately* preceding the commencement of his term in part because "immediately" was not actually used in the statute.[3] The Attorney General then explained that the use of the term "immediately preceding" in other instances in the Ohio Revised Code, including in the very statute that the Attorney General was interpreting ("immediately" was used twice to describe the general election at which the judge shall be elected), supported the conclusion that "if the General Assembly had intended to require that a judge engage in the practice of law or serve as a judge for the six-year period immediately preceding the commencement of his term, it would have explicitly stated so." [2002 Ohio Atty. Gen. Op. No. 20 at *3-4 (relying upon the principle that the use of different language in the same provision gives rise to a presumption that different meanings were intended) (emphasis added)].

Although the language in the qualifications statute for common pleas judges with the Westlake Charter provision is not an apples-to-apples comparison, the Attorney General's refusal to insert words not used in the statute and reliance upon the principle that the provision's use of "immediately" elsewhere indicates the exclusion of it when not used informs the analysis here. First, the Board was wrong to replace "next preceding" with "immediately preceding" in its interpretation. Additionally, the use of "immediately preceding" in the same provision that

[3] 2002 Ohio Atty. Gen. Op. No. 2002 at 3 ("First, to interpret R.C. 2301.01 as requiring a common pleas judge to have met the requisite professional experience during the six years immediately prior to the commencement of his term would require us to insert a word that was not used by the General Assembly. Such an interpretation violates a basic principle of statutory construction.").

contains the legal practice requirement indicates that the drafters of the Charter intended "next preceding" to have a different meaning than "immediately preceding." Thus, if the drafters of the Westlake Charter had, as Respondents allege, intended the Director of Law to have been engaged in the practice of law for "the" period of six years "immediately" preceding the election, then they would have said so.[4] But they did not. Instead, the plain language requires the Law Director to have at least six years of legal practice experience *before* her election.

2. The exact meaning of "next preceding" within the context of the Charter's experience requirement for holding office is unclear. Given this ambiguity, the intent of the provision, the legislative history, and the consequences of Respondents' construction of the Charter all may be considered, and they support a finding that the Charter simply requires the Law Director to have six years of active legal practice experience.

The phrase "next preceding" within the context of Charter language that states "a period" rather than "the period" and uses "immediately preceding" instead of "next preceding" for a second durational requirement is arguably ambiguous. [*See,* Tr. 69 (Respondent Chappell conceding that the Charter "can be interpreted in different ways")]. When a legal provision is ambiguous, the Court may consider the provision's intent, the provision's legislative history, or the consequences of a particular construction of the provision, among other facts. [*See,* Rel. Merit Br. 14-17 citing R.C. 1.49]. As addressed more fully in Relator's Merit Brief, Westlake's longtime Mayor, who participated in the discussions that led to amending the Charter's legal practice requirement to its current language, explained that the intent of the provision was not to limit the number of potential candidates for Director of Law to only those who have practiced law during the six years

[4] At the Protest Hearing, Respondent Chappell contended that "next preceding" constitutes a greater emphasis of "immediately preceding". [Tr. 69 (".....the intent [could] be, as Mr. Synenberg indicated, so that the immediately is really, specifically only in reference to the residency portion of that requirement. And then the next preceding add(s) greater emphasis to indicate that we're really looking at the six years immediately prior to the -- Is that a fair interpretation?"). But how can one more emphasize "*immediately* preceding" than with the phrase "*immediately* preceding? There is simply no evidence—textual, logical, or historical—to support this interpretation.

immediately preceding the election, but to allow the voters of Westlake a choice among candidates who have at least six years of legal practice experience. [Rel. Merit Br. 14-15 citing Rel. Exh. B., Evid. Vol. 1 p.38]. Adopting the Board's interpretation, which completely discounts and disregards the Mayor's firsthand knowledge of the provision's intent, would frustrate this purpose and lead to the absurd result of excluding well-qualified and well-experienced individuals who were not engaged the practice of law for the entire six years before the election. For example, a woman who practiced law consecutively for ten years, but took off six months for maternity leave sometime during the six years before the election would be ineligible. An attorney who paused his law practice to serve in the military, but maintained his law license, would be ineligible. The intent of the provision was not to exclude these individuals from serving as Law Director, and it was not to exclude someone like Relator who has over two decades of legal practice experience, including eleven years as the Westlake Prosecutor and Assistant Law Director, from running for Law Director. The meaning of "next preceding" within the context of the Westlake Charter lacks the clarity to conclude that its meaning is plain and unambiguous. Therefore, the provision's intent, its legislative history, and the consequences of the Board's construction of it all favor an interpretation of the Charter as requiring the Law Director to have been engaged in the active practice of law for a period of six years before the election.

