

Case No. 2021-0274

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**Supreme Court  
of the State of Ohio**

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STATE OF OHIO *ex rel.* MARK W. MILLER,

Relator,

v.

HAMILTON COUNTY BOARD OF ELECTIONS, *et al.*,

Respondents.

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*Original Action in Prohibition // Election-Related Matter*

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**RELATOR'S MERIT BRIEF**

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## TABLE OF CONTENTS

|  |          |
|--|----------|
| Table of Contents .....  | i        |
| Table of Authorities .....   | iii      |
| <b>I. FACTUAL BACKGROUND .....</b>   | <b>1</b> |
| <b>II. LAW AND ARGUMENT .....</b>  | <b>3</b> |
| <b>PROPOSITION OF LAW No. 1: .....</b>   | <b>3</b> |
| <b>The Ohio Supreme Court has original jurisdiction to issue a writ of prohibition.</b>  |          |
| <b>PROPOSITION OF LAW No. 2: .....</b>   | <b>4</b> |
| <b>An administrative agency, including a board of elections, is subject to issuance of a writ of prohibition upon establishment that: (i) the agency is about to exercise or has exercised quasi-judicial power; (ii) the exercise of such power is unauthorized by law; and (iii) relator lacks an adequate remedy in the ordinary course of law.</b> |          |
| <b>A. In rejecting the protest, the Board of Elections exercised quasi-judicial power .....</b>  | <b>4</b> |
| <b>PROPOSITION OF LAW No. 3: .....</b>   | <b>4</b> |
| <b>A board of elections exercises quasi-judicial authority in conducting a protest hearing under R.C. 3501.39 whereat it adjudicates legal issues and, if disputed, factual issues related to the protest and ultimately denying the protest so as to place candidate or measure on the ballot.</b>  |          |
| <b>B. The Board of Elections abused its discretion and/or clearly disregarded applicable law in exercising such quasi-judicial power .....</b>   | <b>6</b> |
| <b>PROPOSITION OF LAW No. 4: .....</b>   | <b>6</b> |
| <b>In adjudicating a protest under R.C. 3501.39, a board of elections abuses its discretion or clearly disregards applicable law when it fails to require candidates to satisfy and perform all legal requirements in order to be candidates.</b>  |          |
| <b>1. The provisions of a city charter supersede conflicting state law on matters of municipal government .....</b>  | <b>7</b> |
| <b>PROPOSITION OF LAW No. 5: .....</b>   | <b>7</b> |
| <b>The provisions of a city charter supersede conflicting state law as it concerns municipal elections, including the requirements a candidate for municipal office must satisfy.</b>  |          |

|   |    |
|---|----|
| <b>PROPOSITION OF LAW No. 6:</b> .....  | 7  |
| When a city charter specifically requires a circulator affidavit be included or attached to each part-petition on a municipal election-related matter, the mandate for a circulator affidavit controls over any contrary state law.                             |    |
| 2. The mandate for inclusion of a circulator affidavit requires strict compliance.....  | 8  |
| <b>PROPOSITION OF LAW No. 7:</b> .....  | 8  |
| When a city charter sets forth procedures and requirements concerning municipal elections, such provisions require strict compliance unless the charter specifically allows for substantial compliance with respect to the particular procedure or requirement. |    |
| 3. Substantial compliance with the form of a nominating petition does not excuse strict compliance with the mandate of a circulator affidavit (or the outright omission of the circulator affidavit) .....  | 10 |
| <b>PROPOSITION OF LAW No. 8:</b> .....  | 10 |
| Substantial compliance with the form of a nominating petition does not excuse strict compliance with the mandate within a city charter requiring a circulator affidavit be attached to each part-petition.  |    |
| 4. An outright failure to comply with an election law is neither strict compliance nor substantial compliance .....   | 12 |
| <b>PROPOSITION OF LAW No. 9:</b> .....  | 12 |
| An outright failure to comply with a provision or requirement of election law is neither strict compliance nor substantial compliance.  |    |
| C. The proximity of the forthcoming election results in Relator lacking an adequate remedy in the ordinary course of law .....  | 16 |
| <b>PROPOSITION OF LAW No. 10:</b> .....   | 16 |
| The proximity of a forthcoming election is sufficient to establish the lack of an adequate remedy in the ordinary course of law in order to support the issuance of a writ of prohibition.  |    |
| <b>III. CONCLUSION</b> .....  | 16 |
| Certificate of Service.....   | 18 |
| <b>APPENDIX</b> .....   | 19 |

## TABLE OF AUTHORITIES

### Case Citations

|   |       |
|---|-------|
| <i>Benedict v. Peters</i> ,<br>58 Ohio St. 527, 51 N.E. 37 (1898) .....   | 15    |
| <i>Brown v. Wood Cty. Bd. of Elections</i> ,<br>79 Ohio App.3d 474, 478, 607 N.E.2d 848 (6th Dist. 1992) .....  | 9     |
| <i>Disciplinary Counsel v. Squire</i> ,<br>130 Ohio St.3d 368, 958 N.E.2d 914, 2011-Ohio-5578 .....   | 14    |
| <i>M.J. Kelley Co. v. Cleveland</i> ,<br>32 Ohio St.2d 150, 290 N.E.2d 562 (1972) .....   | 5     |
| <i>Ohio Renal Ass’n v. Kidney Dialysis Patient Protection Amendment Comm.</i> ,<br>154 Ohio St.3d 86, 111 N.E.3d 1139, 2018-Ohio-32203 .....                          | 8     |
| <i>State ex rel. Allen v. Lake Cty. Bd. of Elections</i> ,<br>170 Ohio St. 19, 161 N.E.2d 896 (1959) .....  | 12    |
| <i>State ex rel. Barney v. Union Cty. Bd. of Elections</i> ,<br>159 Ohio St.3d 50, 147 N.E.3d 595, 2019-Ohio-4277 .....   | 4     |
| <i>State ex rel. Barton v. Butler County Bd. of Elections</i> ,<br>44 Ohio St.2d 33, 336 N.E.2d 849 (1975) .....  | 9     |
| <i>State ex rel. Baryak v. Trumbull Cty. Bd. of Elections</i> ,<br>2019-Ohio-4655 (11th Dist.).....   | 4, 16 |
| <i>State ex rel. Brown v. Summit Cty. Bd. of Elections</i> ,<br>46 Ohio St.3d 166, 545 N.E.2d 1256 (1989) .....   | 3     |
| <i>State ex rel. Columbia Reserve Ltd. v. Lorain Cty. Bd. of Elections</i> ,<br>111 Ohio St.3d 167, 855 N.E.2d 815, 2006-Ohio-5019 .....                              | 16    |
| <i>State ex rel. Combs v. Greene Cty. Bd. of Elections</i> ,<br>158 Ohio St.3d 70, 140 N.E.3d 555, 2019-Ohio-4110 .....   | 11    |
| <i>State ex rel. Comm. for Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections</i> ,<br>96 Ohio St.3d 308, 774 N.E.2d 239, 2002-Ohio-4194) ..... | 9     |
| <i>State ex rel. Coulverson v. Ohio Adult Parole Auth.</i> ,<br>62 Ohio St.3d 12, 577 N.E.2d 352 (1991) .....   | 14    |
| <i>State ex rel. Craig v. Scioto Cty. Bd. of Elections</i> ,<br>117 Ohio St.3d 158, 882 N.E.2d 435, 2008-Ohio-706 .....   | 3     |
| <i>State ex rel. Ditmars v. McSweeney</i> ,<br>94 Ohio St.3d 472, 764 N.E.2d 971, 2002-Ohio-997 .....   | 8, 15 |
| <i>State ex rel. Ebersole v. Delaware Cty. Bd. of Elections</i> ,<br>140 Ohio St.3d 487, 20 N.E.3d 678, 2014-Ohio-4077 .....  | 7     |

