IN THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ROSS JOHNSTON, an individual,

Petitioner,

Case No.

vs.

CYNTHIA S. BONHAM, as City Clerk for the City of Winter Park, Florida, in her official capacity only,

Respondent.
_____/

**PETITION FOR WRIT OF MANDAMUS**

COMES NOW the Petitioner, ROSS JOHNSTON, an individual, by and through his undersigned attorneys, and sues CYNTHIA S. BONHAM, as the City Clerk for the City of Winter Park, Florida, in her official capacity only, and states:

**General Allegations**

1. This is an action for the issuance of a writ of Mandamus to compel a public official to discharge a ministerial duty pursuant to Rule 9.030(c)(3), Rules of Appellate Procedure.

2. Petitioner, Ross Johnston (hereinafter sometimes referred to as "Johnston"), is and has been at all relevant times hereto, a resident and elector in Winter Park, Florida.

3. Respondent, Cynthia S. Bonham, is and has been at all relevant times hereto, the City Clerk of the City of Winter Park, Florida, (hereinafter sometimes referred to as "City Clerk"), and she is sued in her official capacity as City Clerk only.

4. On January 8, 2013, on or about 11:50 a.m., Johnston entered the Winter Park City Hall for the purpose of, and with the intent to qualify as a candidate for City Commissioner, Seat 3. Johnston began the qualifying process with a duly authorized representative of the City Clerk's office, at approximately 11:50 a.m. and continued that process without leaving City Hall until the qualifying process was complete and accepted by the City Clerk at approximately 12:45 p.m. The City Clerk was polite and helpful to Johnston, but she was slow in handling the paperwork, and, as discussed more at length hereinafter, insisted on compliance with matters not dictated by statute, charter or ordinance, thereby wasting considerable time, and directly causing the qualification process to be incomplete before 12:00 noon.

5. Johnston is and has been at all relevant times hereto, fully qualified to run for the office of Winter Park City Commissioner, Group 3.

**City Clerk improperly imposes additional requirement for qualifying beyond those called for by statute, charter or ordinance.**

6. In the course of completing the qualification paperwork in front of the City Clerk, before 12:00 noon, Johnston proffered a personal check to pay the

$24.00 **election assessment** in accordance with Florida Statutes, Section 99.093, which requires the payment of an **election assessment** in the amount of 1% of the annual salary of the office sought for municipal candidates.

7. The **election assessment** pursuant to F.S. §99.093 is the only payment that is required to be made for qualification as a candidate for Winter Park City Commissioner. [Copy of F.S. §99.093 is attached as Exhibit "A"]

8. By comparison, payment of a **qualifying fee** under F.S. §99.092, in the amount of 3% of the annual salary of the office sought, (which is required for non-municipal elections) is not required for qualification as a candidate for Winter Park City Commissioner. [Copy of F.S. §99.092 is attached as Exhibit "B"]

9. The City Clerk acknowledges that the 3% **qualifying fee** under F.S. §99.092 is not required for qualification of a candidate for City Commission. [See copy of City of Winter Park 2013 Municipal Election Information sheet attached as Exhibit "C" in which the only reference to any payment of money is to the "Election Assessment (F.S. 99.093(1)".]

10. Although both require the payment of money to the government to qualify as a candidate, the **qualifying fee** under F.S. §99.092, and the **election assessment** under F.S. §99.093 (for municipal elections) are separate and distinct monetary charges required under different statutes with different requirements for payment.

11. The City Clerk refused to accept Johnston's personal check and stated that the **election assessment** had to be paid out of a candidate's campaign account, a requirement solely attached to the **qualifying fee** under F.S. §99.092.

12. Johnston then offered to pay the assessment with cash, credit card, or wire transfer, and the City Clerk refused payment in any form other than out of the candidate's campaign account.

13. There is no statute, charter, or ordinance provision that requires that the **election assessment** must be paid out of the candidate's campaign account.

