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COUNSEL FOR RESPONDENT OHIO SECRETARY OF STATE JON HUSTED

GENERAL AVERMENTS

1. This is an original action in prohibition. This Court has original jurisdiction in this action pursuant to Article IV, Section 2(B)(1)(d) of the Ohio Constitution.
2. Respondent Stark County Board of Elections is the statutory body established by R.C. 3501.06 to administer the election laws within Stark County, Ohio. Respondent Board of

Elections consists of Chairman Samuel J. Ferruccio, Jr., and members Frank C. Braden, William S. Cline, and William V. Sherer, II. Jeffrey Matthews is the Director of Respondent.

3. Respondent Ohio Secretary of State Jon Husted is the chief election officer of the State of Ohio pursuant to R.C. 3501.04.

4. Relators Robert L. Richards and Melvin T. Schartiger seek a writ of prohibition to prevent acts in violation of law by Respondent Board of Elections, taken by and through the acts of Respondent Husted. Specifically, this action seeks to prohibit Respondents from placing Francis H. Cicchinelli, Jr., on the ballot as an independent candidate for the office of Mayor of Massillon, Ohio, in the November 2015 General Election. Cicchinelli's nominating petition is in violation of law and is invalid, thereby making Cicchinelli disqualified from running as an independent.

5. Relators are qualified electors who timely filed a protest with the Respondent Board of Elections against the candidacy of Cicchinelli, and they hereby request this Court to prohibit Respondents from including the legally defective candidacy on the General Election ballot.

6. As a matter of law, a candidate's status as an "independent" must be established no later than the day before the primary. By his own sworn, un rebutted testimony, the candidate Cicchinelli did not claim to be independent until the day after this deadline, when he voted in the primary. Therefore, Cicchinelli's purported independence is not in good faith and his attempted independent candidacy cannot proceed under Ohio law.

7. Respondents have engaged in an abuse of discretion and acted in clear disregard of applicable law by not applying and enforcing the "independent candidate" requirements of R.C. 3501.01(I) and 3513.257, as interpreted and applied by *Morrison v. Cholley*, 467 F.3d 503 (6th Cir. 2006); *Jolivette v. Husted*, 694 F.3d 760 (6th Cir. 2012); and *State ex rel. Davis v. Summit County Bd. of Elections*, 137 Ohio St.3d 222, 2013-Ohio-4616, 998 N.E.2d 1093.

8. Based upon an abuse of discretion and acting in clear disregard of applicable law, Respondent Husted broke a tie-vote of Respondent Board of Elections in favor of certifying Cicchinelli's independent candidacy for Mayor of Massillon to the November 3, 2015, General Election ballot.

9. Relators aver that they are entitled to a writ of prohibition because (a) Respondents have exercised quasi-judicial power, (b) the exercise of that power is unauthorized by law, and (c) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶¶18, 23; *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶12.

10. Relators further aver that Respondent Husted engaged in an abuse of discretion or acted in clear disregard of applicable law. *State ex rel. Lucas Cty. Republican Party Executive Comm. v. Brunner*, 125 Ohio St.3d 427, 2010-Ohio-1873, 928 N.E.2d 1072, ¶9; *State ex rel. Balas-Bratton v. Husted*, 138 Ohio St.3d 527, 530-531, 2014-Ohio-1406, 8 N.E.3d 933, 936-937, ¶¶15-16.

SPECIFIC STATEMENT OF FACTS UPON WHICH CLAIM FOR RELIEF IS BASED

11. On May 4, 2015, Francis H. Cicchinelli, Jr., filed a nominating petition and statement of candidacy in an effort to be placed on the November General Election ballot as an independent candidate for the office of Mayor of Massillon, Ohio.

12. On May 5, 2015 – the day of the primary and the day after filing his petition and statement of candidacy – Cicchinelli first claimed to be an independent. (Transcript p. 14.) (Exhibit 1.)

13. On June 16, 2015, Relators Richards and Schartiger filed a protest with Respondent Board of Elections against Cicchinelli's nominating petition and candidacy in

accordance with R.C. 3513.262.¹ (Exhibit 2.) The protest challenged Cicchinelli's ability to run as an independent candidate on the ground that Cicchinelli was not actually independent and that Cicchinelli's claim of being independent was not made in good faith. Therefore, Relators asserted that the nominating petition filed by Cicchinelli was in violation of law and Respondent Board of Elections should invalidate the petition and disqualify Cicchinelli from running as an independent.