|  |       |
|--|-------|
| <i>State ex rel. Finkbeiner v. Lucas Cty. Bd. of Elections</i> ,<br>122 Ohio St.3d 462, 912 N.E.2d 573, 2009-Ohio-3657 .....       | 3     |
| <i>State ex rel. Huebner v. W. Jefferson Village Council</i> ,<br>72 Ohio St.3d 589, 651 N.E.2d 1001 (1995) .....                  | 7     |
| <i>State ex rel. Johnson v. Ohio Adult Parole Auth.</i> ,<br>95 Ohio St.3d 463, 768 N.E.2d 1176, 2002-Ohio-2481 .....              | 14    |
| <i>State ex rel. Jones v. Suster</i> ,<br>84 Ohio St.3d 70, 701 N.E.2d 1002, 1998-Ohio-275 .....                                   | 3     |
| <i>State ex rel. Linnabary v. Husted</i> ,<br>138 Ohio St.3d 535, 8 N.E.3d 940, 2014-Ohio-1417 .....                               | 9, 11 |
| <i>State ex rel. Meyer v. Warren Cty. Bd. of Elections</i> ,<br>__ Ohio St.3d __, __ N.E.3d __, 2020-Ohio-4863 .....               | 4, 5  |
| <i>State ex rel. Miller v. Warren Cty. Bd. of Elections</i> ,<br>130 Ohio St.3d 24, 955 N.E.2d 379, 2011-Ohio-4623 .....           | 5     |
| <i>State ex rel. Myles v. Brunner</i> ,<br>120 Ohio St.3d 328, 899 N.E.2d 120, 2008-Ohio-5097 .....                                | 8     |
| <i>State ex rel. Soley v. Dorrell</i> ,<br>69 Ohio St.3d 514, 634 N.E.2d 215, 1994-Ohio-103 .....                                  | 4     |
| <i>State ex rel. Tam O'Shanter Co. v. Stark Cty. Bd. of Elections</i> ,<br>151 Ohio St.3d 134, 86 N.E.3d 332, 2017-Ohio-8167 ..... | 16    |
| <i>State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections</i> ,<br>72 Ohio St.3d 289, 649 N.E.2d 1205 (1995) .....                  | 4     |
| <i>State ex rel. Varnau v. Wenninger</i> ,<br>128 Ohio St.3d 361, 944 N.E.2d 663, 2011-Ohio-759 .....                              | 5     |
| <i>State ex rel. Weller v. Tuscarawas County Board of Elections</i> ,<br>158 Ohio St.3d 266, 141 N.E.3d 157, 2019-Ohio-4300 .....  | 11    |
| <i>State ex rel. White v. Franklin Cty. Bd. of Elections</i> ,<br>160 Ohio St.3d 1, 153 N.E.3d 1, 2020-Ohio-524 .....              | 14    |
| <i>State ex rel. Wright v. Ohio Bur. of Motor Vehicles</i> ,<br>87 Ohio St.3d 184, 186, 718 N.E.2d 908 (1999) .....                | 5     |
| <i>TBC Westlake, Inc. v. Hamilton County Bd. of Revision</i> ,<br>81 Ohio St.3d 58, 62, 689 N.E.2d 32, 1998-Ohio-445 .....         | 2     |
| <i>Toledo Bar Ass'n v. Neller</i> ,<br>102 Ohio St.3d 1234, 809 N.E.2d 1152, 2004-Ohio-2895 .....                                  | 14    |
| <i>Village of Georgetown v. Brown Cty. Bd. of Elections</i> ,<br>158 Ohio St.3d 4, 139 N.E.3d 852, 2019-Ohio-3915 .....            | 6     |

|  |   |
|--|---|
| <i>Whitman v. Hamilton Cty. Bd. of Elections</i> ,<br>97 Ohio St.3d 216, 778 N.E.2d 32, 2002-Ohio-5923 ..... | 6 |
| 03/04/2021 Case Announcements, 2021-Ohio-574 .....   | 1 |

### **State Constitution**

|  |   |
|--|---|
| <i>Ohio Constitution</i> , art. IV, sec. 2(B)(1)(d)..... | 3 |
|--|---|

### **State Statutes**

|                         |               |
|-------------------------|---------------|
| R.C. 3501.38 .....      | 7             |
| R.C. 3501.38(E) .....   | <i>passim</i> |
| R.C. 3501.38(E)(1)..... | 7             |
| R.C. 3501.39 .....      | <i>passim</i> |
| R.C. 3501.39(A).....    | 2             |
| R.C. 3513.261 .....     | 11            |

### **Ohio Laws**

|                         |   |
|-------------------------|---|
| 135 Ohio Laws 799 ..... | 7 |
|-------------------------|---|

### **City Charter**

|   |               |
|---|---------------|
| Cincinnati City Charter, Article IX, Section 2.....   | <i>passim</i> |
| Cincinnati City Charter, Article IX, Section 3a ..... | 10, 12        |

## MERIT BRIEF

In support of the *Verified Complaint for Writ of Prohibition* and pursuant to the order of this Court, *see 03/04/2021 Case Announcements, 2021-Ohio-574*, Relator MARK MILLER tenders the following *Merit Brief*. In support thereof, Relator has tendered: (i) the *Verified Complaint for Writ of Prohibition*; (ii) the *Affidavit of Curt Hartman*; (iii) the *Certified Copy of Article IX of the City of Cincinnati*; and (iv) the *Certified Copy of Transcript of Proceedings of the Hamilton County Board of Elections of March 2, 2021*, which includes the hearing on the protest underlying the present original action.

## MEMORANDUM IN SUPPORT

### I. FACTUAL BACKGROUND

On February 24, 2021, and pursuant to R.C. 3501.39, MARK MILLER filed a protest with the HAMILTON COUNTY BOARD OF ELECTIONS, contending that, in filing his nominating petition with the BOARD OF ELECTIONS to be a candidate at the forthcoming mayoral primary election in Cincinnati set for May 4, 2021, AFTAB PUREVAL failed, to comply with the circulator-affidavit mandate in Article IX, Section 2 of the Cincinnati City Charter:

Signatures to nominating petitions need not be appended to one paper but to each separate paper there shall be attached an affidavit of the circulator thereof stating that each signature thereto was made in the circulator's presence and is the genuine signature of the person whose name it purports to be. Each signer of a petition shall sign his or her name, address and date of signing in ink or indelible pencil.