14. It appears that the City Clerk had the **qualifying fee** under F.S. §99.092 confused with the **election assessment** under F.S. §99.093, and incorrectly required that the **election assessment** under F.S. §99.093 be paid out of the candidate's campaign account, even though such requirement, pursuant to a provision under F.S. §99.061(7)(a)(1), *only* applies to **qualifying fees** under F.S. §99.092, and *not to* **election assessments** under F.S. §99.093. [Copy of F.S. §99.061 is attached as Exhibit "C"]

15. This misunderstanding about the form of payment required is reflected in the "City of Winter Park 2013 Municipal Election Information" paperwork (hereinafter "City Clerk's paperwork"). [See Exhibit "D"] The City Clerk prepared the City Clerk's paperwork, and that paperwork has no basis in statute, charter, or city ordinance. The fact that the confusion between the statutory

payments for qualifying between the two statutes cited above is reflected in the City Clerk's paperwork and has no basis in law of any sort, and is totally non-enforceable. [1]

16. Because the City Clerk refused to accept the payment of the **election assessment** in a form other than a check from a campaign account, Johnston had to stop completing his qualifying papers and had to contact a friend to go to Orange Bank, (where he had already established his campaign account), to get a check to pay the **election assessment**. As a direct and proximate result of the Clerk's inappropriate actions relating to check issue, that friend had to stop getting the final citizen endorsements and go to the bank to get the legally unnecessary check.

**Statutory requirements for qualification for Winter Park City Commissioner**

17. The City of Winter Park's charter provides at Section 3.02 as follows:

> **Sec. 3.02 - Qualifications**
>
> Candidates for the office of city commissioner or mayor shall qualify for such office by filing a written notice of candidacy with the city clerk at such time and in such manner as may be prescribed by ordinance.

18. The City of Winter Park's city code provides at Section 42-7 as follows:

> **Sec. 42-7. - Qualification of candidates and clerk's certification.**

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[1] Had the City Clerk permitted Johnston to pay the municipal assessment by a means other than a campaign account check, (which should have been done), the proper way under the election laws that that would have been handled would be by Johnston reporting the payment as an "in-kind" donation on his first campaign disclosure filing.

(a) In order for the name of any candidate to be printed on the ballot of any election, such candidate must do the following:

(1) File with the city clerk no later than noon of the 35th day and no earlier than noon of the 42nd day prior to the date of the primary election or special primary election date in the year of such election an application to have his or her name printed on the ballot. This requirement may be changed by resolution of the city commission for special elections. In the event that the last day of the period prescribed herein falls on a weekend or a city holiday, the period will be extended to noon of the next subsequent work day.

(2) Have such application endorsed by not less than 25 registered voters of the city; and

(3) Swear to and subscribe to the following oath of affirmation:

State of Florida

County of Orange

Before me, an officer authorized to administer oaths, personally appeared _____ to me well known, who, being sworn, says that he is a candidate for the office of _____; that he is a qualified elector of the City of Winter Park, Orange County, Florida; that he is qualified under the constitution and the laws of Florida to hold the office to which he desires to be nominated or elected; that he has taken the oath required by F.S. §§ 876.05—876.10; that he has not violated any of the laws of the state relating to elections or the registration of electors; that he has qualified for no other public office in the state, the term of which office or any part thereof runs concurrent with that of the office he seeks; that he has resigned from any office from which he is required to resign pursuant to F.S. § 99.012; and that he has submitted a sworn statement of

contributions and expenditures, if any, incurred prior to the time of qualifying and since the last preceding general election.

_____
(Signature of Candidate)

_____
(Address)

Sworn to and subscribed before me this _____ day of _____, 19___, at Orange County, Florida

_____
(Signature and title of officer administering oath)

(4) File with the city clerk a financial disclosure statement as provided for in F.S. § 112.311 et seq.

(b) It shall be the duty of the candidate to comply with the provisions of this section. The city clerk shall, nevertheless, notify each candidate in writing not more than five working days and not less than two working days after the application has been filed of any defect or deficiency in the application. Corrections or additions may be made any time prior to the close of the qualification term, but not thereafter.

*(Code 1960, § 10-8; Ord. No. 2404-01, § 1, 1-9-01; Ord. No. 2780-09, § 1, 9-28-09)*

**Statutory construction as applied to City Code provisions for qualification**

19. There is no required time frame incorporated into the introductory provision of Section 42-7 which states: "In order for the name of any candidate to be printed on the ballot of any election, such candidate must do the following:" Thereafter is a list of four numbered sections. Only the first of the numbered

sections imposes a mandatory timeframe. The other three do not have such a time restriction.