3. Even if the Respondent Board was correct that "next preceding" means immediately preceding the election, the Court should reject this hypertechnical application as it frustrates the public interest and public purpose.

The Court's consideration of the effect of an interpretation is not limited to instances when the language of a provision is ambiguous. Even when the language at issue is clear and unambiguous, the Court has instructed that hypertechnical applications of the law must be avoided when they would be contrary to the public interest or public purpose, including the purpose of the

law. [See, e.g., *Stutzman v. Madison Cty. Bd. of Elec.*, 93 Ohio St.3d 511, 515, 757 N.E.2d 297 (2001); *State ex rel. Phillips v. Lorain Cty. Bd. of Elec,* 93 Ohio St.3d 535, 541, 757 N.E.2d 319 (2001)]. The Board's hypertechnical interpretation of "a" meaning "the" and "next preceding" meaning "immediately preceding" frustrates the public interest in having free, competitive elections as, in the case here, it would prevent the voters of Westlake from having a choice among Law Director candidates at the November 2017 election. [Compl. ¶ 37]. Moreover, the Board's interpretation frustrates the purpose of the legal practice requirement, which, as explained by Westlake's Mayor, is to ensure that the voters have a choice among Law Director candidates who have been practicing law for a minimum number of years—not to require Law Director candidates to have been engaged in the practice of law for the six years immediately preceding the election.[5] [*See,* Rel. Exh. B., Evid. Vol. 1 p.38]. Accordingly, even if the Board was correct in finding that "next preceding" means "immediately" preceding the election, the Court should reject this hypertechnical application as it frustrates the public interest and public purpose of the Charter provision.

C. Respondent Board failed in its duty to give the term "active" a liberal construction in favor of access to the ballot.

There is no factual dispute as to what Relator did as Clerk and that she used her legal training and skills. Respondents repeatedly concede that Relator was engaged in the practice of law during the time she served as the Clerk of Courts, but rest their entire argument on the conclusion that she was not engaged in the "active" practice of law. This argument turns on the

[5] In their brief, Respondents speculate that the intent of the provision could be that recent legal experience, compared to less recent experience, is "an essential qualification" for Law Director. [Resp. Br. at 14]. There is no evidence or testimony to support this theory about the provision's intent; again, Westlake's longtime Mayor expressly stated that this was not the purpose in his affidavit. Moreover, this theory leads to the absurd result that an attorney who spent the six years immediately preceding the election practicing nothing but maritime law would be more "essentially qualified" to serve as landlocked-Westlake's Law Director than someone who has practiced municipal law for twenty years, but did not the year immediately preceding the election.

legal interpretation of "active," a legal, not factual, issue and, it appears, a case of first impression for the Court. Unfortunately, Respondents never precisely explain their definition of "active," and instead just assert that Relators has not satisfied the standard, whatever it is. In so doing, Respondents have failed in their duty to give the term "active" a liberal construction in favor of access to the ballot, as required by this Court.

1. There is no dispute between the parties that Relator repeatedly employed her skills as a lawyer to provide services for the people of Cuyahoga County.

Throughout their brief, Respondents repeatedly concede that Relator was engaged in the practice of law as Clerk of Courts. [*See, e.g.,* Resp. Br. 22 ("…the evidence indicated that relator used her legal knowledge, training, and skills while serving as Clerk of Court…")]. For example, Respondents concede that Relator "read, researched, analyzed, and applied Ohio statutory law and Ohio's Rules of Superintendence and other procedural rules in the course of her office operations"; that she "had to update record retention schedules for her office; comply with Ohio public records laws; resolve a backlog of expungement requests; accounted for outstanding court costs; and worked with judicial officers to improve the administration of justice in the court"; and that she drafted legal documents and memoranda, including a personnel policy handbook for the office.[6] [Resp. Br. at 23-24; *see also*, Resp. Br at 15, 22-23, 26].