*Verified Complaint* ¶34; *Hartman Affidavit* ¶¶5 & 6 & *Exh. B*; *see Certified Copy of Article IX of the City of Cincinnati*. Specifically, Mr. MILLER contended that Mr. PUREVAL failed to satisfy all the legal requirements to be a candidate as Mr. PUREVAL failed to “attach” a

“circulator affidavit” to each part-petition as mandated by Article IX, Section 2. *Hartman Affidavit* ¶¶5 & 6 & *Exh. B*. Instead, Mr. PUREVAL only tendered 76 part-petitions that were then followed on the same document by a section wherein the circulator simply attested to certain matters “under penalty of election falsification laws of the State of Ohio”, though no circulator affidavits were attached to any of the part-petitions. *Verified Complaint* ¶¶26 & 27; *Hartman Affidavit* ¶¶3 & 4 & *Exh. A*.

The same day that Mr. MILLER filed the protest, *i.e.*, February 24, 2021, the Director of the Hamilton County Board of Elections provided notice that the BOARD OF ELECTIONS would conduct the required hearing on the protest on March 2, 2021. *Verified Complaint* ¶35; *Hartman Affidavit* ¶¶7 & 8 & *Exh. C*. On March 2, 2021, the BOARD OF ELECTIONS and its members conducted the required hearing. *Verified Complaint* ¶36; *BOE Answer* ¶36; *see Transcript of Proceedings, at 9 - 42*. At the conclusion of the hearing, all four members of the HAMILTON COUNTY BOARD OF ELECTIONS voted to reject the protest. *Verified Complaint* ¶37; *Transcript of Proceedings, at 42*. In rejecting the protest filed by Mr. MILLER, none of the four members of the HAMILTON COUNTY BOARD OF ELECTIONS provided any statement or legal reasoning for why they rejected the protest. *Verified Complaint* ¶38; *BOE Answer* ¶38. However, just prior to the motion and vote to reject the protest (and after the board convened in private with legal counsel)<sup>1</sup>, legal counsel for the BOARD OF ELECTIONS posited:

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<sup>1</sup> As the BOARD OF ELECTIONS acknowledged in convening in private session, the Open Meetings Act did not apply as the hearing constituted a quasi-judicial proceeding. *Transcript of Proceedings, at 39*. *See TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 62, 689 N.E.2d 32, 1998-Ohio-445 (“the Sunshine Law does not apply to adjudications of disputes in quasi-judicial proceedings”)



The City Charter requires substantial compliance. It does not require strict compliance. The fact that the term that affidavit is used in one section and then a form is provided[] is sufficient for substantial compliance.

*Transcript of Proceedings, at 41; see Verified Complaint ¶39.* And having rejected the protest filed by Mr. MILLER, the BOARD OF ELECTIONS proceeded to certify Mr. PUREVAL's name to the ballot at the mayoral primary election scheduled for May 4, 2021. *Verified Complaint ¶40; BOE Answer ¶40; Transcript of Proceedings, at 45-47.*

As decisions of boards of elections on protests are not subject to administrative appeal under R.C. Chapter 2506, *State ex rel. Brown v. Summit County Bd. of Elections*, 46 Ohio St.3d 166, 167, 545 N.E.2d 1256 (1989), Mr. MILLER commenced this original action seeking issuance of a writ of prohibition consistent with precedent of this Court. *See State ex rel. Finkbeiner v. Lucas Cty. Bd. of Elections*, 122 Ohio St.3d 462, 912 N.E.2d 573, 2009-Ohio-3657 ¶40; *State ex rel. Craig v. Scioto Cty. Bd. of Elections*, 117 Ohio St.3d 158, 882 N.E.2d 435, 2008-Ohio-706 ¶29.

## **II. LAW AND ARGUMENT**

### **PROPOSITION OF LAW No. 1:**

**The Ohio Supreme Court has original jurisdiction to issue a writ of prohibition.**

Pursuant to Article IV, Section 2(B)(1)(d) of the Ohio Constitution “[t]his court has original jurisdiction to issue a writ of prohibition.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002, 1998-Ohio-275.

**PROPOSITION OF LAW No. 2:**

**An administrative agency, including a board of elections, is subject to issuance of a writ of prohibition upon establishment that: (i) the agency is about to exercise or has exercised quasi-judicial power; (ii) the exercise of such power is unauthorized by law; and (iii) relator lacks an adequate remedy in the ordinary course of law.**

“Prohibition is the appropriate remedy by which to challenge a board of elections’ decision to place a candidate or measure on the ballot.” *State ex rel. Meyer v. Warren Cty. Bd. of Elections*, \_\_ Ohio St.3d \_\_, \_\_ N.E.3d \_\_, 2020-Ohio-4863 ¶8. “For a writ of prohibition to issue, a court must find that the respondent is about to exercise judicial or quasi-judicial authority, that the exercise of such power is unauthorized by law, and that relator has no other adequate remedy at law.” *State ex rel. Soley v. Dorrell*, 69 Ohio St.3d 514, 515, 634 N.E.2d 215, 1994-Ohio-103; accord *State ex rel. Barney v. Union Cty. Bd. of Elections*, 159 Ohio St.3d 50, 147 N.E.3d 595, 2019-Ohio-4277 ¶11 (“[t]hree elements are necessary for a writ of prohibition to issue: the exercise of judicial or quasi-judicial power, the lack of legal authority for the exercise of that power, and the lack of an adequate remedy in the ordinary course of law”).

**A. In rejecting the protest, the Board of Elections exercised quasi-judicial power.**

**PROPOSITION OF LAW No. 3:**

**A board of elections exercises quasi-judicial authority in conducting a protest hearing under R.C. 3501.39 whereat it adjudicates legal issues and, if disputed, factual issues related to the protest and ultimately denying the protest so as to place candidate or measure on the ballot.**

“Regarding the first element, a county board of elections exercises quasi-judicial power when it holds a hearing under R.C. 3501.39 and denies a relator’s protest.” *State ex rel. Baryak v. Trumbull Cty. Bd. of Elections*, 2019-Ohio-4655 ¶11 (11th Dist.). So long as the election has not taken place, the writ may still be granted to stop the placement of a name or issue on the ballot even after the hearing has concluded. *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 291, 649 N.E.2d 1205 (1995)(“a writ of prohibition may issue to

prevent the placement of names or issues on a ballot even though the protest hearing has been completed, as long as the election has not yet been held”).

“Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial.” *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*, 87 Ohio St.3d 184, 186, 718 N.E.2d 908 (1999). And “R.C. 3509.39(A) requires a board of elections to conduct a quasi-judicial hearing on a petition protest.” *Meyer*, \_\_ Ohio St.3d \_\_, \_\_ N.E.3d \_\_, 2020-Ohio-4863 ¶9 (quoting *Barney*, 159 Ohio St 3d 50, 147 N.E.3d 595, 2019-Ohio-4277 ¶12). Ultimately, “a board of elections exercises quasi-judicial authority in denying timely protests filed pursuant to [the] applicable statute.” *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 955 N.E.2d 379, 2011-Ohio-4623 ¶16; accord *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 944 N.E.2d 663, 2011-Ohio-759 ¶13.

In this case, and consistent with the requirements of R.C. 3501.39(A), the BOARD OF ELECTIONS provided notice, a hearing, and the opportunity for introduction of evidence in adjudicating the legal dispute before it. See *M.J. Kelley Co. v. Cleveland*, 32 Ohio St.2d 150, 290 N.E.2d 562 (1972)(syllabus ¶2)(“quasi-judicial proceedings require notice, hearing, and the opportunity for introduction of evidence”). And following such hearing, the BOARD ultimately determined and adjudicated the controversy on the compliance *vel non* by Mr. PUREVAL with the legal requirements in Article IX, Section 2 of the Cincinnati City Charter that a circulator affidavit be attached to each part-petition.

**B. The Board of Elections abused its discretion and/or clearly disregarded applicable law in exercising such quasi-judicial power.**

**PROPOSITION OF LAW No. 4:**

**In adjudicating a protest under R.C. 3501.39, a board of elections abuses its discretion or clearly disregards applicable law when it fails to require candidates to satisfy and perform all legal requirements in order to be candidates.**

Next, the Court must consider: “the second element of the prohibition analysis: whether the board’s exercise of power was unauthorized by law. To answer this question, ‘we must determine whether the board acted fraudulently or corruptly, abused its discretion, or clearly disregarded applicable law.’” *Village of Georgetown v. Brown Cty. Bd. of Elections*, 158 Ohio St.3d 4, 139 N.E.3d 852, 2019-Ohio-3915 ¶18 (quoting *State ex rel. Brown v. Butler Cty. Bd. of Elections*, 109 Ohio St.3d 63, 846 N.E.2d 8, 2006-Ohio-1292 ¶23)). In this case, there is no contention that the BOARD OF ELECTIONS acted fraudulently or corruptly; thus, the issue is limited to whether the BOARD engaged in an abuse of discretion or a clear disregard of applicable law in rejecting the protest of Mr. MILLER based upon the non-compliance by Mr. PUREVAL of the requirement in Article IX, Section 2 of the Cincinnati City Charter, viz., to attach to each part-petition a circulator affidavit.

This Court has held that “[c]ounty boards of elections are of statutory creation, and the members thereof in the performance of their duties must comply with applicable statutory requirements.” *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 778 N.E.2d 32, 2002-Ohio-5923 ¶12 (quoting *State ex rel. Babcock v. Perkins*, 165 Ohio St. 185, 187, 134 N.E.2d 839 (1956)). Thus, county boards are not free to ignore or to re-write election laws as part of a protest or otherwise; but when they do, they exercise power unauthorized by law thus giving rise to a writ of prohibition.

1. **The provisions of a city charter supersede conflicting state law on matters of municipal government.**

**PROPOSITION OF LAW No. 5:**

**The provisions of a city charter supersede conflicting state law as it concerns municipal elections, including the requirements a candidate for municipal office must satisfy.**

**PROPOSITION OF LAW No. 6:**

**When a city charter specifically requires a circulator affidavit be included or attached to each part-petition on a municipal election-related matter, the mandate for a circulator affidavit controls over any contrary state law.**

“Municipal elections are matters of local self-government and may be the subject of a charter provision.” *State ex rel. Huebner v. W. Jefferson Village Council*, 72 Ohio St.3d 589, 651 N.E.2d 1001 (1995). “In matters of local self-government, if a portion of a municipal charter expressly conflicts with parallel state law, then the charter will prevail.” *State ex rel. Ebersole v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487, 20 N.E.3d 678, 2014-Ohio-4077 ¶47.

In terms of the circulator statement supporting a part-petition, R.C. 3501.38(E)(1) allows allow for the circulator to make the requisite declaration under penalty of election falsification, not via affidavit:

On each petition paper, the circulator shall indicate the number of signatures contained on it, and shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator’s knowledge and belief qualified to sign, and that every signature is to the best of the circulator’s knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code....

Until it was amended in 1974, however, R.C. 3501.38 actually required a circulator affidavit, instead of a circulator statement, on each part-petition. *See* 135 Ohio Laws 799.

Notwithstanding the change in state law, the Cincinnati City Charter retained the express requirement that circulators of nominating petitions provide the verification statement via

affidavit attached to each part-petition. As explicitly set forth in Article IX, Section 2 of the Cincinnati City Charter:

Signatures to nominating petitions need not be appended to one paper but to each separate paper there shall be attached an affidavit of the circulator thereof stating that each signature thereto was made in the circulator's presence and is the genuine signature of the person whose name it purports to be.

Thus, while R.C. 3501.38(E) allows for a circulator of a petition to attest to the signatures on a petition under penalty of election falsification and not by affidavit, this Court has previously held, with respect to a similar requirement in the Columbus City Charter, “[b]ecause the charter provision conflicts with the statute on the affidavit requirement, the charter provision prevails.” *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 475, 764 N.E.2d 971, 2002-Ohio-997 (“initiative petition was insufficient and invalid because it did not comply with the affidavit requirement of Columbus Charter Section 42”). Thus, the mandate in Article IX, Section 2 that to each part-petition “there shall be attached an affidavit of the circulator thereof” controls the elections process for the City of Cincinnati.

**2. The mandate for inclusion of a circulator affidavit requires strict compliance.**

**PROPOSITION OF LAW No. 7:**

**When a city charter sets forth procedures and requirements concerning municipal elections, such provisions require strict compliance unless the charter specifically allows for substantial compliance with respect to the particular procedure or requirement.**

“[T]he settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is.” *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 899 N.E.2d 120, 2008-Ohio-5097 ¶18. Stated otherwise, “when an election law is clear, ‘the settled rule is that [it is] mandatory and require[s] strict compliance.’” *Ohio Renal Ass’n v. Kidney Dialysis Patient Protection*

*Amendment Comm.*, 154 Ohio St.3d 86, 111 N.E.3d 1139, 2018-Ohio-3220 ¶8 (quoting *State ex rel. Phillips v. Lorain Cty. Bd. of Elections*, 93 Ohio St.3d 535, 539, 757 N.E.2d 319 (2001)).

