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RELATORS' MERIT BRIEF

INTRODUCTION

Relators bring this action for a writ of prohibition to prevent Respondents, Secretary of State Jon A. Husted and the Stark County Board of Elections from placing current Democratic County Commissioner Thomas M. Bernabei on the November 2015 ballot as an independent candidate for Mayor of Canton. Husted broke a tie vote of the Board of Elections and ruled that Bernabei intention to reside in the city of Canton sufficed to meet the state electoral residency requirements and that Bernabei, despite ongoing ties to the Democratic Party and no clear and complete disaffiliation, had established his independent bona fides.

An action in prohibition “is an appropriate proceeding to prevent a board of elections from placing a candidate’s name on a ballot where such name may not be lawfully placed thereon.” *State ex rel. Higgins v. Brown*, 170 Ohio St. 511, 166 N.E.2d 759 (1960), paragraph two of the syllabus. To qualify for the requested writ of prohibition, Relators must establish that (1) the respondents have exercised quasi-judicial power; (2) the exercise of that power is unauthorized by law; and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Knowlton v. Noble Cty. Bd. of Elections*, 125 Ohio St.3d 83, 2010-Ohio-1115, 926 N.E.2d 284, ¶ 17 (citing, *State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St.3d 76, 2008 Ohio 333, 881 N.E.2d 1214, ¶ 28).

Relators can satisfy all three requirements. The board of elections exercised quasi-judicial authority by denying Relators’ protest after conducting the hearing, including sworn testimony, as Ohio law. *See, State ex rel. Reese v. Cuyahoga Cty. Bd. of Elections*, 115 Ohio St. 3d 126, 2007-Ohio-4588, 873 N.E.2d 1251, ¶ 17. Relators also lack an adequate remedy in the ordinary course of law, given the proximity of the November 5 general election. *State ex rel. Columbia*

Res. Ltd. v. Lorain Cty. Bd. of Elections, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815, ¶ 28.

For the remaining prong, Respondents’ exercise of unauthorized power, the Court reviews whether the respondents “acted fraudulently or corruptly, abused their discretion, or clearly disregarded applicable law.” *State ex rel. Brown v. Butler Cty. Bd. of Elections*, 109 Ohio St.3d 63, 2006-Ohio-1292, 846 N.E.2d 8, P23. An abuse of discretion” implies an unreasonable, arbitrary, or unconscionable attitude.” *State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections*, 80 Ohio St.3d 302, 305, 1997-Ohio-315, 686 N.E.2d 238 (1997). Here, Respondent Husted appeared to apply a less than rigorous standard to evaluating Bernabei’s compliance with state election law. Yet, “the general rule is that, unless there is language allowing substantial compliance, election statutes are mandatory and must be strictly complied with.” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶15 (citing, *State ex rel. Ditmars v. McSweeney*, 94 Ohio St.3d 472, 476, 2002-Ohio-997, 764 N.E.2d 971 (2002)). Relators submit that Respondents both disregarded clearly applicable law and abused their discretion in finding that Bernabei was a resident of Canton and had disaffiliated from the Democratic Party, let alone had done so in good faith.

Bernabei lacked a permanent residence within the city of Canton at the time he petitioned to become an independent candidate and has not yet established a domicile within Canton that would permit him to be a candidate for mayor. Moreover, as an elected Democratic official, as a supporter of Democratic candidates, including during the most recent primary election, as a so-called independent candidate who still wishes he had run in the Democratic primary so he would not have to demonstrate his independence from that party, who has no quarrel with the party and still adheres to the views of the party, and for other reasons, Bernabei had not established the clear break with the Democrats that is necessary to run as an independent – and his claims to have done so, which he concedes remains inadequate but justifies because of the press of other

business – do not satisfy the requirements of Ohio’s election laws. The prayed for writ should issue, and Bernabei should be declared ineligible as an independent candidate for the general election in November.

ARGUMENT

I. **BERNABEI FAILED TO SATISFY THE RESIDENCY REQUIREMENTS OF R.C. § 3513.261.**

A. **Bernabei was not a Canton resident, and Respondents abused their discretion and ignored clearly applicable law in deciding otherwise.**

Respondent Husted erred when he decided that Bernabei be placed on the ballot on grounds that “no evidence in the record before me imparts a firm belief or conviction that Mr. Bernabei’s actions exhibited anything but an intent to reside in the city of Canton,” and that the “fact that [Bernabei] would later move into a home at another address in Canton, that was not available when he signed the apartment lease, is of little significance.” July 31, 2015 Tie-Vote Letter of Secretary of State Jon Husted to the Stark County Board of Elections (July 31, 2015), (Exhibit A). When consideration is given to the undisputed record evidence, described in detail in Relators’ Verified Complaint, it must be concluded that this explanation disregards the statutory text on residency requirements, as well as applicable precedent. (Ver. Compl., ¶¶ 97-134).

This Court has held that a candidate’s sworn statement of residency under R.C. 3513.261 requires that the candidate’s “‘voting residence is in’ a specified precinct and that he is a qualified elector *in such specified precinct*; and that statement relates to the time the declaration of candidacy is signed and sworn to.” *State ex rel. Higgins v. Brown*, 170 Ohio St. 511, 166 N.E.2d 759 (1960), paragraph three of the syllabus [emphasis added]. Similarly, “a qualified elector evidently is one who is qualified, at any designated time, to exercise the privilege of voting . . . then and there, not at some future time, or some other place.” *State ex rel. Barrett v. Leonard*, 6 Ohio Supp. 345, 1941 WL 3346 (Ohio Com. Pl., Hamilton Cty., Sept. 27, 1941). A

candidate's petition must be rejected if his statement of voting residence is inaccurate. R.C. 3513.262, 3501.39(A).

As required by R.C. § 3513.261, when Bernabei signed his independent nominating petitions for Canton Mayor on Sunday, May 3, 2015, Bernabei affirmed:

I, Thomas M. Bernabei, the undersigned, hereby declare under penalty of election falsification that my voting residence address is 2118 University Ave. N.W., Canton, Ohio, 44709; and I am a qualified elector.