20. Case law in Florida is clear that in the case of the incorporation of limiting language in one subsection of a statute, which is omitted in another subsection, the limiting language *only* applies to the matter set forth in the subsection including such language. The court addressed this rule of statutory construction at length in *Child v. Florida,* 939 So.2d 1141 (Fla. 1st DCA 2006). The court in *L.G., Child* held that the lower court

> "overlooked pertinent rules of statutory construction, particularly the rule stating that where the legislature has used a term in one part of the statute, but has omitted it from another part of the same provision, the court 'will not imply it where it has been excluded.' *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,* 654 So.2d 911, 914 (Fla. 1995). Stated differently, 'it is a basic principle of statutory construction that courts 'are not at liberty to add words to statutes that were not placed there by the legislature.' *Seagrave v . State,* 802 So.2d 281, 287 (Fla. 2001) (quoting *Hayes v. State*, 750 So.ed 1, 4 (Fla. 1999)."

> "The trial court's implicit incorporation of the limiting language of subsection (46) into subsection (44) is contrary to long–recognized principles governing statutory construction. Where the legislature has used a term in one part of the statute and excluded it in another, it is improper to imply the term in a provision where it has otherwise been excluded. Because the legislature did not include language in the probation definition limiting the imposition of probation for certain specified delinquent acts, the lower court erred in so doing."

21. There is no question whatsoever that the *only* reference to a specific timeframe in Sec. 42-7 is in subsection 1, and such timeframe is clearly omitted from subsections 2, 3, and 4. If the City Commission had intended there to be a

strict timeframe imposed upon the requirements of subsections 2, 3, and 4, it could have inserted the time frame in the introductory section as applicable to each of the subsections, or it could have inserted the timeframe individually in subsections 2, 3, and 4. The City Commission did neither, and the City Clerk's de facto amendment is improper.

22. In addition, the language used in subsection 2, "[h]ave such application endorsed by not less than 25 registered voters of the city;" is phrased in a future directive tense. Subsection 1 does not say that the endorsements for the application are due with the filing of the application, rather it instructs the applicant in subsection 2 to "have" such application endorsed, implying a future action. In any event, the application process for Johnston's qualification took approximately 40 minutes (primarily because of the type of check issue referenced above), it began well prior to noon, Johnston never left City Hall during the process, and by shortly after 12:40, the City Clerk had all the items required in Section 42-7, even the items that do not have specific time frames specified.

**Further General Allegations**

23. During the time that Johnston was taking the required actions to qualify as a candidate, the City Clerk mechanically *stamped some* documents submitted by Johnston with the date and time received, but *failed to stamp* other documents. In fact, of the 38 pages of documents filed with the City Clerk, only 6

pages are actually stamped indicating the exact time they were submitted to the City Clerk. [Copies of the documents submitted to the City Clerk by Johnston are attached hereto as Exhibit "E"]

24. The first paper that Johnston filled out in front of the City Clerk was the application which is required by Section 42-7(a)(1) to be filed before noon. A copy of that document is the first page of Exhibit "E," and it was not stamped in by the City Clerk.[2]

25. The City Clerk thereafter told Johnston that he was required to file a form designating a campaign treasurer before qualifying. Johnston filled out the form designating a campaign treasurer and that form was stamped in by the City Clerk at 11:58 a.m.

26. The improper and unnecessary insistence of the City Clerk to require payment of the **election assessment** by a check from the campaign account delayed the process of completing the qualifying paperwork. The friend of Johnston who had been collecting the final signatures to the endorsement forms

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[2] Such document is entitled "City of Winter Park 2013 Municipal Election," and the title "application" is not included. All other documents in the stack, however, are specifically titled in a manner that identifies them as other specific documents: a) Appointment of Campaign Treasurer, b) Candidate Oath under Sec. 42-7(3), c) Candidate Oath – Nonpartisan Office under F.S. 99.021, d) Instructions for insering phonetic spelling of candidate's name for audio ballot, e) Statement of Candidate under F.S. 106.023, f) check from Campaign Account for Ross Johnston, g) Statement of Financial Interests, and h) Candidate Petitions.

(Candidate Petitioners) needed to comply with 42-7(a)(2) was interrupted by having to go to Orange Bank to get starter checks for the campaign account.