In addition to the examples highlighted by Respondents' Brief, the record is replete with numerous other instances where Relator used her legal skills, knowledge, and training while

[6] Although Respondents acknowledge that the drafting of the personnel policy handbook was evidence that Relator provided legal services to her office, they contend that this service was "isolated and not recurring." [Resp. Br. 24]. However, beyond the development of the handbook itself, what Respondents fail to account for is the legal implications and the legal consequences of *implementing* the handbook. One just does not put into operation a legally enforceable instruction manual and then call it a day. As Relator testified, employment law and human resources issues arose "every day." [Tr. 82 (Rel. Exh. D, Vol. 2 p.83)]. That is not surprising given that the Clerk's office had never before had its own set of legally enforceable rules in place, and that Relator was now implementing them for a large office. And so it is the continuing and continuous management of that legally enforceable personnel handbook that also must be considered when taking into account the active practice of law.

serving as Clerk of Courts. Relator testified that, in her role as Clerk, she performed significant amounts of legal research, analysis regarding specific issues related to the Ohio Rules of Civil Procedure, Ohio Rules of Superintendence, Ohio's public records law, employment law, contract law, and other court administration laws and rules; drafted legal documents; brought her office into compliance with applicable laws and rules after ordering and reviewing the results from an audit; provided legal education to attorneys and judges; frequently advised her office and the public of the applicable laws and rules; frequently advised other County officials of the applicable law and rules; frequently advised and conferred with the judges that worked with her office regarding applicable laws and rules; and advised and conferred with the government attorneys assigned to her office. [Rel. Merit Br. 4-5, 26-34; Tr. 40-84 (Rel. Exh. D, Evid. Vol. 2)]. All of these actions resulted in changed process and changed policies. [S*ee,* Rel. Exh. B, Evid. Vol. 1, p.66 (discussing Relator's efforts to get other County agencies to sign an agreement to waive certified mail costs)].

Respondents spend much time arguing that Relator presented no evidence that she engaged in any legal practice outside of her role as Clerk of Courts, but this is not true. Relator testified that, outside of her role as Clerk but while she served as Clerk, she advised and conferred with attorneys on criminal law matters outside of Cuyahoga County [Tr. 51-52 (Rel. Exh. D, Vol. 2 p.52-53)]; advised a non-attorney on an employment law matter outside of Cuyahoga County [Tr. 51 (Rel. Exh. D, Vol. 2 p.52)] and has served as pro bono legal counsel to a non-profit organization since early-2013. [Tr. 25-34 (Rel. Exh. D, Vol. 2 p.26-35).[7] Although Relator was not compensated

[7] Relator testified that, in her role as legal counsel to the nonprofit, she attended regular board meetings at which she provided legal advice on issues ranging from the organization's affiliation agreement, bylaws, revenue collecting system, and forfeited funds collections; Relator provided meeting minutes to corroborate this testimony. [See, Tr. 25-34; Rel. Exh. B Vol. 1 p.70-89].

for these particular services, there is no requirement that legal practice must be compensated in order for it to count as legal practice.[8]

Respondents also contend that much of Relator's work cannot constitute the practice of law because her work was no different than the work of all other clerks of courts, and that clerks of court are not required to be licensed attorneys. [Resp. Br. 23]. Respondents failed to support this argument with evidence as to what other clerks do, but the general duties of the clerks of the courts of common pleas are set forth in R.C. 2303.08. Nothing in this statute required Relator to rewrite subpoena forms, draft personnel policy handbooks, draft contracts, draft waiver agreements for certified mail, advise and confer with judges regarding the consequences of lawsuits, perform her own legal research and analysis, or do any of the other legal actions that Relator testified to and are detailed more fully in Relator's Merit Brief.