* * *

I further declare that I am an elector qualified to vote for the office I seek.

(Ver. Compl, ¶ 97; Prts.' Exh. 1).

This sworn statement necessitated by R.C. § 3513.261 effectively creates a residency requirement for persons desiring to run for municipal office, commencing on the date the candidate *signs* the nominating petition. *State ex rel. Markulin v. Ashtabula Cty. Bd. of Elections*, 65 Ohio St.3d 180, 184, 602 N.E.2d 626 (1992).

Bernabei's own words make clear he never intended to reside at 2118 University Ave. N.W.; it was simply a sham residence used in a desperate attempt to claim Canton residency:

But I myself, ya know, in order to comply with the residency requirements. Again, and the law says that to be mayor, and again to be law director, urn ah, auditor or treasurer of a municipality you have to be an elector. That means that as of the date that you take office you have to be a resident, but in order also to circulate a petition to have those positions, you have to be an elector.

So before the filing of the petitions it was necessary that a, ya know, re-establish, or establish my residence in Stark County. In, in the City of Canton.

(Ver. Compl., ¶ 99; Prts.' Exh. 49, p. 4).

Bernabei's attempt to "comply with the residency requirements" consisted of signing a one-month lease for a friend's vacant property that was listed for-sale and spending a five nights at that property. (Ver. Compl., ¶¶ 110, 115 Tr., pp. 240-42, 259-60). This is a far cry from the standard this Court has clearly and consistently articulated when discussing candidate residency, relying on R.C. § 3503.02, which "emphasizes the person's intent to make a place a *fixed* or permanent place of abode." *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 115 Ohio St.3d 405, 2007-Ohio-5346, 875 N.E.2d 578, ¶11 [emphasis added] (citing, *State ex rel. Stine v. Brown Cty. Bd. of Elections*, 101 Ohio St.3d 252, 2004-Ohio-771, 804 N.E.2d 415, ¶15; *In re Protest of Brooks*, 3rd Dist. No. 17-03-17, 2003-Ohio-6990, ¶25 (circulator's part petitions were invalidated because his use of hotel address where he stayed for five nights "was misleading to voters presented with the petition"). R.C. § 3503.02 defines a voter's residence as the place "in which the person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning." R.C. § 3503.02(A) [emphasis added].

Taking out a one-month lease and spending a total of five nights at that property for the sole purpose of "complying with residency requirements," as Bernabei conceded he did, is not evidence of an intent to make that place the "fixed or permanent place of abode." Indeed, the evidence confirms that, at the moment Bernabei signed his nominating petitions on May 4, 2015, he had no "habitation" at the address listed on his petition – he had yet to move a single belonging. (Ver. Compl., ¶¶ 116-120; Tr., pp. 257-58, 265). This is clear evidence of an attempt to circumvent statutory requirements, something this Court has never countenanced, and should not start to do so now.

From the time Bernabei moved to Hills and Dales with his wife, until May 3, 2015 (the day before he filed his petitions), Bernabei was registered to vote at his Hills and Dales address, where he lived with his wife. (Ver. Compl., ¶ 111; Tr., pp. 251-53; Prts.' Exhs. 25, 26, 44). And while Bernabei filed a change of voter registration, Bernabei's wife voted in person at their Hills

and Dales polling location on May 5, 2015. (Ver. Compl., ¶ 130; Tr., pp. 263, 292-293, Prts.’ Exh. 127). This corresponds with the rule that “that place where the family of a married person resides shall be considered to be the person’s place of residence.” R.C. § 3503.02(D). While this Court has recognized some exceptions to this rule, these exceptions are, ironically, only when the other members of a person’s family temporarily vacate the permanent residence. *State ex rel. Lakes v. Montgomery Cty. Bd. of Elections*, 161 Ohio St. 341, 119 N.E.2d 279 (1954) (candidate did not lose residency because wife and children temporarily moved to another city to obtain treatment for their sick child).

Nor was Bernabei’s residency in Hills and Dales a temporary absence from Canton. He intended to live, and did in fact live, in Hills and Dales long term. In fact, far from wanting to live in Canton, Bernabei previously requested that Canton City Council pass a resolution specifically exempting him from residency requirements for city employees so he could continue to live in Hills and Dales. (Prts.’ Exh. 127)

Until he decided to run for Mayor of Canton days before the filing deadline , Bernabei had no intention of ever residing in Canton. (Ver. Compl., ¶¶ 108-110; Tr., pp. 237-43). At the hearing, Bernabei claimed that he had “two permanent residences” when he signed his petition and voter registration forms: the empty rental property on 2118 University Ave., and the contemplated residence on Lakecrest Street. (Tr., pp. 92-94). However, “R.C. § 3503.02 does not contemplate multiple residences for voting purposes.” *State ex rel. MacPherson v. Trumbull Cty. Bd. of Elections*, 11th Dist. No. 2011-T-0028, 2011-Ohio-1296; Ohio Att’y Gen. No. 2002-025 (“Although a person may have more than one residence for some purposes, it is firmly established that a voter may have only one residence for voting purposes”). *See also, Schill v. Cincinnati Ins. Co.*, 2014-Ohio-4527, ¶ 25, 141 Ohio St. 3d 382, 387, 24 N.E.3d 1138, 1143. In *Schill*, one “can have multiple residences, but can have only one domicile.” *Id.* at ¶ 25.

Residency for election purposes actually means domicile. *Schill*, 141 Ohio St. 3d 382 ¶ 25. This Court has defined domicile as the place “a person resides, where he intends to remain, and where he intends to return when away temporarily.” *Id.* For more than a century, this Court has construed permanent residence, or domicile, to be the place ““where [a person] has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.”” *Id.* at ¶ 24.

