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LAW AND ARGUMENT

Proposition of Law No. 1: The Evidence is clear that the Board abused its discretion in invalidating Davis Nominating petition to run as an independent candidate for Akron City Council Ward 10.

A: The Board invalidated Davis' petition based on her voting history, alone.

The Summit County Board of Elections admits in its Answer, Merit Brief and within the transcript of the Board meeting, held September 20, 2013, that Relator Darrita L. Davis' petition to run as an independent candidate was determined to be invalidated by her voting history, alone. This is clear and convincing evidence that the Board abused its discretion and disregarded the law when making its determination. The transcript provided by the Board illustrates its failure to apply the appropriate standard. Its misstatements of law provide evidence that Davis' petition was rejected based on the Board's misunderstanding of established law. Following are some examples from the transcript:

Mr. Arshinkoff: Well, it's not a judgment cause she's a member—two years. She's a member of the Democratic Party...

* * *

Mr. Arshinkoff: And you're a member of that political party if you have voted in that Party's Primary within two years.

Respondent's Ex. G, Transcript, pg 40.

Mr. Gorbach: But if you're going to try to—if you want to disaffiliate the only you can do that is then...

Mr. Archinkoff: Voting in a Primary.

Mr. Gorbach: To not a vote in a Primary.

Mr. Arshinkoff: But not one year later.

Id. at 43.

* * *

Mr. Arshinkoff: No, the law says if you vote in a Primary in a two-year window you are a member of that party. That's how we check petitions.

Id.

* * *

Mr. Gorbach: We're being told what do we feel at the Summit County Board of Elections. What period of time should pass before we feel a person is disaffiliated. So that's what we are talking about. (sic)

Id at pg 50.

Ohio law is clear. Advisory Opinion 2007-05, states, "voting *history*, alone, is an insufficient basis on which to disqualify an independent candidate because **Ohioans are freely entitled to change or revoke their party affiliation at any time.**" (Emphasis in bold, added.) Further, R.C. 3513.257 requires that "independent candidates claim on the day before the primary that they are not affiliated with any political party."

The Board disregarded Ohio law and applied its own "policy" by looking at voting history, alone, to determine that a candidate is not an independent. Nothing in the transcript indicates the Board *used any other information* about Davis, except for her prior voting history. Davis' most recent vote in a Democratic

Primary was in March 2012. The Board knew she had not voted in a party primary since filing her nominating petition on July 2, 2013.

In fact, it disqualified her based on a “feeling.” Respondent Ex.G, pg. 51. Mr. Gorbach stated, “ [the Board] ha[s] a motion and a second to not approved candidate #7 based on the feeling that they’re not disaffiliated.” *Id.* This is contrary to the proposition that election laws should be liberally construed in favor of candidates for public office. *State ex rel. Allen v. Warren Cty. Bd. of Elections*, 115 Ohio St.3d 186. “[A] candidate can renounce his prior affiliation with a party by declaring in his ‘independent’ petition that he has now severed that association.” *State ex rel. Wilkerson v. Trumbull Cty. Bd. of Elections*, Trumbull App. No. 2007-T-0081, 2007-Ohio-4702. The Board had no basis for its “feeling” other than Davis’ March 2012 voting activity. Since her filing on July 2, 2013, where she declared her “independent” status and disaffiliation with her prior party, Davis did not engage in any conduct that would warrant even a “feeling” that she was not making her claim in good faith.

“A lack of good faith is shown by **subsequent conduct** that is materially inconsistent with the prior claim of unaffiliation. A lack of good faith may also be shown by evidence of prior conduct that portrays a subsequent claim of disaffiliation to be a sham or deceitful.” *State of Ohio ex rel. Livingston, et al. v. Miami Bd. of Elections*, (Ohio Ct. App., 2011), 196 Ohio App.3d 263, 2011-Ohio-

6126, 963 N.E.2d 187. The Court in *Livingston* also held that a standard of clear and convincing evidence applied to a finding by a Board of disqualifying a candidate on the basis of R.C. 3513.39(A)(3). Admittedly, the Board has no such evidence. It used its own policy¹ to determine that it would look at the candidates' two year voting history and reject anyone who voted in a primary for two years prior to filing the independent petitions.

B: The Board's argument that Relator's contributions to two Democratic candidates made **prior** to her candidacy show her "continued affiliation" is meritless and contrary to well-established law.