Although there is no dispute among the parties that Relator provided legal services while she was Clerk, Respondents contend in their Brief that Relator never informed them that she considered the County government as her client. [Resp. Br. at 23] This is dead wrong. Not only is it inherent in the Clerk of Courts position that she serves the County, but at the Protest Hearing, Relator's counsel stated:

> McTIGUE: We've heard today, in response to the questions asked by one of the Board members, that the Prosecutor's Office has said your employer, in this case, a public employer, can be a client. So [Relator] was providing legal advice when called upon. She wasn't the official lawyer, but she was using her skills as a lawyer to research, analyze, draft, and advise.
>
> [Tr. 92-93]

[8] In their Brief, Respondents dismiss Relator's pro bono legal practice experience as "laudable" but not "fairly [] characterized as constituting the active practice of law. [Resp. Br. at 26]. This flies in the face of the Court's Statement on Professionalism, which provides that lawyers have a duty to provide pro bono representation and to support organizations that provide pro bono representation. [Supreme Court of Ohio, Professional Ideals for Ohio Lawyers and Judges, Statement Regarding the Provision of Pro Bono Legal Services by Ohio Lawyers, available at https://www.supremecourt.ohio.gov/Publications/AttySvcs/proIdeals.pdf; *see also*, Ohio Rules of Professional Conduct, Rule 6.2, Comment 1 ("All lawyers have a responsibility to assist in providing *pro bono publico* service.")].

Moreover, and as alluded to by Relator's counsel's statement at the Protest Hearing, Respondents' counsel had previously informed the Board that Relator's employer was her client. [See, Rel. Merit Br. at 5, fn.1; Tr. 52-53, 107 (Rel. Exh. D, Evid. Vol. 2 p.53-54, 108)]. This point was undisputed then, and cannot reasonably be disputed now.

In short, there is no dispute between the parties that Relator repeatedly employed her skills as a lawyer to provide services for the people of Cuyahoga County.

2. Relator's uncontroverted testimony and evidence that she provided legal advice or took actions connected with the law nearly every day as Clerk of Courts is more than enough to satisfy the liberally construed legal practice requirement.

Interpreting the phrase "active practice of law," and specifically the word "active," is where Respondent Board failed in its duty to "liberally construe election laws in favor of persons seeking to hold office so as to avoid restricting the right of electors to choose among qualified candidates." [*State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St.3d 222, 2013-Ohio-4616, 998 N.E.2d 1093, ¶ 23; Rel. Merit Br. 20-21]. It is clear that Respondents think the "active" practice of law constitutes a higher threshold than the mere "practice of law," but they never explain what that threshold is or how Relator or any candidate can meet it. Respondents never precisely defined "active practice of law" during the Protest Hearing, nor did they offer the Court a clear definition of the term in their Brief. Moreover, Respondents made no attempt to explain why their interpretation of the term differed from the Westlake Law Department's special counsel's opinion, which defined "active" simply as "characterized by action rather than by contemplation" and did not interpret the phrase as establishing some sort of quantitative threshold. [*See,* Rel. Merit Br. 18; Rel. Exh. C, Evid. Vol. 1 p.137 quoting Webster's Ninth New Collegiate Dictionary, "Active" p.54 (1985)].

The closest Respondents get to providing a clear definition is when they "do not disagree" that the active practice of law "may be understood liberally to include a licensed attorney who is using the attorney's legal knowledge, training, experience, and legal skills on a continuous if not daily basis in the course of performing official duties." [Resp. Br. 16]. But Respondents quickly discarded this definition as Relator provided significant amounts of testimony and evidence that she was in fact using her "legal knowledge, training, experience, and legal skills on a continuous if not daily basis" as the Clerk and that she did not have to rely as much on the government attorneys assigned to her office.[9] [See, Tr. 64, 80, 83 (Rel. Exh. D, Evid. Vol. 2)]. Instead, Respondents continued to raise the threshold without ever explaining themselves.

Instead of offering a concrete definition of the "active" practice of law, all Respondents say in the end is that "there was no evidence to suggest that such use [of Relator's legal training, skills, and knowledge] constituted an active practice of law *as that phrase has been described in Ohio decisional law*." [Resp. Br. 26 (emphasis added)]. But there is no Ohio decisional law interpreting the phrase the "active practice of law"; indeed, this is a case of first impression. All of the relevant case law from this Court concerns the "practice of law," and Respondent has conceded that every legal principle under this precedent requires a broad and liberal standard favoring access to the ballot. [Resp. Br. 15-17 (conceding that the "practice of law" has been defined "expansively" and must be "understood liberally"; that Relator was not required to have been engaged in the full-time or exclusive practice of law; that Relator was not required to have been compensated for her legal practice; and that Relator could have been engaged in the practice of law in a position even if being a licensed attorney was not a pre-requisite for the position)].