Bernabei’s actions in April and May, 2015 are exactly the type of political chicanery that the Ohio General Assembly intended to prevent by enacting residency requirements to vote and run for office. In fact, the legislature did not merely want to discourage people from voting or running for office from a temporary address, the legislature made it a felony, for which people have been prosecuted and punished. *See, e.g., State v. Hippensteele*, Franklin Cty. Comm. Pleas No. 09 CR 002467 (May 1, 2009); *State v. Hausman*, Franklin Cty. Comm. Pleas No. 09 CR 002466 (May 1, 2009); *State v. Little*, Franklin Cty. Comm. Pleas No. 09 CR 002465 (May 1, 2009). To allow a person to register and vote at an address where they have yet to spend a single night, which they intend to vacate as soon as possible, and end up spending less than a week subverts the legislature’s intent in passing these requirements. It undercuts the integrity of our electoral framework. Moreover, it creates a perverse incentive for fraudulent voters to run for office in order to evade criminal liability.

This Court has articulated “well settled rules relating to the selection or change of residence, existing when the constitution was adopted, and consequently apply in all cases where a change of residence results from or depends upon choice.” *Sturgeon v. Korte*, 34 Ohio St. 525, 535 (1878), *cited with approval in, Schill*, 2014-Ohio-4527, at ¶ 26, 141 Ohio St. 3d at 388, 24 N.E.3d at 1144. *Sturgeon* made plain the requirement that a prospective voter must adopt the new residence “as his abode,” “look[] upon and treat[] it as his home,” be there “sufficiently long,” and have “no family in another township.” *Id.* Thus, “[t]o acquire a new residence or

domicile, . . . two things must concur—the fact of removal and an intention to remain. The old domicile is not lost or gone until the new one is acquired, *facto et animo*.” *Sturgeon*, 34 Ohio St. at 534, quoted by *Schill*, 014-Ohio-4527, ¶ 26, 141 Ohio St. 3d at 387, 24 N.E.3d at 1144. *See also E. Cleveland v. Landingham*, 97 Ohio App.3d 385, 390, 646 N.E.2d 897 (8th Dist.1994).

Bernabei does not satisfy these longstanding requirements, but instead has conceded that he is maintaining a residence outside the city so that he could return to the home he has plainly has made and continues to intend to be his permanent residence outside the city of Canton. This Court must follow more than a century of its precedents, find error in Respondent Husted’s ruling, and disqualify Bernabei’s candidacy.

B. Allowing Candidates To Claim Temporary Residency In A Community Where They Do Not Live, Solely To Run For Office In That Community, Runs Contrary To The Policy Behind Residency Laws.

Dr. Stephen Brooks of the Bliss Institute of Applied Politics at the University of Akron provided a report in connection with this matter, and on this point explained:

[C]andidates are usually required to reside within the same geographical boundaries where the voters electing the candidate reside. The rationale for this requirement is that public servants can best represent their constituents by being a part of their community. Residency requirements are designed to reinforce the purpose of residency requirements by eliminating those who are taking up residency only to gain political office. Many states and communities also have durational residency requirements for candidates ranging from a few weeks to a few years. Those creating durational requirements see them serving the public interest by guaranteeing that a candidate not only lives within the boundaries but has shown his or her commitment to their community and has a greater understanding of the issues and concerns of the residents of the district.

Brooks, S., *A Political Science Examination of Candidate Qualifications and Ballot Access*, July 6, 2015 (Sup. Apx. Tab 134).¹

In fact, residency requirements reflect important governmental interests beyond those described by Dr. Brooks and must be enforced with discriminating care. *See, e.g., Gilbert v.*

¹ While Dr. Brooks was not permitted to provide testimony at the hearing, his Report was permitted to be proffered into evidence during the hearing. (Tr., pp. 130-33).

State, 526 P.2d 1131, 1134 (Alaska 1974); *Chimento v. Stark*, 353 F. Supp. 1211, 1215 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973); *Walker v. Yucht*, 352 F. Supp. 85, 98 (D. Del. 1972). Such a requirement operates to assure that the chief executive officer of Canton is exposed to the city, its structure and administration, and its people in more than a passing fashion, thereby giving the candidate familiarity with and awareness of the conditions, needs, and problems of both the city and the various segments of its population. At the same time, a real residency gives the voters of the city an opportunity to gain by observation and personal contact some firsthand knowledge of the people who would be candidates for Mayor. In addition, the requirement serves to prevent frivolous candidacies by persons who have had little previous exposure to the problems and desires of the people of the city. While some public issues transcend the city borders and are more generally familiar to those operating in other governmental units as public problems often transcend state lines, there are unquestionably distinctive policy questions or political considerations within a city that a resident is more likely to be familiar with than one who asserts a pretextual residency solely for purposes of candidacy.

Similarly, as one court held, residency requirements serve:

(1) the interest in exposing candidates to the scrutiny of the electorate, so voters may make informed choices; (2) the interest in protecting the community from outsiders who are interested only in their own selfish ends and not seriously committed to the community; and (3) the interest in having officeholders who are familiar with the problems, interests, and feelings of the community.

Joseph v. City of Birmingham, 510 F. Supp. 1319, 1336 (E.D. Mich. 1981).

Indeed, municipalities have a strong interest “in protecting the citizens from ‘raiders’ who are not seriously committed to the interests of the community. It is fair to assume that the longtime resident has had a stake in the community and has not moved there merely to further his own political career.” *Id.*

Ohio’s statutory requirement and venerable precedent embrace these purposes and mandate that Bernabei’s candidacy be disallowed.

