

BOARD OF ELECTIONS

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STARK COUNTY

BOARD OF ELECTION

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**PROTEST AGAINST NOMINATING PETITION  
OF FRANCIS H. CICCHINELLI, JR.  
FOR THE OFFICE OF MAYOR OF THE CITY OF MASSILLON, OHIO**

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**PROTESTORS:**

Tony M. Townsend, President of Massillon City Council  
Shaddrick Stinson, Massillon City Council, Ward 4  
Bob Richards, Elector of the City of Massillon  
Ted Schartiger, Elector of the City of Massillon

Pursuant to R.C. 3513.262, Tony M. Townsend, President of Massillon City Council, Shaddrick Stinson, Massillon City Council, Ward 4, Bob Richards and Ted Schartiger (hereafter collectively referred to as “the protestors”) hereby submit this written protest against the nominating petition filed by Francis H. Cicchinelli, Jr., as an “independent” candidate for the office of Mayor of the City of Massillon, Ohio. The protestors are qualified electors eligible to vote for the candidate whose nominating petition the electors object to. This protest is timely filed not later than 4:00 p.m. of July 30, 2015, in accordance with statutory requirements.

The grounds for this protest, as explained in detail below, are that Cicchinelli is not actually independent and that Cicchinelli’s claim of being “independent” has not been made in good faith. Therefore, the nominating petitions filed by Cicchinelli are in violation of law and this Board should invalidate the petition and disqualify Cicchinelli from running as an independent.

Beyond the specific grounds detailed below, this protest is also about protecting the integrity of Ohio’s carefully planned process of how voters gain access to candidates on the ballot. Candidates who are affiliated with a political party appear on the ballot via the partisan

primary. Candidates who are actually and in good faith independent appear on the ballot via the independent petition.

However, when a candidate who is affiliated with a political party attempts to camouflage his partisan status and appear on the ballot as a false “independent,” such a subterfuge imperils the integrity of Ohio’s election system, causes confusion and deceives the voters. As the U.S. 6<sup>th</sup> Circuit Court of Appeals has stated, “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—the partisan primary and the independent petition.”<sup>1</sup>

**I. The Procedure of a Protest**

This procedure of this protest is governed by the provisions of R.C. 3513.262, which states in pertinent part:

Written protests against nominating petitions may be filed by any qualified elector eligible to vote for the candidate whose nominating petition the elector objects to, not later than four p.m. of the thirtieth day of July, or if the primary election was a presidential primary election, not later than the end of the twelfth week after the day of that election. Such protests shall be filed with the election officials with whom the nominating petition was filed. Upon the filing of such protest, the election officials with whom it is filed shall promptly fix the time and place for hearing it, and shall forthwith mail notice of the filing of such protest and the time and place for hearing it to the person whose nomination is protested. They shall also forthwith mail notice of the time and place fixed for the hearing to the person who filed the protest. At the time fixed, such election officials shall hear the protest and determine the validity or invalidity of the petition. Such determination shall be final.

If a candidate’s petition is invalid, or if a candidate’s petition violates any requirement established by law, then the Board of Elections shall not accept the candidate’s petition. This process is clearly set forth in R.C. 3501.29(A):

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<sup>1</sup> *Jolivette v. Husted*, 694 F.3d 760, 769 (6<sup>th</sup> Cir. 2012).

(A) \* \* \* [A] board of elections 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) 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.

## II. The Substantive Legal Standards

The substantive legal standards that govern this protest are found in the Ohio Revised Code and in the case law issued by the courts.

R.C. 3513.257 states that “[e]ach person desiring to become an independent candidate” for office must file a statement of candidacy and nominating petition.

The term “independent” 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.”

Despite the Revised Code’s wording that an independent candidate must merely “claim” not to be affiliated with a political party, it is settled Ohio law that much more than a mere claim is required. As the court held in the seminal case of *Morrison v. Colley*, “an aspiring

independent candidate must actually be independent, rather than merely claim it. \* \* \* [T]he claim of independence must be made in good faith.”<sup>2</sup>

If a candidate’s claim of independence is not made in good faith, then the Board of Elections shall not accept the candidate’s petition.