While no court has addressed the circulator affidavit mandate in Article IX, Section 2 of the Cincinnati City Charter, this Court has repeatedly addressed the standard for compliance with the requirements concerning the circulator statement as set forth in R.C. 3501.38(E). Repeatedly and unequivocally, this Court has long and repeatedly held that “R.C. 3501.38(E) demands strict compliance”. *State ex rel. Comm. for Referendum of Lorain Ordinance No. 77-01 v. Lorain Cty. Bd. of Elections*, 96 Ohio St.3d 308, 774 N.E.2d 239, 2002-Ohio-4194 ¶49; accord *State ex rel. Barton v. Butler County Bd. of Elections*, 44 Ohio St.2d 33, 35, 336 N.E.2d 849 (1975)(“[w]e hold that the inclusion of the circulator’s statement as required by R.C. 3501.38(E) must be strictly complied with” and that “the omission of the circulator’s statement, which statement is required by R.C. 3501.38(E), invalidates the initiative petition herein”); *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 8 N.E.3d 940, 2014-Ohio-1417 ¶¶41 & 42 (“strict compliance is required” with respect to R.C. 3501.38(E)); see also *Brown v. Wood Cty. Bd. of Elections*, 79 Ohio App.3d 474, 478, 607 N.E.2d 848 (6th Dist. 1992)(“[b]ased on the opinions of the Ohio Supreme Court, we must conclude that substantial compliance with R.C. 3501.38(E) is not sufficient; strict compliance is mandated”). *A fortiori*, the circulator statement requirement in the comparable provision of the Cincinnati City Charter, i.e., Article IX, Section 2, also requires strict compliance.<sup>2</sup>

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<sup>2</sup> Besides the requirement of the circulator affidavit vice the circulator statement under penalty of election falsification, the other most notable difference between Article IX, Section 2 and R.C. 3501.38(E)(1) is that the former requires an unequivocal statement that “each signature [on the part-petition]...is the genuine signature of the person whose name it purports to be” while the latter simply requires the statement that “that every signature is to the best of the circulator’s knowledge and belief the signature of the person whose signature it purports to be or

3. Substantial compliance with the form of a nominating petition does not excuse strict compliance with the mandate of a circulator affidavit (or the outright omission of the circulator affidavit).

**PROPOSITION OF LAW No. 8:**

**Substantial compliance with the form of a nominating petition does not excuse strict compliance with the mandate within a city charter requiring a circulator affidavit be attached to each part-petition.**

Any effort to negate, through substantial compliance with the form of the petition itself, the mandate in Article IX, Section 2 as it concerns attachment of a circulator affidavit to each part-petition is belied by precedent of this Court. In a different section of the Cincinnati City Charter, viz., Article IX, Section 3a, the form of a nominating petition for candidates is set forth and clearly sets the standard for that section as substantial compliance:

The form of the nominating petition papers shall be substantially as follows for candidates for member of the council:

Candidate for Member of the Council  
Petition of Candidate

We, the undersigned, here present \_\_\_\_\_ whose residence is \_\_\_\_\_ Cincinnati Ohio, as a candidate for the council to be voted for at the election to be held on the \_\_\_\_\_ day of November, \_\_\_\_\_; and we individually certify that we are qualified to vote for candidates for the council, and that we have signed no more than nine petitions nominating persons for members of the council.

| Name | Street and Number | Date |
|------|-------------------|------|
|------|-------------------|------|

Statement of Circulator

I, \_\_\_\_\_ [name of circulator of petition], declare under penalty of the election falsification laws of the state of Ohio that I am a qualified elector of the city of Cincinnati; that I reside at the address appearing below my signature; that this petition paper contains \_\_\_\_\_ (number) signatures; that I witnessed the affixing of every signature; and that every signature is to the best of my knowledge and belief the signature of the person whose signature it purports to be.

Signed: \_\_\_\_\_

Address: \_\_\_\_\_

Date: \_\_\_\_\_

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of an attorney in fact acting pursuant to section 3501.382 of the Revised Code". But in terms of the established case law requiring strict compliance, these are distinctions without a difference.



Under state law, the comparable provision relating to the form of a nominating petition is R.C. 3513.261 and, also, expressly provides for substantial compliance therewith.

Yet, in *State ex rel. Combs v. Greene Cty. Bd. of Elections*, 158 Ohio St.3d 70, 140 N.E.3d 555, 2019-Ohio-4110, this Court directly addressed the strict-compliance standard for a circulator's statement under R.C. 3501.38(E) versus the substantial-compliance standard for the form of a nominating petition under R.C. 3513.261. When the part-petitions in *Combs* did not satisfy the circulator-statement requirements of R.C. 3501.38(E), the prospective candidate challenged the rejection of his petition and the refusal of the board of election to place his name on the ballot. In *Combs*, this Court directly addressed and clarified the interplay between the requirement concerning a circulator statement, *i.e.*, R.C. 3501.38(E), versus the requirement for the form of the nominating petition itself, *i.e.*, R.C. 3513.261:

Combs also argues that only substantial, not strict, compliance with R.C. 3501.38(E)(1) is required, citing R.C. 3513.261. But R.C. 3513.261 merely provides that a nominating petition must be substantially in the form provided in the statute; it does not change the fact that candidates are required to strictly comply with R.C. 3501.38(E)(1).

*Id.* ¶12; *see also Linnabary*, 138 Ohio St.3d 535, 8 N.E.3d 940, 2014-Ohio-1417 ¶¶39-41 (rejecting contention R.C. 3513.261 superseded non-compliance with the strict compliance standard of R.C. 3501.38(E)). This was consistent with the Ohio Supreme Court recognizing a distinct difference between the form of a petition and other statutory mandates. *See State ex rel. Weller v. Tuscarawas County Board of Elections*, 158 Ohio St.3d 266, 141 N.E.3d 157, 2019-Ohio-4300 ¶10 (R.C. 3513.261 “requires only substantial compliance with the prescribed ‘form’ of the nominating petition, but [it] contains no language regarding substantial compliance as to other matters” (quoting *State ex rel. Simonetti v. Summit Cty. Bd. of Elections*, 151 Ohio St.3d 50, 85 N.E.3d 728, 2017-Ohio-8115 ¶26)). Similarly, in *State ex rel. Allen v. Lake Cty. Bd. of*

*Elections*, 170 Ohio St. 19, 161 N.E.2d 896 (1959), this Court also rejected the contention that the absence of a circulator's oath (via affidavit) can be excused by substantial compliance with the form of the petition (which only goes to the wording of the petition):

*The statutory form, like any suggested statutory form, need not be followed absolutely as to its wording. The statute [prescribing the form] itself provides for only substantial compliance. However, as we have said, substantial compliance would not warrant complete omission of the jurat of the circulator. Such jurat is a vital and material part of the nominating petition paper, and its inclusion is a condition precedent to the acceptance and validation of a candidate's nominating petition paper by a board of elections.*

*Id.* at 20 (emphases added).

As this Court has already held that, with respect to the pertinent state law provisions, substantial compliance with the form of a nominating petition does not lessen the strict compliance standard for the requirement vis-à-vis the circulator statement, the same legal requirement applies *a fortiori* to the comparable provisions within the Cincinnati City Charter, *i.e.*, substantial compliance with the form, *i.e.*, the wording, of a nominating petition under Article IX, Section 3a does not negate the strict compliance standard for the requirement concerning the attachment of a circulator affidavit to each part-petition under Article IX, Section 2.