II. BERNABEI FAILED TO SATISFY THE INDEPENDENT CANDIDATE REQUIREMENTS OF R.C. §§ 3501.01(I) AND 3513.257.

Relators' Complaint for Writ of Prohibition extensively sets the factual and legal basis that demonstrates Bernabei's candidacy for Canton Mayor failed to comply with Ohio's independent disaffiliation law and that Respondent Husted abused his discretion in clear disregard of Ohio Election law in holding otherwise. The clear and convincing record shows Bernabei was not actually unaffiliated or disaffiliated from the Democratic Party when he signed and/or submitted his independent candidate nominating petition for the office of Canton Mayor, and Bernabei's claim of unaffiliation from the Democratic Party was not made in good faith as required by R.C. §§ 3501.01(I) and 3513.257 and Ohio Sec. State Adv. Op. No. 2007-05. When Bernabei's candidacy is evaluated in the in light of the policies underlying and the requirement incorporated in the independent disaffiliation law, it is readily apparent that Bernabei's effort to run as an independent for Canton Mayor is exactly the type of candidacy the General Assembly intended to prevent.

A. Political Parties are an Important Part of Ohio's Electoral System.

Political parties "were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable." *Ray v. Blair*, 343 U.S. 214, 220-21, 72 S. Ct. 654, 96 L. Ed. 894 (1952). Indeed, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, 2408, 147 L. Ed. 2d 502 (2000).

Whether by design or happenstance, "American politics has been, for the most part, organized around two parties since the time of Andrew Jackson." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367, 117 S. Ct. 1364 (1997) (citation omitted). On this point, Dr.

Brooks of the Bliss Institute explained:

For a century and a half U.S. politics has been dominated by two major parties. While some changes in the electoral process, like party primaries and non-partisan elections, were instituted to reduce the influence of parties in elections, party leaders still play a major role in structuring the elections process.

Brooks, S., *A Political Science Examination of Candidate Qualifications and Ballot Access*, July 6, 2015 (Sup. Apx. Tab 134).

The objectives of these political parties are not simply to win elections, but to shape public policy:

A political party ... is a voluntary association, instituted for political purposes, with the goal of effectuating the will of its members. The party's ultimate goal, in the electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. ... [I]t is a function of parties to form coalitions of interest groups, providing their members access to power and facilitating the passage of legislation once a party has achieved office. In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its members') policies and philosophies. The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.

Nader v. Schaffer, 417 F. Supp. 837, 844 (D. Conn.) *aff'd*, 429 U.S. 989, 97 S. Ct. 516 (1976) (citations and text omitted).

Ohio is not alone in its enactment of laws that embrace the representative roles these political parties have in our in our electoral system. *Timmons*, 520 U.S. at 367; *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001). In doing so, Ohio, like nearly all other states, “require[s] parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion.” *Jones*, 530 U.S. at 572. The primary election process adopted by the General Assembly has therefore assumed a critical role in Ohio's political framework.

B. Ohio's Independent Candidacy Requirements Stabilize our Electoral Process.

In 1971, the U.S. Supreme Court recognized that, “as a practical matter, there must be a

substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274 (1974). It is beyond dispute that the right to be an independent candidate for public office in Ohio is important; both to the individual candidate and to the overall electoral process. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983). But “the independent candidacy route to obtaining ballot position is but a part of the candidate-nominating process, an alternative to being nominated in one of the direct party primaries.” *Storer*, 415 U.S. at 733. Indeed, with no regulation whatsoever, independent candidacies can have a destabilizing effect upon the established political party system. *Id.* at 735.

In an effort to prevent destabilization, like many other states, the Ohio General Assembly has enacted two separate requirements of independent candidates. The first is Ohio’s “sore loser” law. R.C. § 3513.04. The “sore loser” law prohibits a candidate who runs and loses in the primary election from running in the following general election as an independent candidate. *Id.* The second is Ohio’s “independent disaffiliation” law. R.C. §§ 3501.01(I) and 3513.257. Dr. Brooks explained that these “election policies have been instituted to address the potential of manipulation” and “maintain[] voter confidence” by endeavoring to distinguish between those independent candidates who sever their political ties due to a sincere “shift [of] one’s political allegiance” from those who do so “simply for electoral advantage.” Brooks, *supra*, at 7. While their objectives are the same, it is Ohio’s independent disaffiliation law that is implicated here.

a. Ohio’s Disaffiliation Law is Intended to Require that Independent Candidates are Actually “Independent.”

Nearly 80 years ago, this Court recognized that “the term ‘independent’ is inconsistent with the status of party affiliation.” *State ex rel. Bigelow, v. Butterfield*, 132 Ohio St. 5, 4 N.E.2d 142 (1936). While Ohio’s “sore loser” law has been in place since 1930,² there was little

² See, *State ex rel. Patterson v. Schirmer*, 129 Ohio St. 143, 194 N.E. 13, 15 (1934).

legislative authority to enforce this Court's observation outside the specific circumstances contemplated by the sore loser law.

As a result of this statutory omission, in 1980, the Tenth District recognized that “any person, regardless of his political affiliation, may become an independent candidate for election to office.” *State, ex rel. Moss v. Franklin Cnty. Bd. of Elections*, 69 Ohio App. 2d 115, 116, 432 N.E.2d 210 (10th Dist.1980). *Moss* centered upon Bill Moss' efforts to appear on the ballot as an independent candidate for State Representative in the 1980 general election. *Id.* On March 20, 1980, Moss filed a Declaration of Candidacy, seeking election to the Franklin County Democratic Central Committee at the June 3, 1980 primary election. *Id.* The problem, at least according to the Franklin County Board of Elections, was that on the very same day, March 20, 1980, Moss also filed his nominating petition to run as an independent candidate for the 31st House District. *Id.* However, because Moss' actions were not prohibited by the “sore loser” law, nothing prohibited Moss from running simultaneously as a Democrat for one office and an independent candidate for another. *Id.* This is true even though Moss was ultimately elected to the Democratic Central Committee in the June 3, 1980 primary, and would be a member of the Democratic Central Committee while running for office as an independent candidate that November. *Id.*

On March 4, 1980, H.B. 1062 was introduced in the Ohio House, making various changes to Ohio Election law. (Legislative Service Commission File, H.B. 1062, Ohio Historical Society (“LSC H.B. 1062 File”), pp. 1-7 (Exhibit H); H.B. 1062 (Exhibit I)). On April 15, 1980 – twenty-five days after Moss filed his petitions with the Franklin County Board of Elections and in apparent response to his claims of affiliation with the Democrats while also claiming to be an independent – the House Elections Committee reported out Sub. H.B. 1062. This Substitute Bill added a provision to the original H.B. 1062, which was “intended to clarify the distinctions

between ‘party,’ ‘independent,’ and ‘nonpartisan candidates.’” (LSC H.B. 1062 File, pp. 14; Sub. H.B. No. 1062 (Exhibit J)). This clarification was set forth at R.C. § 3501.01(I):

“Independent candidate” means any candidate who does not consider himself or herself affiliated with a political party, and who has his or her name 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.