27. Had the City Clerk not improperly required the payment of the **election assessment** out of the campaign account, the entire qualification process may have been completed before 12:00 noon.

28. In addition, the noon deadline for the submission of the "application" required under Code Section 42-7(a)(1), is the *only* part of the requirements to qualify to have a particular time-frame for filing. The other three requirements under Code Section 42-7(a) for qualification do not have specific deadlines for filing. In any event, the "application," which was, for reasons only known by the City Clerk, not "time-stamped in" was filed *before* the form designating a campaign treasurer which was stamped in at 11:58a.m.

29. In spite of the inappropriate and unnecessary delay caused by the City Clerk requiring the **election assessment** to be paid out of the campaign account, Johnston had completed the filing of all required documents (as well as complying with the improperly imposed requirement for a campaign check) by shortly after 12:30 p.m.

**Case Law**

30. There are no Florida cases whatsoever that hold (or even imply) that someone who timely begins the qualification process, and completes it in within a

reasonable timeframe is disqualified because the application was "late". In fact, the court in *Bayne v. Glisson,* 300 So.2d 79, (Fla. 1st DCA 1974), acknowledged that the Secretary of State of Florida does not "require the actual *filing* of candidates qualification papers and the payment of the qualification fees and party assessments prior to the noon deadline," but rather it is the "custom and practice" to "accept for filing such papers, fees, and assessments as are presented by persons physically present prior to such deadline." To do otherwise would give the elections official the ability to disqualify a candidate by taking a lengthy process in the handling of the qualifying papers.

31. The practice of allowing a candidate to complete the qualification process so long as he or she is present at the time of the ending of the qualification period is similar to the universal practice at polling places at which persons who are physically present at the polls at the time the polls "close" are nonetheless permitted to vote, regardless of how long such voting takes.

32. Case law in Florida is clear that "[l]iteral and 'total compliance' with statutory language which reaches hypersensitive levels and which strains the quality of justice is not required to fairly and substantially meet the statutory requirements to qualify as a candidate for public office." *State ex rel Siegendorf v. Stone,* 266 So.2d 345 (Fla. 1972).

33. In *Siegendorf*, the Florida Supreme Court held that a prospective candidate who sought to qualify for a judicial office two minutes before the qualifying period closed, but who failed to properly fill out the required Oath of Office by not accurately describing the office for which the candidate was attempting to qualify, should be permitted to stand for election. The court held that "[i]t is better in such factual situations to let the people decide the ultimate qualifications of candidates, unless they appear clearly contrary to law." The Supreme Court ruled that what was required for qualification of a candidate is "substantial compliance."

34. In *Bayne v. Glisson,* 300 So.2d 79, (Fla. 1st DCA 1974), the court addressed a situation in which the candidate's representative was physically present in the office of the Secretary of State, (which the court noted took up an entire wing of the Capital Building), but was not in the office where qualifying of candidates took place, by noon of the last day of qualifying. As a result, the qualification papers were not even filed.

35. In *Bayne*, the court stated that it was interpreting the statutory requirement that candidates "file their qualification papers and pay the qualification fees and party assessment, if any has been levied, to the department of state at any time after noon of the first filing date, which shall be the sixty-third

day prior to the first primary, but not later than noon of the forty-ninth day prior to the date of the first primary in the year in which any primary is held."

36. The court in *Bayne* interpreted that statutory provision to allow the qualification of the candidate whose representative never did file qualification papers because, although in the Secretary of State's wing of the Capital Building, he was not in the correct office for qualification before the noon cut-off time. The court cited *Siegendorf* by stating that "a technical flaw in a candidate's qualifying papers should not prevent his candidacy." The court in *Bayne* also opined:

> "Also affirming the philosophy that 'the public policy of Florida favors affording the people an opportunity to make a choice in the election of their public officials is *State v. Gray, Sup.Ct.Fla.1953,* 69 So.2d 187, 193, wherein the Court said: "The tendency has been, and still is, to extend further the privilege of the people to participate in their government and to elect officers originally appointed, rather than to curtail such participation by the people.'"

37. The court in *Bayne* cited with approval two out of state cases. In one of the cases, the court qualified a candidate who was two days late filing qualification papers because the Clerk who had prepared the election calendar had made a two day mistake in calendaring. The other case was one in which the Town Clerk had mistakenly failed to file a certificate required for qualification until after the end of the qualifying period.