**4. An outright failure to comply with an election law is neither strict compliance nor substantial compliance.**

**PROPOSITION OF LAW No. 9:**

**An outright failure to comply with a provision or requirement of election law is neither strict compliance nor substantial compliance.**

There is a *sine qua non* issue which must first be established before the Court even addresses the standard – strict or substantial – for compliance with the requirement in Article IX, Section 2 that an “affidavit” be “attached” to each part-petition. Mr. PUREVAL never submitted any circulator affidavits, let alone such affidavits attached to the part-petitions or otherwise.

Thus, there was no compliance whatsoever with Article IX, Section 2. And whether the standard is strict compliance or substantial compliance, the lack of any compliance whatsoever fails to satisfy either standards.

Amazingly, at the hearing before the BOARD OF ELECTIONS, counsel for Mr. PUREVAL contended that the unsworn circulator statements included with the part-petitions actually constitute “affidavits” that satisfy the requirements in Article IX, Section 2:

[Complainant] makes no reference at all to how the word affidavit is treated in the City Charter. Within the City Charter the word affidavit appears a number of number of times. In some cases, it says that it is a sworn affidavit that is required. And in this instance, that is not the case.

So, as a matter of law, we disagree we disagree that the affidavit referred to the City Charter requires any oath....

*Transcript of Proceedings, at 22.*<sup>3</sup> And in an inquiry to Mr. PUREVAL’s counsel, the Chair of the BOARD OF ELECTIONS demonstrated acceptance of the erroneous legal proposition posited by Mr. PUREVAL that an affidavit need not have been executed under oath or before an officer authorized to administer an oath:

CHAIR McFARLIN: I have a question Mr. Nolan. My understanding is the term affidavit does not always mean you have to be sworn in. It is not indicated there, it’s not applicable; am I correct?

Mr. NOLAN: I think it would depend. The cases that the complainant has cited suggest in certain instances under Ohio in certain context the word affidavit should include a sworn statement. But in the case that he cites distinguishes between the use of having an affidavit under Ohio law, and under certain circumstances acknowledges that under federal law it doesn't necessarily mean that affidavit is a sworn statement.

In none of the cases that he cited refers to how the word affidavit is used to how the word affidavit is used in the City Charter. Again, noting that the word affidavit in some instances is referenced as a sworn affidavit, and in others it is not referenced as a sworn affidavit.

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<sup>3</sup> The representation that the Cincinnati City Charter utilizes the phrase “sworn affidavit” in some instance is false. A search of the Cincinnati City Charter reveals that “affidavit” is utilized only once and that is in Article IX, Section 2 and no place else.

*Transcript of Proceedings, at 30-31.*<sup>4</sup> Thus, at least one member of the BOARD OF ELECTIONS apparently proceeded from the erroneous presumption that an “affidavit” does not necessitate an oath (though questions from other members also indicated a myopic focus and doubt as to whether an affidavit actually requires the administration of an oath).

But Ohio law clearly establishes what is required to constitute an “affidavit” – the administration of an oath before an officer authorized to administer such oath. “In Ohio, an affidavit ‘is a written declaration under oath.’” *Toledo Bar Ass’n v. Neller*, 102 Ohio St.3d 1234, 809 N.E.2d 1152, 2004-Ohio-2895 ¶10 (quoting R.C. 2319.02). In fact, “this court has repeatedly explained...that an ‘affidavit’ must be a sworn statement.” *Id.* ¶22; *see State ex rel. Johnson v. Ohio Adult Parole Auth.*, 95 Ohio St.3d 463, 768 N.E.2d 1176, 2002-Ohio-2481 ¶5 (“unnotarized statements attached to [plaintiff’s] complaint...did not meet the affidavit requirement” of state law).

Thus, “[a] paper purporting to be an affidavit, but not to have been sworn to before an officer, is not an affidavit.” *State ex rel. White v. Franklin Cty. Bd. of Elections*, 160 Ohio St.3d 1, 153 N.E.3d 1, 2020-Ohio-524 ¶13 (quoting *In re Disqualification of Pokorny*, 74 Ohio St.3d 1238, 657 N.E.2d 1345 (1992)); *see State ex rel. Coulverson v. Ohio Adult Parole Auth.*, 62 Ohio St.3d 12, 14, 577 N.E.2d 352 (1991)(an “‘affidavit’...not sworn before anyone authorized to give oaths...is void”); *Benedict v. Peters*, 58 Ohio St. 527, 536, 51 N.E. 37 (1898)(“[t]he general rule

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<sup>4</sup> As noted above, the representation that the Cincinnati City Charter utilizes the phrase “sworn affidavit” in some instance is false.

Additionally, the reference to federal law is presumably a reference to 28 U.S.C. 1746 which allows, for purposes of federal law, the tendering of an unsworn statement under penalty of perjury in lieu of an affidavit. But case law has recognized this federal statute has no application under Ohio law. *Disciplinary Counsel v. Squire*, 130 Ohio St.3d 368, 958 N.E.2d 914, 2011-Ohio-5578 ¶45 n.3 ¶c (“Exhibit B is the purported unsworn declaration of Lay, executed pursuant to Section 1746, Title 28, U.S. Code (authorizing in federal proceedings declarations under penalty of perjury that are not sworn before a notary). But Ohio has never recognized that these unsworn declarations may serve as a substitute for a valid affidavit”)

is that an affidavit must appear on its face to have been taken before the proper officer, and in compliance with all legal requisitions”).

And the argument by Mr. PUREVAL’s counsel before the BOARD OF ELECTIONS (which certain members appeared to accept) that the term “affidavit” as used in Article IX, Section 2 of the Cincinnati City Charter does not need to comply with the well-established definition of “affidavit” is refuted by case law of this Court. “Undefined language used in a municipal charter must be construed according to its ordinary and common usage.” *Ditmars*, 94 Ohio St.3d at 475. And, thus, when confronting a similar issue relating to the requirement of a circulator “affidavit” in the Columbus City Charter, this Court held that an oath was required to be administered before a notary or person authorized to administer oaths:

Applying the ordinary and common meaning of the word here, an “affidavit” is a “voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black’s Law Dictionary (7 Ed.1999) 58; see, also, Webster’s Third New International Dictionary (1986) 35, defining “affidavit” as “a sworn statement in writing made esp. under oath or on affirmation before an authorized magistrate or officer.” Therefore, the mere fact that Section 42 of the Columbus Charter does not include terms like "notary" or "notarization" in addition to "affidavit" does not obviate the requirement that circulators of initiative petitions must declare under oath before an officer authorized to administer oaths the number of signers on the part petitions and that those signatures were made in their presence.

*Id.* at 475.