(1979-1980 Ohio Laws, Part II, 4570, 4678 (Am. Sub. H.B. 1062, eff. March 23, 1981)).

Through the passage of this legislation, Ohio now had an independent “disaffiliation” law. To qualify as an “independent” candidate, that candidate could not “consider himself or herself affiliated with a political party.” Moss indeed “considered himself affiliated” with the Democratic Party when he filed his independent nominating petitions with the Franklin County Board of Elections because he simultaneously submitted a declaration of candidacy for the Franklin County Democratic Party Central Committee the same day. Consequently, under the new law, the Tenth District certainly would have affirmed the Franklin County Board of Elections’ disqualification of Moss’ independent candidacy for the 31st House District had this legislation been in effect at that time. As recognized by the Southern District of Ohio, the General Assembly effectively overruled *Moss* and the case’s “abandonment of the commonsense interpretation” of what it means to be “independent.” *Morrison v. Colley*, S.D. Ohio No. 2:06cv644, 2006 WL 2619825 (Sept. 12, 2006), *aff’d*, 467 F.3d 503 (6th Cir. 2006).

In 1983, the U.S. Supreme Court in *Anderson* found that because R.C. § 3513.257, at the time, required independent candidates to file their nominating petitions 75 days before the day of the primary, this worked an unreasonable burden on independent presidential candidates. 460 U.S. 780. In response, the General Assembly amended R.C. § 3513.257 by moving the petition filing deadline for independent candidates further back, to the day before the primary election. In doing so, the General Assembly quoted *Storer*, which upheld California’s independent disaffiliation law, with the following statement of legislative intent:

The purpose of establishing a filing deadline for independent candidates prior to the primary election immediately preceding the general election at which the candidacy is to be voted on by the voters is to recognize that the state has a substantial and compelling interest in protecting its electoral process by encouraging political stability, ensuring that the winner of the election will represent a majority of the community, providing the electorate with an understandable ballot, and enhancing voter education, thus fostering informed and educated expressions of the popular will in a general election. The filing deadline for independent candidates required in this section prevents splintered parties and unrestrained factionalism, avoids political fragmentation, and maintains the integrity of the ballot. The deadline, one day prior to the primary election, is the least drastic or restrictive means of protecting these state interests. The general assembly finds that the filing deadline for independent candidates in primary elections required in this section is reasonably related to the state's purpose of ensuring fair and honest elections while leaving unimpaired the political, voting, and associational rights secured by the first and fourteenth amendments to the United States Constitution.

R.C.. § 3513.257. *Cf.*, *Storer*, 415 U.S. at 729, 736.

For purposes of enforcing Ohio's disaffiliation law, determining whether a potential candidate "consider[s] himself or herself affiliated with a political party" in instances other than the obvious circumstances of the Moss candidacy, the General Assembly amended Ohio's independent disaffiliation in 1999 to its current form, which reads:

"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.

R.C. §§ 3501.01(I), 1999 H.B. 157.

Informed by the Sixth Circuit's decision in *Morrison v. Colley*, 467 F.3d 503 (6th Cir.2006), Ohio's independent disaffiliation law requires an independent candidacy satisfy a two-part test:

- (1) The independent candidate must actually be unaffiliated, or disaffiliated from any political party; and
- (2) The required claim of unaffiliation by an independent candidate must be made in good faith.

Ohio Sec. State Adv. Op. No. 2007-05, p. 3 (the “Advisory”). These requirements must be satisfied when the independent candidate files the nominating petition, which is the day before the primary pursuant to R.C.. § 3513.257. *Id.*

The first step of the test is determined objectively by examining evidence that demonstrates an actual affiliation with a political party. As recognized in *Jolivette v. Husted*, 694 F.3d 760, 767-70 (6th Cir. 2012), if the evidence shows that the candidate is “not unaffiliated,” the candidate “cannot run as an independent candidate,” and the analysis ends there.

However, if this first requirement appears to be met, the second step ensures that, even if a candidate claiming independence is not actually affiliated with a political party, the “claims” of disaffiliation are not a temporary conceit of convenience but a reflection of “good faith.” In other words, as explained by the lower court in *Jolivette*, a claim of disaffiliation must be “genuine and legitimate” and not “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.” 886 F. Supp. 2d 820, 827 (S.D. Ohio 2012). This is determined by examining the circumstantial evidence surrounding the candidate’s conduct.

b. Ohio’s Disaffiliation Law Maintains the Integrity of our Ballot Access Framework.

In upholding a law in California that required “disaffiliation” for more than a year before submitting nominating petitions, the U.S. Supreme Court in *Storer* explained the many important reasons for independent disaffiliation laws. 415 U.S. at 729, 736. In affirming Colorado’s disaffiliation law, the Tenth Circuit recounted many of these policy objectives, the potentially relevant ones to this matter being:

- (1) thwarting frivolous or fraudulent candidates,
- (2) avoiding voter confusion,
- (3) preventing the clogging of election machinery required to administer an election,

- (4) refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot,
- (5) working against independent candidacies prompted by short-range political goals, pique, or personal quarrel,
- (6) providing a substantial barrier to a party fielding an “independent” candidate to capture and bleed off votes in the general election that might well go to another party,
- (7) reserving the general election ballot for major struggles and not allowing it to be used as a forum for continuing intraparty feuds, and
- (8) limiting the names on the ballot to those who have won the primaries and those independents who have properly qualified.