14. On July 13, 2015, Respondent Board of Elections conducted a hearing on the protest. Relators called the candidate Cicchinelli as the first witness. At the beginning of his testimony², Cicchinelli testified as follows:

Q. Mr. Cicchinelli, could you please tell this Board of Elections, what is the date that you claim you were first an Independent?

A. Technically, it would be the May primary, when I voted non-issues -- or nonpartisan ballot.

Q. That would have been -- the May primary would have been, I believe, May 5th --

A. The 5th.

Q. -- Tuesday, May 5th, sir?

A. Yes.

(Tr. p. 14.)

15. It is significant that the above question asked when Cicchinelli claims he was "first" an independent. This required Cicchinelli to identify the initial time when he claimed to

¹ The protest originally included two other qualified Massillon electors. They withdrew as protestors on July 10, 2015.

² In their position statement to the Ohio Secretary of State, Respondent Board of Elections members Braden and Cline falsely stated that this testimony came "after very lengthy direct and cross examination."

be independent. Cicchinelli could have provided any number of answers – two months before he filed his petition, or two weeks, or even at the filing deadline the day before the primary. But Cicchinelli chose the day after he filed his petition to be the time he was first an independent.

16. Cicchinelli’s testimony was corroborated by his wife, who was deeply involved in Cicchinelli’s candidacy by circulating his petitions and gathering signatures. Mrs. Cicchinelli expressly stated that Cicchinelli was a Democrat until the day after he filed his petitions:

Q. Did you have an understanding of when it was that your husband was an Independent?

[Colloquy between counsel and Chairman Ferruccio.]

A. My husband was an Independent when he, the day of the primary, became an Independent.

Q. May 5th, 2015?

A. Uh-huh.

Q. Is that a yes, ma'am?

A. Yes.

Q. Okay. Before that, he was a Democrat?

A. Yes.

(Tr. pp. 36-38.)

17. The above testimony of the candidate Cicchinelli and his wife was un rebutted, as Cicchinelli failed to offer any testimony to the contrary or any other evidence to refute his own testimony.

18. At the conclusion of the protest hearing, Respondent Board of Elections members William S. Cline and Frank C. Braden voted to deny the protest and allow Cicchinelli’s name to be placed on the ballot as an independent candidate. Respondent Board of Elections Chairman

Samuel J. Ferruccio, Jr., and member William V. Sherer, II, voted to uphold the protest and disqualify Cicchinelli's name from being placed on the ballot.

19. On July 27, 2015, the tie vote of the Respondent Board of Elections was submitted to Respondent Husted for a decision pursuant to R.C. 3501.11(X).

20. On July 31, 2015, Respondent Husted issued a letter decision breaking the tie vote in favor of certifying Cicchinelli as an independent candidate on the November 3, 2015, General Election ballot. (Exhibit 3.)

21. The entirety of Respondent Husted's analysis of this matter is contained in the following three sentences found at the end of the letter:

Engaging in a similar analysis of the record in Mr. Cicchinelli, Jr.'s case, I arrive at the same conclusion. Once again unlike Mr. Jolivette, Mr. Cicchinelli, Jr. did not seek to run in a party primary election before filing a nominating petition as an independent candidate for the general election, and a recitation of past political activity does not impart a firm belief or conviction that Mr. Cicchinelli, Jr.'s motivation was insincere.

Without clear and convincing evidence that his disaffiliation from the Democratic Party was not in good faith, I also break this tie in favor of certifying Mr. Cicchinelli, Jr.'s independent candidacy for Mayor of Massillon to the November 3, 2015 General Election ballot.

22. The actions of Respondents constitute the exercise of quasi-judicial power.

23. Respondent Husted abused his discretion and acted in clear disregard of applicable law in two ways. First, Respondent Husted fundamentally applied the wrong legal standard. Respondent Husted stated in his decision of July 30, 2015: "Without clear and convincing evidence that his disaffiliation from the Democratic Party was not in good faith, I also break this tie in favor of certifying Mr. Cicchinelli, Jr.'s independent candidacy ***."

24. The correct legal standard was established by the Ohio Supreme Court in *State ex rel. Davis v. Summit County Bd. of Elections*. As this Court held, the issue is not whether there is a lack of good faith in disaffiliating from a party: “In addition, the board abused its discretion because it fundamentally misconstrued the relevant inquiry. Based on her past voting record, the board informs the court, ‘the Board determined that Relator did not make a good faith attempt to disaffiliate from the Democratic Party.’ But the requirement imposed by R.C. 3513.257 and *Morrison v. Colley* is that a candidate must declare her lack of affiliation in good faith, not that she take affirmative action to disaffiliate in order to prove her good faith.” *State ex rel. Davis v. Summit County Bd. of Elections*, 137 Ohio St.3d 222, 227, 2013-Ohio-4616, ¶28, 998 N.E.2d 1093, 1098.