38. In *Browning v. Young,* 993 So.2d 64 (Fla. 1st DCA 2008), the court considered whether a candidate who did not fully fill out a required Disclosure of

Financial Interest Form should be permitted to have her name on the ballot. The court cited the *Seigendorf* case for the proposition that a candidate who had "substantially complied with the elections laws"... "should remain on the ballot." This 2008 decision again rejected the use of "literal and 'total compliance' with statutory language" as a basis for preventing a candidate from qualifying for office.

**City Attorney's Opinion**

39. It is apparent that after Johnston completed the submission of all her paperwork, the City Clerk questioned her implied decision to deem Johnston to be in compliance for purposes of qualifying for insertion of his name on the ballot as indicated by her acceptance of all documents and paperwork, including the campaign check, even though all documents were not filed by Noon. The City Clerk requested a legal opinion from the Winter Park City Attorney as to how this matter should be handled. A copy of the response to that request is attached hereto as Exhibit "F".

40. The City Attorney, in an apparent attempt to please the incumbent city commissioner who would be unopposed if Johnston's qualification were rejected, opined that Johnston's name should not be placed on the ballot. That opinion, however, contains substantial inaccuracies with regard to both statutory and case law cited therein.

41. The first paragraph of the City Attorney's opinion misstates the factual scenario applicable in this case. That opinion states that it is addressing an issue of a candidate submitting material "shortly after the qualifying period has ended", rather than the factual scenario that actually occurred. In the instant case, Johnston began the qualification process well before the deadline for qualification, but his attempts at completing the application process were delayed until after 12:00 noon due to the City Clerk inappropriately rejecting the payment of the **election assessment** by way of anything other than a campaign check.

42. The second paragraph of the City Attorney's opinion grossly misstates Section 42-7(a) of the City Code by stating that "the potential candidate *must do four things by noon on January 8th:* 1) file an application; 2) have the application endorsed by not less than 25 registered voters; 3) swear to an oath set forth in the code, which substantially tracks the one required by Fla. Stat. 99.021; and 4) file a financial disclosure statement." In fact, the requirement for completing something before noon on January 8th *only* relates to the first of the requirements – "file an application".

43. The reference to the time period is not in the general provision of Section 42-7(a); but rather it is *only* included in Section 42-7(a)(1) relating to the "application", and not to the endorsement of voters referred to in Sec. 42-7(a)(2),

the oath of affirmation referred to in Section 42-7(a)(3), or the financial disclosure statement referred to in Sec. 42-7(a)(4).

44. There is no question but that the "application" was filed before noon. This distinction is reinforced by the language of Code Section 42-7(b) which states:

> "It shall be the duty of the candidate to comply with the provisions of this section. The city clerk shall, nevertheless, notify each candidate in writing not more than five working days and not less than two working days after the **application** has been filed of any defect or deficiency in the **application**. Corrections or additions may be made any time prior to the close of the qualification term, but not thereafter." [Emphasis supplied.]

The only thing that the City Clerk must notify the potential candidate of within a certain amount of time before the end of the deadline for the filing of the application is a defect in the "application," not the endorsement of voters, the oath of affirmation, or the financial disclosure statement.

45. The third paragraph of the City Attorney's opinion evidences the fact that the City Attorney apparently believes that the City Clerk has the authority to impose requirements for candidate qualification that are not otherwise required by state law or city charter or ordinance. That opinion states that:

> "It appears that the Statement of Candidate required by Fla. Stat. 106.023 is also required before the end of qualifying, according to the City Clerk's website, although the statute only requires filing the form within 10 days after appointment of campaign treasurer."

This legally absurd statement makes it clear that the City Attorney believes that somehow the City Clerk can unilaterally impose additional candidate qualification criteria that are contrary to state law and not provided by local charter or ordinance. That is clearly not the law. See: *State ex rel. Finlayson v. Amos,* 79 So. 433 (Fla. 1918), in which the court held that "[t]here is no authority for a department of the government charged with the execution of the law" [in the instant case, like the City Clerk] "to restore a provision which the legislature" [in the instant case, the Florida legislature or the Winter Park City Commission] "strikes from the act when in progress of its passage. Whatever the Legislature does within its constitutional authority, no other department of the government may change, modify, alter or amend." It is axiomatic that a City Clerk has no authority to change or add to legislation enacted either by the City Commission or the Florida Legislature.