Curry v. Buescher, 394 F. App’x 438, 442 (10th Cir. 2010).

As noted above, the General Assembly has expressly embraced these policy goals. R.C.. § 3513.257. As their objectives are the same, this Court and other courts have relied upon these policy goals to uphold “sore loser” laws. *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St. 3d 338, 344, 1997-Ohio-278, 673 N.E.2d 1351 (citing, *Storer*, 415 U.S. 724); *Libertarian Party of Michigan v. Johnson*, 905 F. Supp. 2d 751, 764 (E.D. Mich. 2012) *aff’d*, 714 F.3d 929 (6th Cir. 2013). At their core, both laws are intended to preserve the integrity of the ballot access system. *Purdy*, 77 Ohio St. 3d at 344; *Storer*, 415 U.S. at 729, 736.

It is not difficult to demonstrate that electoral outcomes that contravene these policy objectives can, and do, occur in the absence independent disaffiliation requirements and sore loser laws. By way of one well-known example, in 2006, incumbent-Democratic Connecticut Senator Joe Lieberman’s re-election efforts by were challenged in the primary Democratic primary by Ned Lamont. M. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L.J. 1013, 1050 (2011). Lamont’s primary challenge was based on dissatisfaction with Lieberman’s political positions within the Democratic Party. *Id.* As a result, Senator Lieberman lost the Democratic primary, 52% to 48%, to Lamont. *Id.* However, Connecticut lacks any “sore loser”

law or independent disaffiliation law. *Id.* Lieberman was therefore legally permitted to run in the general election as an independent, despite being a sitting Democratic Senator. *Id.* Significant splintering within both the Democratic and Republican parties ensued, whereby Lieberman drew fractions of both parties (mostly Republicans and many Democrats) to prevail in the three-way race, though he failed to obtain a majority of the vote cast. *Id.* Upon his election, he continued to caucus with the Senate Democrats, despite being elected as an “independent.”³ Ohio’s independent affiliation law would have been flouted by such a result.

Another particularly relevant example, in 2010, involved sitting Republican-Governor Charlie Crist, who ran for the Republican nomination for U.S. Senate. *See, e.g., Fla. Senate Comm. on Ethics and Elections, Legal Implications of Candidate Party Switching in Florida Elections*, S. 2011-119, Reg. Sess., at 2-3 (2010), <http://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-119ee.pdf> (last accessed Aug. 16, 2015). However, when pre-filing polling indicated that Crist was significantly behind his potential Republican opponent, Marco Rubio, Crist bypassed the primary and instead filed to run as an independent candidate in the November general election against Rubio and Democratic nominee Kendrick Meek. *Id.* While Florida’s petition filing framework effectively operates as a sore loser law, Florida lacks an independent disaffiliation requirement that would have prevented Crist’s candidacy, notwithstanding that he was a sitting, Republican-elected governor. *Id.* Indeed, Crist’s candidacy caused the Florida Legislature to consider the enactment of a disaffiliation law before the November general election even took place. *Id.* Ultimately, and predictably, significant splintering within both the Democratic and

³ Leibovich, M., *Enter, Pariah: Now It’s Hugs for Lieberman*, The New York Times, Nov. 15, 2006, <http://www.nytimes.com/2006/11/15/us/politics/15lieberman.html> (last accessed Aug. 16, 2015).

Republican Parties ensued.⁴ But unlike Lieberman, Crist failed to garner enough of the fractured vote to prevail in the three-way November race. Rubio received the greatest number of votes, though Rubio too failed to obtain a majority of the votes cast.⁵

Neither of these independent candidacies would be possible under Ohio's ballot access framework. They would be barred by operation of Ohio's sore loser and disaffiliation laws. It has long been recognized by this Court that it is valid and important for the General Assembly to "prevent candidates from altering their political party affiliations for opportunistic reasons" and in furtherance of "short-range political goals," and to "prevent splintered parties" and "political fragmentation." *State ex rel. Bible v. Bd. of Elections of Hamilton Cnty.*, 22 Ohio St. 2d 57, 60, 258 N.E.2d 227 (1970); *Purdy*, 77 Ohio St. 3d at 344; R.C. § 3513.257. These are the exact interests impugned by the Lieberman and Crist independent candidacies. To be sure, every political candidate is motivated by "opportunism" and "short-range political goals" to some extent. *State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St. 3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 63 (Pfeifer, J., dissenting). However, independent candidacies that fall within the ambit of the sore loser law and disaffiliation law are different. The General Assembly has made the policy decision that these are the type that impugn "the integrity of various routes to the ballot." *Purdy*, 77 Ohio St. 3d at 344.

An important policy objective of Ohio's independent disaffiliation requirement is to ensure the eventual winner "represent[s] a majority of the community." R.C. § 3513.257. Yet, in

⁴ Zeleny, J., *Reaction to Crist's Decision*, The New York Times, April 29, 2010, <http://thecaucus.blogs.nytimes.com/2010/04/29/reaction-to-crist-decision/> (last accessed Aug. 16, 2015); Luo, M., *Lacking G.O.P. Largess, Crist Turns to Democrats*, The New York Times, <http://www.nytimes.com/2010/07/02/us/politics/02crist.html>, July 1, 2010 (last accessed Aug. 16, 2015); Shear, M., *Bill Clinton Urged Florida Democrat to Quit Bid*, The New York Times, Oct. 28, 2010, <http://www.nytimes.com/2010/10/29/us/politics/29florida.html> (last accessed Aug. 16, 2015).