Accordingly, the circulator statements tendered by AFTAB PUREVAL as part of each part-petition are is not affidavits as mandated by the Cincinnati City Charter and, thus, there non-compliance therewith by Mr. PUREVAL such that substantial compliance or strict compliance need not be addressed.

**C. The proximity of the forthcoming election results in Relator lacking an adequate remedy in the ordinary course of law.**

**PROPOSITION OF LAW No. 10:**

**The proximity of a forthcoming election is sufficient to establish the lack of an adequate remedy in the ordinary course of law in order to support the issuance of a writ of prohibition.**

“As to the third element for a writ of prohibition, the relator is deemed to have no adequate legal remedy when the proximity of the election will take away his ability to pursue the appellate process in relation to other forms of relief, such as an injunction.” *Baryak*, 2019-Ohio-4655 ¶12; accord *State ex rel. Tam O’Shanter Co. v. Stark Cty. Bd. of Elections*, 151 Ohio St.3d 134, 86 N.E.3d 332, 2017-Ohio-8167 ¶15 (“because of the close proximity of the election, relators lack an adequate remedy in the ordinary course of law”); *State ex rel. Columbia Reserve Ltd. v. Lorain Cty. Bd. of Elections*, 111 Ohio St.3d 167, 855 N.E.2d 815, 2006-Ohio-5019 ¶28 (“because of the proximity of the election date in this expedited election case, relators lack an adequate remedy in the ordinary course of law”). In light of the proximity of the mayoral primary election in the City of Cincinnati for May 4, 2021, Relator clearly lacks an adequate remedy in the ordinary course of law.

**III. CONCLUSION**

Based upon the foregoing, the HAMILTON COUNTY BOARD OF ELECTIONS and its members abused their discretion and clearly disregarded applicable law in rejecting the protest filed by MARK MILLER. Based upon the failure of AFTAB PUREVAL to comply with the mandate in Article IX, Section 2 of the Cincinnati City Charter to attach circulator affidavits to each part-petition and in light of the forthcoming mayoral primary election for the City of Cincinnati, a writ of prohibition should prohibiting the HAMILTON COUNTY BOARD OF

ELECTIONS and its members from placing the name of AFTAB PUREVAL on the ballot at the forthcoming nonpartisan primary election to be held for mayor of the City of Cincinnati on May 4, 2021.

Respectfully submitted,

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*Counsel for*  
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following counsel of record via e-mail on the 8th day of March 2021:

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## **APPENDIX**

Article IX, Section 2 of Cincinnati City Charter

Article IX, Section 3a of Cincinnati City Charter

R.C. 3501.38

R.C. 3513.261

## **Cincinnati City Charter, Article IX, Section 2**

Any person eligible to the office of member of the council or the office of mayor may be placed in nomination therefor only by a petition filed in such person's behalf with the election authorities and signed by not less than 500 nor more than 1000 electors. Signatures to nominating petitions need not be appended to one paper but to each separate paper there shall be attached an affidavit of the circulator thereof stating that each signature thereto was made in the circulator's presence and is the genuine signature of the person whose name it purports to be. Each signer of a petition shall sign his or her name, address and date of signing in ink or indelible pencil.

An elector may sign petitions for no more than one candidate for mayor and for no more council candidates than the number to be elected at any election. If an elector signs petitions for more than one candidate for mayor or for more than the number of other candidates to be elected, the elector's signature shall be declared valid on petitions in the order of filing.

An eligible person who has accepted a nomination for mayor as provided in Article IX, Section 4 shall not be eligible for election to the office of member of council that year.

### **Cincinnati City Charter, Article IX, Section 3a**

The form of the nominating petition papers shall be substantially as follows for candidates for member of the council:

#### **Candidate for Member of the Council**

##### **Petition of Candidate**

We, the undersigned, here present \_\_\_\_\_ whose residence is \_\_\_\_\_ Cincinnati Ohio, as a candidate for the council to be voted for at the election to be held on the \_\_\_\_\_ day of November, \_\_\_\_\_; and we individually certify that we are qualified to vote for candidates for the council, and that we have signed no more than nine petitions nominating persons for members of the council.

| Name | Street and Number | Date |
|------|-------------------|------|
|      |                   |      |
|      |                   |      |

##### **Statement of Circulator**

I, \_\_\_\_\_ [name of circulator of petition], declare under penalty of the election falsification laws of the state of Ohio that I am a qualified elector of the city of Cincinnati; that I reside at the address appearing below my signature; that this petition paper contains \_\_\_\_\_(number) signatures; that I witnessed the affixing of every signature; and that every signature is to the best of my knowledge and belief the signature of the person whose signature it purports to be.

Signed: \_\_\_\_\_

Address: \_\_\_\_\_

Date: \_\_\_\_\_

## **Ohio Revised Code § 3501.38**

### **General rules for petitions and declarations of candidacy.**

(A) Only electors qualified to vote on the candidacy or issue which is the subject of the petition shall sign a petition. Each signer shall be a registered elector pursuant to section [3503.01](#) of the Revised Code. The facts of qualification shall be determined as of the date when the petition is filed.

(B) Signatures shall be affixed in ink. Each signer may also print the signer's name, so as to clearly identify the signer's signature.

(C) Each signer shall place on the petition after the signer's name the date of signing and the location of the signer's voting residence, including the street and number if in a municipal corporation or the rural route number, post office address, or township if outside a municipal corporation. The voting address given on the petition shall be the address appearing in the registration records at the board of elections.

(D) Except as otherwise provided in section [3501.382](#) of the Revised Code, no person shall write any name other than the person's own on any petition. Except as otherwise provided in section [3501.382](#) of the Revised Code, no person may authorize another to sign for the person. If a petition contains the signature of an elector two or more times, only the first signature shall be counted.

(E)

(1) On each petition paper, the circulator shall indicate the number of signatures contained on it, and shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section [3501.382](#) of the Revised Code. On the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition, the circulator shall identify the circulator's name, the address of the circulator's permanent residence, and the name and address of the person employing the circulator to circulate the petition, if any.

(2) As used in division (E) of this section, "statewide candidate" means the joint candidates for the offices of governor and lieutenant governor or a candidate for the office of secretary of state, auditor of state, treasurer of state, or attorney general.

(F) Except as otherwise provided in section [3501.382](#) of the Revised Code, if a circulator knowingly permits an unqualified person to sign a petition paper or permits a person to write a name other than the person's own on a petition paper, that petition paper is invalid; otherwise, the signature of a person not qualified to sign shall be rejected but shall not invalidate the other valid signatures on the paper.

(G) The circulator of a petition may, before filing it in a public office, strike from it any signature the circulator does not wish to present as a part of the petition.

(H) Any signer of a petition or an attorney in fact acting pursuant to section [3501.382](#) of the Revised Code on behalf of a signer may remove the signer's signature from that petition at any time before the petition is filed in a public office by striking the signer's name from the petition; no signature may be removed after the petition is filed in any public office.

(I)

(1) No alterations, corrections, or additions may be made to a petition after it is filed in a public office.