25. Lack of affiliation is very different from disaffiliation. Based on *Davis, Morrison* and the Revised Code, Relators had to show that Cicchinelli’s declaration of lack of affiliation was not in good faith. Relators were not required to somehow prove a failure to disaffiliate in good faith, which is the erroneous standard applied by the respondent Husted.

26. Respondent Husted also abused his discretion and acted in clear disregard of applicable law by completely and inexplicably ignoring the unrebutted evidence presented at the hearing, and by disregarding the legal requirement that a candidate must be independent at the time the candidate’s petitions are filed, and no later than the day before the primary

27. At the hearing before Respondent Board of Elections, clear, convincing and unrebutted evidence proved that Cicchinelli fails to meet the “independent candidate” requirements of R.C. 3501.01(I) and 3513.257.

28. Ohio law is clear that a candidate must claim to be an independent as of the time that the candidate’s petitions are filed. This claim of independence can be made no later than the

day before the primary. The day of the primary was May 5, 2015, making May 4 the deadline for a candidate to claim in good faith to be an independent.

29. R.C. 3513.257 states: “Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election *** shall file no later than four p.m. of the day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 of the Revised Code.”

30. The term “independent candidate” is defined by R.C. 3501.01(I) as follows: “‘Independent candidate’ means any candidate who claims not to be affiliated with a political party, and whose name has been certified on the office-type ballot at a general or special election through the filing of a statement of candidacy and nominating petition, as prescribed in section 3513.257 of the Revised Code.”

31. In *Morrison v. Cholley*, the Sixth Circuit U.S. Court of Appeals stated: “The election regulation at issue [R.C. 3513.257] is merely a reasonable, nondiscriminatory regulation to require would-be independent candidates to claim, no later than 4:00 p.m. of the day before the primary elections, that they are free of affiliation with any political party.” The Constitution “do[es] not prohibit the Ohio General Assembly from requiring independent candidates to claim on the day before the primary that they are not affiliated with any political party.” *Morrison v. Cholley*, 467 F.3d 503, 508 (6th Cir. 2006). (Emphasis added.)

32. In *Jolivette v. Husted*, the Sixth Circuit U.S. Court of Appeals stated: “Instead, §3513.257 is a means of restricting the candidates who may appear on the ballot, and does so by requiring that independent candidates make a good-faith claim that they are free of affiliation with a political party at the time they submit their petitions for independent candidacy.” “By requiring

independent candidates to make a good-faith claim of non-affiliation by the day before the primary, Ohio seeks to maintain the integrity of its different routes to the ballot ***.” *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012). (Emphasis added.)

33. Thus, the law clearly requires that a candidate seeking to be on the ballot as an independent must make a good faith claim of independence no later than the day before the primary. Indeed, the day before the primary is the last possible date on which a candidate’s independent status can be established for the general election. Ohio law does not permit a candidate to remain affiliated with a political party up through and including the filing of petitions, yet still run as an “independent.” This is exactly what Cicchinelli is trying to do.

34. A candidate’s “intent is of great import.” *State ex rel. Stine v. Brown County Bd. of Elections*, 101 Ohio St. 3d 252, 254, 2004-Ohio-771, 804 N.E.2d 415, 417, ¶15.

35. The unrebutted evidence leaves no doubt regarding Cicchinelli’s subjective intent about when he was first an independent. The candidate himself, a Democrat for 42 years who continued to sign numerous petitions as a Democrat in 2015, did not consider himself to be an independent when he filed his petitions on May 4, 2015. It was not until the next day, the day of the primary, that Cicchinelli claims he was first an independent. By virtue of Cicchinelli’s subjective intent and understanding, he fails to meet the definition of “independent candidate” within the clear time requirements of R.C. 3513.257. Therefore, Cicchinelli’s claim of independence is not in good faith. Applying the clear law of Ohio, the unrefuted facts are dispositive of Cicchinelli’s attempt to appear on the ballot as an independent candidate for the upcoming General Election.

36. Relators are not asking this Court to substitute its judgment for that of Respondent Husted or Respondent Board of Elections. “We will not substitute our judgment for that of a

board of elections if there is conflicting evidence on an issue.” *State ex rel. Commt. for the Referendum of Lorain Ord. 77-01*, 96 Ohio St.3d 308, 2002-Ohio-4194, 774 N.E.2d 239, ¶47, quoting *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 185, 2000-Ohio-294, 724 N.E.2d 771; *State ex rel. Stine v. Brown County Bd. of Elections*, 101 Ohio St.3d 252, 255, 2004-Ohio-771, 804 N.E.2d 415, 418, ¶21. However, in this case, there is no conflicting evidence. The only evidence is that Cicchinelli does not claim to be independent within the time frame required by Ohio law.