In deciding whether to invalidate Cicchinelli’s petition, this Board can look to evidence from both before and after the petition was filed. As one court has held: “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.”<sup>3</sup>

The Ohio Supreme Court has made it very clear that postpetition evidence is not required: “This court has never held that a successful *Morrison* challenge requires postpetition evidence, and we do not so declare today. But where the challenge is based solely on prepetition evidence, the evidence needs to be that much more substantial to warrant excluding an otherwise qualified candidate.”<sup>4</sup> Other courts have also stressed that the mere absence of postpetition factors does not end the inquiry. “[E]ven if a candidate does not vote in a party primary after filing as an independent, and does not serve on a party’s central or executive committee after filing as an independent, these circumstances do not preclude a finding that the candidate is not unaffiliated or disaffiliated in view of other conduct or circumstances, or a finding that the disaffiliation was not made in good faith.”<sup>5</sup>

Each case much rise and fall on its own unique facts. “The standard for determining whether a candidate meets the definition of an ‘independent candidate’ makes it difficult to determine the

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<sup>2</sup> *Morrison v. Colley*, 467 F.3d 503, 509 (6<sup>th</sup> Cir. 2006). (Internal quotes omitted.)

<sup>3</sup> *State ex rel. Livingston v. Miami Cty. Bd. of Elections*, 196 Ohio App.3d 263, 2011-Ohio-6126, at ¶33.

<sup>4</sup> *State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St.3d 222, 2013-Ohio-4616, 998 N.E.2d 1093, at ¶27.

<sup>5</sup> *Jolivette v. Husted*, 886 F. Supp.2d 820, 831 (S.D. Ohio 2012).

point of demarcation between a candidate's genuine and legitimate unaffiliation or disaffiliation and a claim of independence that is actually rooted in intra-party feuding, tactical maneuvering, or political convenience — circumstances that potentially disrupt the integrity of the election process by causing voter confusion or other problems. Consequently, determining whether a candidate is actually unaffiliated or disaffiliated with a political party, and whether the claim of independence is made in good faith, are necessarily fact specific and intensive. This determination requires a thorough review of the candidate's conduct as it relates to party affiliation. Furthermore, the strength of the affiliation is necessarily pertinent when evaluating an asserted disaffiliation, as the candidate must demonstrate that the strings attaching him or her to the party are sufficiently severed, or at least that the candidate has engaged in decisive conduct demonstrating an intent to completely sever those strings, within a context not demonstrating a shift to independence as a means of political convenience or opportunism.”<sup>6</sup>

The unique facts of each case will determine whether a candidate who claims to be independent has truly disaffiliated himself from his political party. A non-exclusive list of factors that are relevant to this case includes:

- Being registered with a political party,<sup>7</sup>
- Voting in a partisan primary election,<sup>8</sup>
- Running in a partisan primary election,<sup>9</sup>
- Information contained on election filings,<sup>10</sup>

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<sup>6</sup> *Jolivette v. Husted*, 886 F. Supp.2d 820, 830 (S.D. Ohio 2012).

<sup>7</sup> *Morrison v. Colley*, 467 F.3d 503, 510 (6<sup>th</sup> Cir. 2006).

<sup>8</sup> *Id.*; *State ex rel. Lorenzi v. Mahoning Cty. Bd. of Elections*, 7<sup>th</sup> Dist. Mahoning No. 07 MA 127, 2207-Ohio-5879 at ¶26.

<sup>9</sup> *Morrison* at 510.