46. The fourth paragraph of the City Attorney's opinion is a flat-out misrepresentation of the law. That opinion states that "Florida Statutes 99.021(1) requires that in order to qualify every candidate must pay a filing fee and an election assessment, provided for in Fla. Stat. 99.092 and 99.093. This fee must be paid at the time of filing qualifying papers, per the statute. The fee must be drawn from the campaign." A copy of F.S. 99.021(1) is attached hereto as Exhibit "G", and that statute does not even refer to F.S. 99.092 or 99.093. In addition, as set

forth in detail earlier in this Petition, it is clear that the **qualifying fee** under F.S. 99.092 is not required to be paid for a municipal candidate, and the **election assessment** under F.S. 99.093 is not required to be paid out of the candidate's campaign account.

47. In the sixth paragraph of the City Attorney's opinion, Attorney General Opinion, AGO 058-216 is cited as alleged authority in support of not allowing Johnston's name to be placed on the ballot. The facts of that AGO opinion are not even close to the facts of this case. That AGO dealt with a potential candidate who did not even show up at the qualifying office until 10 minutes after the deadline for qualifying. The potential candidate was not in the middle of qualifying at the noon deadline as in the instant case. In addition, in the AGO scenario, the official charged with the duty of taking qualification papers did not make inappropriate, unnecessary and time-consuming demands upon the potential candidate as in the instant case.

48. In the seventh paragraph of the City Attorney's opinion, two cases that clearly are not on point with the facts of this case were cited. The opinion cites *State ex rel. Taylor v. Gary*, 25 So.2d 492 (Fla. 1946) which held that a potential candidate paid an incorrect filing fee and therefore the qualification was not valid. The City Attorney's opinion then cites *Sancho v. Joanos,* 715 So.2d 382 (Fla. 1st DCA 1998) that held that a potential candidate who did not properly file

four of the six required documents for qualification would not be deemed qualified to be put on the ballot. Neither of these cases have any relevance to the instant case.

49. In the seventh paragraph of the City Attorney's opinion, the case of *Bayne v. Glisson,* is cited.[3] That is the case where the court allowed the candidacy of a person whose representative never did file his qualification papers, but he had been in the Secretary of State's wing of the Capital Building at the close of qualifying. The court found that the fact that the candidate's representative was not able to find the office in which qualification took place, and that the Secretary of State's office was very crowded with people, constituted "extraordinary circumstances" which formed the basis for allowing the candidacy. Although acknowledging the existence of the *Bayne* case, the City Attorney's opinion fails to recognize the crux of that decision – that the "public policy of Florida favors affording the people an opportunity to make a choice in the election of their public officials."

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[3] It is unknown why the City Attorney's opinion did not even mention the seminal case by the Florida Supreme Court on the subject of candidate qualification for office, *State ex rel. Siegendorf v. Stone,* 266 So.2d 187 holding that "a technical flaw in a candidate's qualifying papers should not prevent his candidacy", and that "[l]iteral and 'total compliance' with statutory language which reaches the hypersensitive levels and which strains the quality of justice is not required to fairly and substantially meet the statutory requirements to qualify as a candidate for public office."

50. In the eighth and last paragraph of City Attorney's opinion, facts in the instant case are supposedly compared with the facts of the *Bayne* case. The City Attorney opines that, unlike the situation in the *Bayne* case, where qualification papers were never filed, but the candidate's representative was at least somewhere in the Secretary of State's office at noon on the qualifying deadline, Johnston has failed to show "extraordinary circumstances". That conclusion is absurd. Unlike in the *Bayne* case, Johnston was able to find the correct location for the qualifying, he got there significantly before the noon deadline, he filed the application form before the noon deadline, was given incorrect information by the City Clerk which held up the completion of the remaining qualifying paperwork, but properly completed all the qualifying paperwork within a reasonable period of time.

51. Johnston has performed all acts required for him to be placed on the ballot for City Commissioner candidate.

52. The denial of Johnston's right to have his name on the ballot is unlawful, arbitrary and capricious, and not supported by Florida statutory or case law.