37. Respondents’ failure to uphold the protest and disqualify Cicchinelli’s name from being placed on the ballot is unauthorized by law, and was an abuse of discretion and in clear disregard of Ohio law.

38. Relators have promptly filed this original action within five business days of the decision issued by Respondent Husted.

39. Given the approaching General Election on November 3, 2015, denying the writ of prohibition would result in injury to Relators for which no other adequate remedy exists in the ordinary course of law.

40. This complaint is supported by the attached Affidavits of Relators Richards and Schartiger.

WHEREFORE, Relators Robert L. Richards and Melvin T. Schartiger respectfully request that this Court issue a peremptory writ of prohibition, or in the alternative, an alternate writ against Respondents Stark County Board of Elections and Ohio Secretary of State Jon Husted, prohibiting Respondents from placing Francis H. Cicchinelli, Jr., on the ballot as an independent candidate for the office of Mayor of Massillon, Ohio, in the November 2015 General Election.

Respectfully submitted,

/s "Steven P. Okey"

Steven P. Okey (0038697)
(COUNSEL OF RECORD)

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RICHARDS AND SCHATIGER

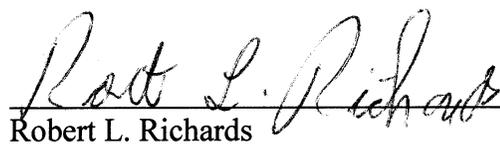
IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.	:	Case No.: _____
ROBERT L. RICHARDS, et al.,	:	
	:	
Relators,	:	<u>ORIGINAL ACTION IN PROHIBITION</u>
	:	
v.	:	
	:	
STARK COUNTY BOARD OF ELECTIONS,	:	
et al.,	:	
	:	
Respondents.	:	

AFFIDAVIT OF RELATOR ROBERT L. RICHARDS

Robert L. Richards, being first duly sworn, states the following to be true:

1. I have personal knowledge of and am competent to testify to all matters stated in this Affidavit.
2. I am a Relator in this original action in prohibition.
3. I testified under oath during the hearing before the Stark County Board of Elections on July 13, 2015, and was present during the entire hearing.
4. It is my intent, through this Affidavit, to specify the details of this claim by hereby incorporating by reference all of the facts and exhibits contained in, appended to and referred to in the preceding Complaint for Writ of Prohibition, which are based upon my personal knowledge, and are true and accurate.



 Robert L. Richards

Sworn to and subscribed before me on August 7, 2015.



Notary Public



STEVEN P. OKEY
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03

IN THE SUPREME COURT OF OHIO

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ROBERT L. RICHARDS, et al.,	:	
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Relators,	:	<u>ORIGINAL ACTION IN PROHIBITION</u>
	:	
v.	:	
	:	
STARK COUNTY BOARD OF ELECTIONS,	:	
et al.,	:	
	:	
Respondents.	:	

AFFIDAVIT OF RELATOR MELVIN T. SCHARTIGER

Melvin T. Schartiger, being first duly sworn, states the following to be true:

1. I have personal knowledge of and am competent to testify to all matters stated in this Affidavit.
2. I am a Relator in this original action in prohibition.
3. I testified under oath during the hearing before the Stark County Board of Elections on July 13, 2015, and was present during the entire hearing.
4. It is my intent, through this Affidavit, to specify the details of this claim by hereby incorporating by reference all of the facts and exhibits contained in, appended to and referred to in the preceding Complaint for Writ of Prohibition, which are based upon my personal knowledge, and are true and accurate.



 Melvin T. Schartiger

Sworn to and subscribed before me on August 7, 2015.



Notary Public



STEVEN P. OKEY
ATTORNEY AT LAW
Notary Public, State of Ohio
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v.	:	
	:	
STARK COUNTY BOARD OF ELECTIONS,	:	
et al.,	:	
	:	
Respondents.	:	

PRAECIPE

TO: CLERK OF COURT
 SUPREME COURT OF OHIO

Please issue a summons and serve the summons and a copy of the preceding Complaint for Writ of Prohibition by certified mail upon each of the Respondents at the addresses listed on the cover page of the Complaint.

Respectfully submitted,

/s "Steven P. Okey"
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