⁵ Cave, D., *Rubio Continues Quick Rise in G.O.P. With Win in Florida Senate Race*, The New York Times, <http://www.nytimes.com/2010/11/03/us/politics/03florida.html> (last accessed Aug. 16, 2015).

each of the examples cited above, none of the winners obtained a majority of the vote. In his report, Dr. Brooks of the Bliss Institute explained why the General Assembly would strive to avoid such a result:

A vast majority of elections in the U.S. have been characterized as “first past the post” and “winner take all” systems. This means that the winner of the election is the candidate receiving the most votes no matter how few votes she or he receives. Critics of this system point out that, as the number of candidates increase, the likelihood of a winner receiving a majority of votes decrease. A low percentage share of the vote decreases the legitimacy of winners, making post-election governing more difficult.

Brooks, *supra*, at 4.

In order to effectuate the policy goal of ensuring that the ultimate winner represents a majority of the voters, the number of candidates competing in the general election must be limited. Indeed, the avoidance “ballot overcrowding” is an express policy objective of the independent candidate requirements. *Purdy*, 77 Ohio St. 3d at 344. In achieving this objective, Dr. Brook explained:

[T]he most effective process to reduce the number of candidates is the party primary. The likely successful candidates are those who have been endorsed by the two major political parties so those wishing to hold political office seek out party endorsements. In addition to reducing the number of candidates, political primaries resolve intra-party disputes and personal conflicts allowing the party to unite behind a single candidate.

Brooks, *supra*, at 4.

Limiting the number of candidates at the general election through primary elections not only helps to ensure that the ultimate general election winner represents a majority of the voters, but also promotes an informed voting process. This too is a desired policy consequence. R.C. § 3513.257. Dr. Brooks continued:

Shorter ballot lists and primaries also benefit voters, especially in local elections. As much as we may hope citizens would spend time analyzing the credentials of every candidate for every office, most voters have no incentive and little interest in using their time for such analysis. This is especially true in “low information” elections like municipal elections where access to information about the candidates and issues is difficult to find. The decline in traditional media

(newspapers and local television news) has only made getting information more difficult. For example, the possibility of a news story on a Canton city election appearing on one of the major Cleveland television news outlets approaches zero.

* * *

[W]ithout information, voters rely on cues to make their voting decisions. In local elections, the two most used cues are party identification and name recognition. Without information about a candidate, party identification at least suggests the general ideological and policy preferences of the candidate.

Brooks, *supra*, at 5.

While the independent candidacy examples explained above illustrate how Ohio's independent candidate ballot access requirements can achieve their policy objectives, this type of evidence is not only anecdotal. A study released in April of this year was the first to demonstrate empirically that independent ballot access requirements do achieve their desired policy affect. N. Stephanopoulos, *The Realities of Electoral Reform*, 68 Vand. L. Rev. 761 (2015). Specifically, the study found that sore loser laws measurably help ensure that representatives' positions are aligned and congruent with voters' views. *Id.* In other words, if voters hold certain preferences, then so should their representatives. *Id.* Sore loser laws help accomplish this. *Id.* If a policy goal of these ballot requirements is to ensure candidates "represent a majority of the community" and "enhance[] voter education," R.C. § 3513.257, the empirical data confirms that this goal is being advanced. *Id.*

While independent ballot access requirements are not without criticism, Kang, *Sore Loser Laws*, *supra*, the weighing of any such drawbacks is the province of the General Assembly. By adopting such laws, Ohio, like 46 other states, have made this policy choice clear. While this wisdom of this decision may be debated, at least in the concluding opinion of the only empirical study on this issue, "[t]he relatively few states that lack them thus should give serious thought to passing them." Stephanopoulos, *The Realities of Electoral Reform*, *supra*.

A. How Bernabei's Candidacy Threatens Ohio's Policy Objectives.

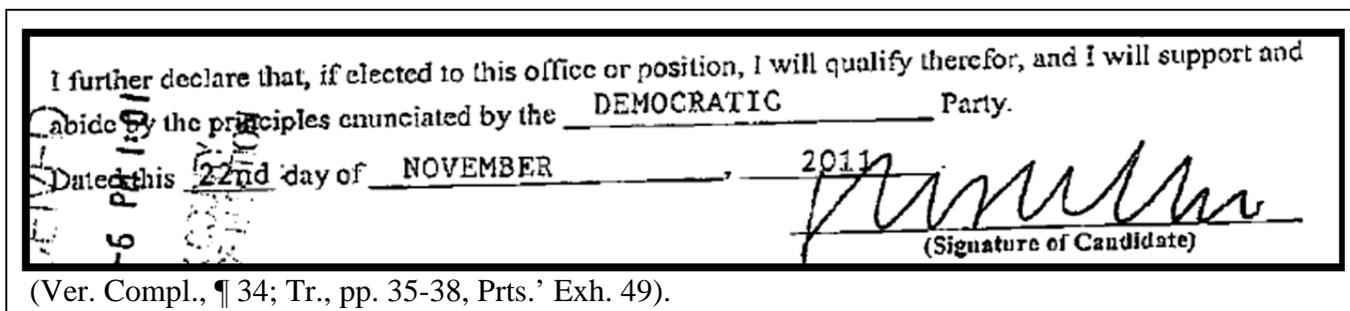
In this case, Bernabei purported independent candidacy squarely implicates the policies underlying Ohio's disaffiliation law. To allow Bernabei's candidacy would fundamentally require a new reading of our disaffiliation law and would embrace exactly what the law is meant to prevent.

1. The Post-Petition Evidence Confirming Bernabei's Objective Failure to Completely Disaffiliate from the Democratic Party Demonstrates that Bernabei's Attempted Candidacy Would Compromise Ohio's Ballot Access Framework.