(2)

(a) No declaration of candidacy, nominating petition, or other petition for the purpose of becoming a candidate may be withdrawn after it is filed in a public office. Nothing in this division prohibits a person from withdrawing as a candidate as otherwise provided by law.

(b) No petition presented to or filed with the secretary of state, a board of elections, or any other public office for the purpose of the holding of an election on any question or issue may be resubmitted after it is withdrawn from a public office or rejected as containing insufficient signatures. Nothing in this division prevents a question or issue petition from being withdrawn by the filing of a written notice of the withdrawal by a majority of the members of the petitioning committee with the same public office with which the petition was filed prior to the sixtieth day before the election at which the question or issue is scheduled to appear on the ballot.

(J) All declarations of candidacy, nominating petitions, or other petitions under this section shall be accompanied by the following statement in boldface capital letters: **WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.**

(K) All separate petition papers shall be filed at the same time, as one instrument.

(L) If a board of elections distributes for use a petition form for a declaration of candidacy, nominating petition, or any type of question or issue petition that does not satisfy the requirements of law as of the date of that distribution, the board shall not invalidate the petition on the basis that the petition form does not satisfy the requirements of law, if the petition otherwise is valid. Division (L) of this section applies only if the candidate received the petition from the board within ninety days of when the petition is required to be filed.

(M)

(1) Upon receiving an initiative petition, or a petition filed under section [307.94](#) or [307.95](#) of the Revised Code, concerning a ballot issue that is to be submitted to the electors of a county or municipal political subdivision, the board of elections shall examine the petition to determine:

(a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power; or

(b) Whether the petition falls within the scope of a county's authority to enact via initiative, including whether the petition conforms to the requirements set forth in Section 3 of Article X of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county officers by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The finding of the board shall be subject to challenge by a protest filed pursuant to division (B) of section [307.95](#) of the Revised Code.

(2) After making a determination under division (M)(1)(a) or (b) of this section, the board of elections shall promptly transmit a copy of the petition and a notice of the board's determination to the office of the secretary of state. Notice of the board's determination shall be given to the petitioners and the political subdivision.

(3) If multiple substantially similar initiative petitions are submitted to multiple boards of elections and the determinations of the boards under division (M)(1)(a) or (b) of this section concerning those petitions differ, the secretary of state shall make a single determination under division (M)(1)(a) or (b) of this section that shall apply to each such initiative petition.

**Ohio Revised Code § 3501.39**

**Grounds for rejection of petition or declaration of candidacy.**

(A) The secretary of state...shall accept any petition described in section 3501.38 of the Revised Code unless one of the following occurs:

(1) A written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition is invalid, in accordance with any section of the Revised Code providing a protest procedure.

(2) A written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition violates any requirement established by law.

(3) In the case of an initiative petition received by the board of elections, the petition falls outside the scope of authority to enact via initiative or does not satisfy the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

(4) The candidate's candidacy or the petition violates the requirements of this chapter, Chapter 3513. of the Revised Code, or any other requirements established by law.

### **3513.261**

#### **Nominating petition form and fee.**

A nominating petition may consist of one or more separate petition papers, each of which shall be substantially in the form prescribed in this section. If the petition consists of more than one separate petition paper, the statement of candidacy of the candidate or joint candidates named need be signed by the candidate or joint candidates on only one of such separate petition papers, but the statement of candidacy so signed shall be copied on each other separate petition paper before the signatures of electors are placed on it. Each nominating petition containing signatures of electors of more than one county shall consist of separate petition papers each of which shall contain signatures of electors of only one county; provided that petitions containing signatures of electors of more than one county shall not thereby be declared invalid. In case petitions containing signatures of electors of more than one county are filed, the board of elections shall determine the county from which the majority of the signatures came, and only signatures from this county shall be counted. Signatures from any other county shall be invalid.

All signatures on nominating petitions shall be written in ink or indelible pencil.

At the time of filing a nominating petition, the candidate designated in the nominating petition, and joint candidates for governor and lieutenant governor, shall pay to the election officials with whom it is filed the fees specified for the office under divisions (A) and (B) of section 3513.10 of the Revised Code. The fees shall be disposed of by those election officials in the manner that is provided in section 3513.10 of the Revised Code for the disposition of other fees, and in no case shall a fee required under that section be returned to a candidate.

Candidates or joint candidates whose names are written on the ballot, and who are elected, shall pay the same fees under section 3513.10 of the Revised Code that candidates who file nominating petitions pay. Payment of these fees shall be a condition precedent to the granting of their certificates of election.

Each nominating petition shall contain a statement of candidacy that shall be signed by the candidate or joint candidates named in it or by an attorney in fact acting pursuant to section 3501.382 of the Revised Code. Such statement of candidacy shall contain a declaration made under penalty of election falsification that the candidate desires to be a candidate for the office named in it, and that the candidate is an elector qualified to vote for the office the candidate seeks.

The form of the nominating petition and statement of candidacy shall be substantially as follows:

#### **"STATEMENT OF CANDIDACY**

I, ..... (Name of candidate), the undersigned, hereby declare under penalty of election falsification that my voting residence is in ..... Precinct of the ..... (Township) or (Ward and City, or Village) in the county of ..... Ohio; that my post-office address is ..... (Street and Number, if any, or Rural Route and Number) of the ..... (City, Village, or post office) of ....., Ohio; and that





WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE."

The secretary of state shall prescribe a form of nominating petition for a group of candidates for the office of member of a board of education, township office, and offices of municipal corporations of under two thousand population.

The secretary of state shall prescribe a form of statement of candidacy and nominating petition, which shall be substantially similar to the form of statement of candidacy and nominating petition set forth in this section, that will be suitable for joint candidates for the offices of governor and lieutenant governor.

If such petition nominates a candidate whose election is to be determined by the electors of a county or a district or subdivision within the county, it shall be filed with the board of such county. If the petition nominates a candidate whose election is to be determined by the voters of a subdivision located in more than one county, it shall be filed with the board of the county in which the major portion of the population of such subdivision is located.

If the petition nominates a candidate whose election is to be determined by the electors of a district comprised of more than one county but less than all of the counties of the state, it shall be filed with the board of elections of the most populous county in such district. If the petition nominates a candidate whose election is to be determined by the electors of the state at large, it shall be filed with the secretary of state.

The secretary of state or a board of elections shall not accept for filing a nominating petition of a person seeking to become a candidate if that person, for the same election, has already filed a declaration of candidacy, a declaration of intent to be a write-in candidate, or a nominating petition, or has become a candidate through party nomination at a primary election or by the filling of a vacancy under section 3513.30 or 3513.31 of the Revised Code for any federal, state, or county office, if the nominating petition is for a state or county office, or for any municipal or township office, for member of a city, local, or exempted village board of education, or for member of a governing board of an educational service center, if the nominating petition is for a municipal or township office, or for member of a city, local, or exempted village board of education, or for member of a governing board of an educational service center.