53. The denial of Johnston's right to have his name on the ballot denies him of his fundamental rights under the U.S. Constitution, the Florida Constitution, Florida Statutes, and Winter Park City Charter and Code.

54. The duty on the part of the City Clerk with regard to deeming Johnston qualified to have his name on the ballot for candidate for the office of Winter Park City Commissioner, is a ministerial duty, and the City Clerk is breaching her lawful duties by preventing Johnston from having his name put on said ballot. As held by the court in *Browning,* "[i]f the qualifying papers submitted by a candidate comply with the election laws, the elections official has a duty to accept them, and mandamus will lie to enforce that duty."

55. As soon as Johnston learned that the City Clerk would not put his name on the ballot, he retained the undersigned counsel to represent him in an attempt to overturn the City Clerk's decision. The undersigned counsel called the City Attorney of Winter Park on the morning of January 9, 2013, the day after the end of qualifying, and informed that office that unless Johnston's name was put on the ballot, a mandamus action would be filed. In spite of such knowledge, it is apparent that the City of Winter Park has cancelled the special election to have been held on February 12, 2013. [See copy of January 9, 2013, article in the Orlando Sentinel on-line attached hereto as Exhibit "H"]

56. Johnston has no adequate remedy at law.

57. Johnston will be irreparably harmed if his name is not placed on the ballot as a candidate for Winter Park City Commissioner. As held by the Florida

Supreme Court in *Siegendorf* to "remove Mr. Klein from the people's consideration, and his name from the election ballot, would be irremediable."

58. Time is of the essence of a ruling in this case because the Special Election for City Commissioner had been scheduled for February 12, 2012, and if the City of Winter Park continues its apparent desire to rush to prevent a challenge to their decision and protect an incumbent City Commissioner, (which is evident by the announcement by the City that the election was being cancelled even though the City knew that a petition for mandamus was being filed), the City might even swear in the incumbent commissioner for a new term before this matter is resolved in court.

Wherefore, Petitioner respectfully requests:

1. Granting of an expedited hearing on this matter.

2. Issuance of a writ of mandamus directed to the City Clerk commanding the City Clerk to take appropriate steps to have Johnston's name placed on the ballot as a candidate for Winter Park City Commissioner, Group 3, and rescheduling a special election to take place five weeks from the date of an order granting the writ; or

3. Issuance of an order to the City Clerk to show cause why the City Clerk will not place Johnston's name on the ballot as a candidate for Winter Park City Commissioner, Group 3.

4. The recovery of costs.

5. Such other and further relief as the court deems proper.

Dated: January 10, 2013

*/s/ Gretchen R.H. Vose*
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# VERIFICATION

STATE OF FLORIDA )
COUNTY OF ORANGE )

Ross Johnston came before the undersigned authority duly authorized to administer oaths, was duly sworn, and stated the following facts were true and correct:

1. I am Ross Johnston. I am the Petitioner in this action.

2. I have first hand personal knowledge of all factual matters set forth in this Petition for Writ of Mandamus.

3. I have reviewed the Petition for Writ of Mandamus, and swear that the factual matters set forth therein are true and correct.

Ross Johnston

SWORN TO AND SUBSCRIBED before me this 10th day of January, 2013 by Ross Johnston, to me personally known, and who did take an oath.

Barbara A. Swims
Notary Public
My Commission expires:

10/20/15

NOTARY PUBLIC STATE OF FLORIDA
BARBARA ANN SWIMS
MY COMMISSION # EE 117699
EXPIRES: October 20, 2015
Bonded Thru Budget Notary Services

## CERTIFICATE OF SERVICE

I CERTIFY that the foregoing Petition for Writ of Mandamus was electronically filed with the Clerk of Court by using the ECF system and was sent by U.S. Mail and e-mail to Catherine D. Reischmann, Brown, Garganese, Weiss & D'Agresta, P.A., 111 N. Orange Ave., Suite 2000, Orlando, FL 32802, creischmann@orlandolaw.net, who verbally agreed to accept service of process on behalf of Respondent, Cynthia S. Bonham, as City Clerk for the City of Winter Park, Florida, in her official capacity only, this 10th day of January, 2013.

I hereby certify that the foregoing Petition complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

*/s/ Gretchen R.H. Vose*

Gretchen R.H. Vose
Florida Bar No. 169913
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