[9] Although Relator testified that she used her legal skills nearly every day as Clerk, this Court's precedent provides that one does not have to be engaged in the practice of law "continuously" or "daily". Part-time law practice experience is acceptable. [*Kelly*, 70 Ohio St.3d at 415; *Ohio Secretary of State, Tie Vote of March 24, 2010* [sic], *Concerning the Candidacy of James O'Grady*].

Relator's uncontroverted testimony and evidence demonstrate that, on her own initiative, she regularly engaged in the research and analysis of laws, and she regularly advised and conferred with other attorneys, members of the judiciary, and county government officials about her legal research and analysis. Relator's testimony and evidence further demonstrates that her legal research and analysis resulted in finding solutions to problems and actions being taken in connection with her legal analysis. This is the core essence of what attorneys do when they practice law, and this is what the record demonstrates that Relator regularly did while she served as Clerk of Courts.

Applying a liberal construction to the phrase "active practice of law" means applying a construction that favors access to the ballot and providing voters the opportunity to select from among all qualified candidates; a construction clearly not followed by two of the Board members. Rather, they applied a construction that excludes qualified candidates.

II. CONCLUSION

This Court has repeatedly found that the public has an interest in free, competitive elections. Adopting the Board's restrictive interpretation of the Charter and their position that Relator, who has more than twenty-three years of legal practice experience, including eleven years as the Westlake's Prosecutor and Assistant Law Director, is not qualified to serve as Westlake's Law Director, would thwart this interest as the voters of Westlake would lose the opportunity to choose their next Law Director. For these reasons, and the reasons in Relator's Merit Brief, Relator respectfully prays this Court to issue an Order, Judgment and/or Writ of Mandamus ordering Respondents to certify Relator's name for placement on the November 7, 2017 general election ballot for the office of Westlake Director of Law; assess the costs of this action against

Respondents; award Relator her attorneys' fees and expenses; and award such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 12.08(C), I hereby certify that the foregoing Reply Brief has been sent via email this 23rd day of March, 2017 to Counsel for Respondents.

/s/ Donald J. McTigue
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RELATOR'S APPENDIX OF CITED CHARTER PROVISIONS AND STATUTES

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Article IV, Section 4, Westlake Charter – Department of Law

The Department of Law shall be headed by the Director of Law and commencing with the regular municipal election in the year 2005, and every fourth (4th) year thereafter, he shall be elected for a term of four (4) years. The Director of Law's term shall commence and he shall assume office on the first day of January following his election and shall serve out his term or until his successor is elected and qualified, whichever occurs last. During his term of office he shall continue to be a resident and qualified elector of the municipality. The Director of Law shall appoint all assistant directors of law and office staff; assistant directors of law shall be subject to confirmation by a majority of the members of Council. The Director of Law shall be a qualified elector at the time of his election, shall have been a resident of the City for at least eighteen (18) months immediately preceding his election, an attorney at law duly admitted to the practice of law before the courts of the State of Ohio, and been engaged in the active practice of law in Ohio for a period of six (6) years next preceding his election. The annual salary for the Director of Law for the term commencing January 1, 2014 and each succeeding term thereafter shall be fixed by Council at least forty-five (45) days prior to the time a person is required to file nominating petitions for the office of Director of Law for that particular term. The annual salary may be increased but shall not be decreased during the term it was set.

He shall serve the Mayor, the various administrative departments, boards, and officers of the Municipality and the Council, as attorney and legal counsel, and shall represent the Municipality in all proceedings in courts of law and before any administrative body. He or his designee shall attend all Council meetings and Committee meetings of Council. He shall perform all other duties now or hereafter imposed by law upon directors of law of cities unless otherwise provided by ordinance of Council. He shall act as the Prosecuting Attorney of the City.