<sup>10</sup> *Id.*

- Past voting history,<sup>11</sup>
- Participation as a political party officer or member,<sup>12</sup>
- Holding public office for which the candidate was nominated through a political party's primary election and elected on a partisan ticket.<sup>13</sup>

### **III. Cicchinelli's 42 Year History as a Democrat**

Cicchinelli's lifelong affiliation as a Democrat is summarized as follows:

- Cicchinelli ran and was elected as a Democrat for 14 years on Massillon City Council
- 1987, Cicchinelli first ran and was elected as a Democrat to the office of Mayor of Massillon
- 1991, Cicchinelli ran and was elected as a Democrat to his second term as Mayor of Massillon
- 1995, Cicchinelli ran and was elected as a Democrat to his third term as Mayor of Massillon
- 1999, Cicchinelli ran and was elected as a Democrat to his fourth term as Mayor of Massillon
- 2003, Cicchinelli ran and was elected as a Democrat to his fifth term as Mayor of Massillon
- 2007, Cicchinelli ran and was elected as a Democrat to his sixth term as Mayor of Massillon
- 2011, Cicchinelli ran as a Democrat for Mayor of Massillon and was defeated in the Democratic primary.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

A review of Cicchinelli's Certificate of Registration with the Stark County Board of Elections reveals the following recent voting history:

- 2006 May Democratic primary
- 2007 May Special – Democratic
- 2008 March Democratic primary
- 2009 May Democratic primary
- 2010 May Democratic primary
- 2011 May Democratic primary
- 2012 March Democratic primary
- 2014 May Democratic primary.

Recent Democratic Nominating Petitions signed by Cicchinelli include the following:

- 2-03-2014, Joy M. Cicchinelli, candidate for Stark Democratic Central Committee
- 1-21-2015, James D. Ress, Democratic candidate for Mayor of Massillon
- 1-23-2015, Jill E. Creamer, Democratic candidate for Massillon City Council
- 1-31-2015, Paul B. Manson, Democratic candidate for Massillon City Council.

Thus, for a period of approximately 42 years, Cicchinelli has run as a Democrat, been elected as a Democrat, served in office as a Democrat, voted as a Democrat, and signed petitions as a Democrat.

**IV. When a candidate is affiliated with a political party, then purportedly disaffiliates, then re-affiliates with his original political party, and then purportedly disaffiliates again – all within the same election cycle – the candidate's conduct is incompatible with his claim that he is not affiliated with any political party.**

The unique facts of this case present substantial evidence that is clear and convincing that Cicchinelli is not actually independent, and that his claim of independence was not made in good faith. Indeed, the facts show a 42 year affiliation with the Democratic Party, followed by a

peculiar back-and-forth between the Democratic Party and Cicchinelli's newly minted claim of being "independent."

In *Jolivette v. Husted*, the candidate circulated four part-petitions to run as a Republican candidate for state representative. After the part-petitions were filed, questions arose regarding the number of valid signatures and regarding one part-petition not being signed. The candidate then withdrew his partisan candidacy and began circulating petitions to run as an independent for the same office. The independent petitions were filed about two and a half months after the candidate withdrew his partisan candidacy. Three individuals then filed a protest, challenging the candidate's ability to run as an independent. This protest was successful, with the court stating: "[A]n individual running for public office undermines the integrity of the election process if he or she initially runs as a partisan for a particular office (and affirms allegiance to the party when seeking the necessary petition signatures), and then withdraws that partisan candidacy and attempts to run as an independent, all within the same election cycle."<sup>14</sup>

As the *Jolivette* court noted, flip-flopping between a party and "independence" does not demonstrate an intent to be disaffiliated, but instead appears to be a naked political maneuver that is rightfully condemned: "This type of political maneuvering must not be condoned, lest the integrity of the political process will suffer."<sup>15</sup>

Such political maneuvering is exactly what Cicchinelli engineered in this case. But even worse than in *Jolivette*, Cicchinelli committed a double flip-flop of political affiliation.

Cicchinni began the current election cycle as a decades-long Democrat. Then, in late 2014, Cicchinni began to circulate petitions to run for mayor of Massillon as an independent. A number of electors signed these petitions.