Respondent cites Ohio Secretary of State Jennifer Brunner's tie breaking vote on the Boyle candidacy as the basis for its decision that Relator remained affiliated with the Democratic Party. Respondent's Brief, Ex. C. Brunner noted that Boyle was a past Republican Director at the Summit County Board of Elections; had given donations to the state and local Republican Party organizations in the same year she sought to run as an independent; and had received a donation of \$40,000.00 from the Republican Party. *Id.*

Davis shows none of those affiliation indicators. She never held a party job, did not donate to a political party, has never received a donation from a political

¹ Respondent argues that the Board analogized R.C. 3513.05 to arrive at the two-year policy. However, the provision in 3513.05 regarding the two year look back is for qualifying a person for signing or circulating a party petition. As R.C. 3513.257 clearly states the requirement of independent candidates is that they must "claim on the day before the primary that they are not affiliated with any political party." The Board's substitution of requirements for party petitions in place of the clearly defined requirements for independent status is a clear disregard for statutes or applicable legal provisions.

party, and did not donate to any Democrat or Republican candidate after declaring her independent status. In its Brief, Respondent cites Davis' donations to the Democratic candidate campaign committees of Friends of Samples and Friends of Humphries. However, a review of the transcript of the Board meeting shows no finding that the donations were a basis for its decision. Respondent's Brief, Ex. G.

Were the candidate donations the basis for the Board's decision, it would be improper to use them as affiliation indicators. Democrats and Republicans cross party lines to donate to candidates. This Court can take judicial notice that Supreme Court candidates receive donations from Democratic and Republican supporters. The Board's policy discourages this practice and violates the rights of political expression and association guaranteed by the First Amendment and Article I, Section 3 of Ohio's Constitution. See *Buckley v. Valeo*, 424 U.S. 1.

The Supreme Court recognized that the "First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 611-612, 37 L. Ed. 2d 830, 93 S. Ct. 2908.

The Board's policy overlooks the "...primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating

political speech, any speech arguably within their reach is chilled.” *Citizens United v. FEC*, 558 U.S. 310, 334 (U.S. 2010). The Board’s argument that donations to candidates will guide its decisions about candidate affiliation has a chilling effect on speech. Its policy is not narrowly drawn to give the First Amendment the required breathing space.

Proposition of Law No. 2: The Board’s action of determining Davis’ Nominating Petition invalid should be time-barred and their affirmative defense of laches and other equitable affirmative defenses are meritless.

The deadline for filing a petition as an independent candidate was September 9, 2013. The Board chose to make its determination on September 20, 2013. They sent a letter to Davis on or around September 23, 2013, which she received on September 25, 2013. Aff. of Darrita L. Davis attached to Davis’ Complaint. Her Complaint was filed less than 48 hours later. This is not an unreasonable delay considering the time it takes to prepare a said complaint and travel to Columbus to file it.

Any prejudice to Respondent is caused by its own delay in making the determination and its own lack of findings. The Board provided no reason why the determination was not made prior to September 20, 2013. The Board’s meeting was on a Friday. Respondent’s Ex. G. Any phone call would have come after the meeting adjourned, thus too late in the day to file a Complaint in Columbus. To

argue that Davis delayed for seven days is disingenuous. The Board delayed the decision by more than 11 weeks, yet now claims prejudice by Davis' filing less than 48 hours after her receipt of the determination letter. The transcript also reveals the Board's uncertainty with the decision to invalidate her petition. The following comments were made:

Mr. Gorbach: Like I said, Alex, I'm not saying I totally disagree. I'm just trying to make sure if someone does want to disaffiliate that we don't start—votes here...

Mr. Weber: Well we have no basis for that in this case.

Mr. Gorbach: We might not.

Respondent's Ex. G, pg. 46.

Even their legal counsel was in error, as the following exchange demonstrates:

Mr. Galonski: Well you have to sign a statement if you are switching.

Mr. Masich: Not anymore.

Mr. Arshnikoff: Not anymore.

Mr. Galonski: Oh, you don't have to do that?

Ms. Zurz: No.

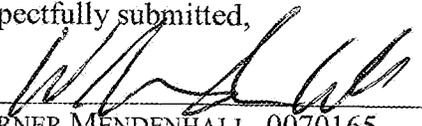
Id. at 47.

The Board's inability to follow the law and its own delays caused any prejudice or "peril" to the process for early and absentee voting. Therefore, the affirmative defenses of laches and other equitable defenses are meritless.

CONCLUSION

Respondent's failure to apply applicable law and its disregard for the law has been shown by clear and convincing evidence. In fact, the evidence has been provided by Respondent's own admissions and exhibits. Therefore, Davis is entitled to the request of a writ of mandamus.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by regular U.S. Mail and email on 10-11-2013, upon:

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