Council may, by a two-thirds (2/3) vote of the members of Council after public hearing, expel or remove the Director of Law from office for gross misconduct, malfeasance, nonfeasance, misfeasance in or disqualification for office; for violation of his oath of office; for conviction while in office of a crime involving moral turpitude; or for mental or physical disability rendering it impossible for him to perform the duties of the Director of Law. Prior to any such action by Council, the Director of Law shall be notified in writing of the charge against him at least ten (10) days in advance of the hearing upon such charge, and he and his counsel shall be given an opportunity to be heard, present evidence or examine any witness appearing in support of such charge.

In the event the office of Director of Law shall become vacant, for any reason, the Mayor shall appoint an Acting Director of Law subject to confirmation of Council. The Acting Director of Law shall be an attorney-at-law licensed to practice before the Courts of the State of Ohio but need not be resident of the municipality. The Council shall, within fourteen (14) days after the vacancy occurs, provide for a special election, with no preliminary primary, to be held one hundred twenty (120) days from the date of the vacancy to fill such vacancy.

Article VII, Section 3, Westlake Charter – Declaration of Candidacy

Any persons desiring to become a candidate for election to any office to be voted for at the next succeeding regular municipal election shall, not later than 4:00 p.m. of the 90th day before primary election day, file a nominating petition. Such petition shall require signatures of registered electors and shall be accompanied by the written acceptance of the nominees. The petition for offices of Mayor, President of Council and Director of Law shall be signed by not less than five hundred (500) qualified electors. The petition for office of Ward Councilman shall be signed by not less than one hundred (100) qualified electors of the ward in which election is sought. Petitions shall be circulated by a qualified elector of the City of Westlake.

R.C. 1.49 - Determining legislative intent.

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

R.C. 311.01 – Election and qualifications of sheriff.

(A) A sheriff shall be elected quadrennially in each county. A sheriff shall hold office for a term of four years, beginning on the first Monday of January next after the sheriffs election.

(B) Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

(1) The person is a citizen of the United States.

(2) The person has been a resident of the county in which the person is a candidate for or is appointed to the office of sheriff for at least one year immediately prior to the qualification date.

(3) The person has the qualifications of an elector as specified in section 3503.01 of the Revised Code and has complied with all applicable election laws.

(4) The person has been awarded a high school diploma or a certificate of high school equivalence issued for achievement of specified minimum scores on a high school equivalency test approved by the department of education pursuant to division (B) of section 3301.80 of the Revised Code.

(5) The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude under the laws of this or any other state or the United States, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree under the laws of this state or an offense under the laws of any other state or the United States that carries a penalty that is substantially equivalent to the penalty for a misdemeanor of the first degree under the laws of this state.

(6) The person has been fingerprinted and has been the subject of a search of local, state, and national fingerprint files to disclose any criminal record. Such fingerprints shall be taken under the direction of the administrative judge of the court of common pleas who, prior to the applicable qualification date, shall notify the board of elections, board of county commissioners, or county central committee of the proper political party, as applicable, of the judge's findings.

(7) The person has prepared a complete history of the person's places of residence for a period of six years immediately preceding the qualification date and a complete history of the person's places of employment for a period of six years immediately preceding the qualification date, indicating the name and address of each employer and the period of time employed by that employer. The residence and employment histories shall be filed with the administrative judge of the court of common pleas of the county, who shall forward them with the findings under division (B)(6) of this section to the appropriate board of elections, board of county commissioners, or county central committee of the proper political party prior to the applicable qualification date.

(8) The person meets at least one of the following conditions:

(a) Holds a current valid peace officer certificate of training issued by the Ohio peace officer training commission or has been issued a certificate of training pursuant to section 5503.05 of the Revised Code;

(b) Has been employed full-time by a law enforcement agency performing duties related to the enforcement of statutes, ordinances, or codes for a minimum of thirteen consecutive pay periods within the four-year period prior to the qualification date. As used in this division, "full-time" means a minimum of eighty hours of work in a fourteen-day period.

(9) The person meets at least one of the following conditions:

(a) Has at least two consecutive years of supervisory experience as a peace officer at the rank of sergeant or above;

(b) Has completed a bachelor's degree in any field or has an associate degree in law enforcement or criminal justice from a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located.