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<sup>14</sup> *Jolivette v. Husted*, 886 F. Supp.2d 820, 834 (S.D. Ohio 2012).

<sup>15</sup> *Id.*

Cicchinni then flip-flopped and reverted back to being a Democrat. On three separate occasions, Cicchinelli signed petitions for Democratic candidates:

- On January 21, 2015, Cicchinelli signed the petition of James D. Ress for the Democratic nomination for Mayor of Massillon.<sup>16</sup>
- On January 23, 2015, Cicchinelli signed the petition of Jill E. Creamer for the Democratic nomination for Massillon City Council.
- On January 31, 2015, Cicchinelli signed the petition of Paul B. Manson for the Democratic nomination for Massillon City Council.

By signing these petitions, Cicchinelli certified on three separate occasions that he was a “member of the Democratic Party.” Appearing above Cicchinelli’s signatures is the following legend: “Signatures on this petition shall be of persons who are of the same political party as stated above by the candidate.”

But Cicchini’s game of political flip-flopping was not over. On May 4, 2015, he filed petitions with the Board of Elections to appear on the ballot as a candidate for Mayor of Massillon, once again purportedly as an independent.

Cicchinnelli’s multiple flip-flops in political affiliation (Democrat – Independent – Democrat – Independent), and all within the same election cycle, evidence not an actual disaffiliation in good faith, but rather an invalid political machination to circumvent the law of the primary process. Such gaming of the system must not be condoned or encouraged.

Cicchinnelli’s flip-flops demonstrate a lack of good faith in another way. Cicchinelli was a Democrat when he signed the petition of James D. Ress to run for Mayor of Massillon in the Democratic Party primary on May 5, 2015. Relying in part upon Cicchinelli’s Democratic

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<sup>16</sup> All supporting exhibits and documentation for this protest shall be filed under separate cover.

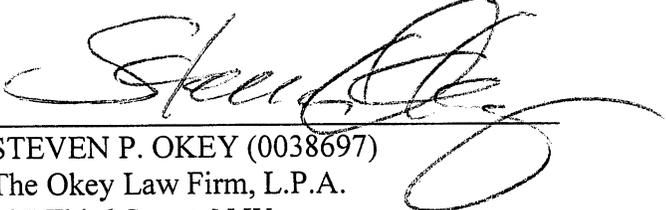
signature, Ress appeared on the Democratic ballot and lost the primary election. But now, Cicchinelli claims to be an independent – for the same office where he previously signed a petition as a Democrat.

Conceivably, the outcome might be different if Cicchinelli had signed petitions as a Democrat, but only for races that he himself never entered as a candidate. But in a single election cycle and in a single race, Cicchinelli wants this Board to believe that he was both a Democrat and an unaffiliated independent. The law does not recognize such a split personality when it comes to party affiliation and disaffiliation. Nor is it incumbent upon this Board to figure out exactly what was going through the mind of Cicchinelli when he was engaging in these machinations. Instead, it is sufficient for this Board to recognize the obvious: claiming to be both a Democrat and an independent in the same race and in the same election cycle demonstrates that the strings attaching him to his Democratic Party are not sufficiently severed. In fact, Cicchinelli's double flip-flop is objective evidence that his claim of independence is not in good faith. This is exactly the scenario described by the *Jolivette* court as “a claim of independence that is actually rooted in intra-party feuding, tactical maneuvering, or political convenience.”

#### **V. Conclusion**

For the above reasons, and reserving the right to present additional evidence and testimony at the hearing, the above protestors request that the Stark County Board of Elections determine that the nominating petition filed by Francis H. Cicchinelli, Jr., for the office of Mayor of the City of Massillon, Ohio, is in violation of law and is invalidated, and therefore Cicchinelli is disqualified from running as an independent for the office of Mayor of Massillon in the November 2015 General Election.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven P. Okey", with a large, sweeping flourish extending to the right.

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