(C) Persons who meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, may take all actions otherwise necessary to comply with division (B) of this section. If, on the applicable qualification date, no person has met all the requirements of division (B) of this section, then persons who have complied with and meet the requirements of division (B) of this section, except the requirement of division (B)(2) of this section, shall be considered qualified candidates under division (B) of this section.

(D) Newly elected sheriffs shall attend a basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code. A newly elected sheriff shall complete not less than two weeks of this course before the first Monday in January next after the sheriffs election. While attending the basic training course, a newly elected sheriff may, with the approval of the board of county commissioners, receive compensation, paid for from funds established by the sheriffs county for this purpose, in the same manner and amounts as if carrying out the powers and duties of the office of sheriff.

Appointed sheriffs shall attend the first basic training course conducted by the Ohio peace officer training commission pursuant to division (A) of section 109.80 of the Revised Code within six months following the date of appointment or election to the office of sheriff. While attending the basic training course, appointed sheriffs shall receive regular compensation in the same manner and amounts as if carrying out their regular powers and duties.

Five days of instruction at the basic training course shall be considered equal to one week of work. The costs of conducting the basic training course and the costs of meals, lodging, and travel of appointed and newly elected sheriffs attending the course shall be paid from state funds appropriated to the commission for this purpose.

(E) In each calendar year, each sheriff shall attend and successfully complete at least sixteen hours of continuing education approved under division (B) of section 109.80 of the Revised Code. A sheriff who receives a waiver of the continuing education requirement from the commission under division (C) of section 109.80 of the Revised Code because of medical disability or for other good cause shall complete the requirement at the earliest time after the disability or cause terminates.

(F)

(1) Each person who is a candidate for election to or who is under consideration for appointment to the office of sheriff shall swear before the administrative judge of the court of common pleas as to the truth of any information the person provides to verify the person's qualifications for the office. A person who violates this requirement is guilty of falsification under section 2921.13 of the Revised Code.

(2) Each board of elections shall certify whether or not a candidate for the office of sheriff who has filed a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate meets the qualifications specified in divisions (B) and (C) of this section.

(G) The office of a sheriff who is required to comply with division (D) or (E) of this section and who fails to successfully complete the courses pursuant to those divisions is hereby deemed to be vacant.

(H) As used in this section:

(1) "Qualification date" means the last day on which a candidate for the office of sheriff can file a declaration of candidacy, a statement of candidacy, or a declaration of intent to be a write-in candidate, as applicable, in the case of a primary election for the office of sheriff; the last day on which a person may be appointed to fill a vacancy in a party nomination for the office of sheriff under Chapter 3513. of the Revised Code, in the case of a vacancy in the office of sheriff; or a date thirty days after the day on which a vacancy in the office of sheriff occurs, in the case of an appointment to such a vacancy under section 305.02 of the Revised Code.

(2) "Newly elected sheriff means a person who did not hold the office of sheriff of a county on the date the person was elected sheriff of that county.

R.C. 2301.01 – Courts of common pleas.

There shall be a court of common pleas in each county held by one or more judges, each of whom has been admitted to practice as an attorney at law in this state and has, for a total of at least six years preceding the judge's appointment or commencement of the judge's term, engaged in the practice of law in this state or served as a judge of a court of record in any jurisdiction in the United States, or both, resides in the county, and is elected by the electors therein. Each judge shall be elected for six years at the general election immediately preceding the year in which the term, as provided in sections 2301.02 and 2301.03 of the Revised Code, commences, and the judge's successor shall be elected at the general election immediately preceding the expiration of that term.

R.C. 2303.08 – General duties [of the clerk of the court of common pleas]

The clerk of the court of common pleas shall indorse on each pleading or paper in a cause filed in the clerk's office the time of filing, enter all orders, decrees, judgments, and proceedings of the courts of which such individual is the clerk, make a complete record when ordered on the journal to do so, and pay over to the proper parties all moneys coming into the clerk's hands as clerk. The clerk may refuse to accept for filing any pleading or paper submitted for filing by a person who has been found to be a vexatious litigator under section 2323.52 of the Revised Code and who has failed to obtain leave to proceed under that section.