If Bernabei wished to avoid the primary election process, the first step of Ohio's independent disaffiliation law required Bernabei to have completely disaffiliated himself from the Democratic Party by the time he submitted his nomination petitions on May 4, 2015. *Jolivette*, 694 F.3d at 768. As explained extensively in Relators' Verified Action in Prohibition, with citation to the undisputed post-petition evidence presented at the Hearing, Bernabei failed to do this. (Ver. Compl., ¶¶ 32-63). This was confirmed most clearly by Bernabei's current and ongoing service as a Democratic-elected County Commissioner. (Ver. Compl., ¶¶ 34-42; Tr. pp. 38-39; Prts.' Exhs. 16, 110). It is also confirmed by Bernabei's ongoing membership in two separate Democratic clubs. (Ver. Compl., ¶¶ 51-60; Tr., pp. 112-13, 119-20, Prts.' Exhs. 90, 112, 113). It was further confirmed by Bernabei's active campaigning on behalf of other Democratic candidates up to and through the filing date. (Ver. Compl., ¶¶ 43-50; Tr., pp. 46-58, Prts.' Exhs. 52, 90, 93, 103). The conclusion is further reinforced by the public displays conveying affiliation with the Democratic Party on websites and even at the Stark County Democratic Headquarters. (Ver. Compl., ¶¶ 61-63, Tr., pp. 59-60, Prts.' Exhs. 94-98). Yet, if other evidence were necessary, Bernabei supplied it by admitting, post-petition, that he wished he had entered the Democratic primary for mayor. (Ver. Compl., ¶ 58; Tr., p. 296). Disqualifying Bernabei based upon this undisputed post-petition evidence is not only required based upon the letter of the

disaffiliation law, but is necessary to fulfill the objectives that the law is designed to achieve.

First, Bernabei's current sitting status as the elected-Democrat Stark County Commissioner uniquely warrants disqualification of Bernabei's independent candidacy. (Ver. Compl., ¶¶ 34-42; Tr. pp. 38-39; Prts.' Exhs. 16, 110). The first reason is because unique relationship a partisan elected official has with the political party. This begins with the oath taken by the official when seeking the party nomination as a candidate. Indeed, when Bernabei circulated his Declaration of Candidacy to run for election to this position in 2010, and again when he ran for re-election in 2012, Bernabei affirmed as follows:



This oath is not meaningless. Long ago, this Court explained the relationship created between the voter and the candidate effectuated through this oath:

The members of a party are presumed to act as the members of a lodge, or the members of a church, or of any other voluntary organization, to select representatives of their lodge, church, or such association, to fill certain offices and discharge certain trusts.

By an examination of the primary statutes all combine to demonstrate the soundness of this position. The voters signing the original petition must certify that they are members of the party whose nomination is sought, and some one signer must make oath to that effect. The candidate also makes a declaration that he will abide by the principles enumerated by his political party.

State ex rel. Murphy v. Graves, 91 Ohio St. 36, 39, 109 N.E. 590 (1914). Described another way:

What the party members generally share – what their affiliation declaration symbolizes – is a present intention to support party nominees at the general election and in succeeding elections, and a commitment to the party as an ongoing body and to the party's basic political beliefs.

Developments in the Law – Elections, Nominating Procedures of Political Parties, 88 Harv. L. Rev. 1151, 1167 (1975). The oath and voluntary affiliation “protects a party from intrusion by those with adverse political principles.” *Ray*, 343 U.S. at 221-22.

Bernabei himself agreed that this statement of party affiliation is important and something he would expect voters to rely upon:

Q. When a candidate like you makes a statement on a serious document to the public, you would expect that this statement, this promise is something that you wanted the voters to believe and rely on; correct?

A. Yes.

(Ver. Compl., ¶ 35; Tr., p. 37). Bernabei’s acknowledgement is consistent with this Court’s case law:

The affidavit of a candidate in his declaration of candidacy is required so that the person asked to sign the petition of that candidate may have the assurance under oath that the facts recited in the declaration of candidacy are true.

1993 Ohio Op. Att’y Gen. 2-249 (1993) (*quoting, State ex rel. Higgins v. Brown*, 170 Ohio St. 511, 166 N.E.2d 759 (1960), paragraph four of the syllabus (1960)).

Bernabei agreed that this oath has no expiration. (Ver. Compl., ¶ 35; Tr., p. 280). Indeed, by its terms, it extends for entire duration that Bernabei holds this elected office. (Ver. Compl., ¶ 34; Tr., pp. 35-38, Prts.’ Exh. 49). *See also*, R.C. § 3513.07. And Bernabei continues to hold the elected office upon which this oath was based. (Ver. Compl., ¶¶ 36-38; Tr., pp. 37-38).

To be sure, Bernabei is not captive of the Democratic Party. But if his decision is to repudiate the oath he made, then he must return the benefit received. And upon his resignation, the Democratic Party has the right to appoint someone else who will uphold these values until a successor is elected. (Ver. Compl., ¶ 39). *See also* R.C. § 305.02(B). Even Bernabei agreed:

Q. Your counsel asked the rhetorical question of what more you could have done to disaffiliate yourself. You ran twice and won with the support of the Democratic Party, suggesting and promising that if elected you would support

and abide by the principles of the Democratic Party. One of the things you could have done to clarify and make clear your disaffiliation, you could have resigned this position; correct? You could have done that?

A. Yes.

(Ver. Compl., ¶ 39; Tr., p. 39. See also, Tr., p. 63).

This Court's previous case law confirms that Bernabei cannot have it both ways:

A party candidate is required by section 4785–71, General Code, to declare his intention to vote for a majority of the candidates of his party and to support and abide by its principles, which declaration removes a candidate from the status of being independent.

State ex rel. Bigelow v. Butterfield, 132 Ohio St. 5, 6, 4 N.E.2d 142 (1936). Another Justice of this Court observed:

There is a natural inconsistency between an independent candidacy and a party candidacy. Common sense dictates that the same candidate cannot be both a party candidate and at the same time be independent of that party. The act plainly recognizes the distinction, because the declaration of a party candidate must set forth, as a prerequisite to his candidacy, that (instead of being independent) he must declare, not only that he is a party member, but must also declare that he intends "to vote for a majority of the candidates of such party at the forthcoming election." By the same section he is required to declare that, if nominated and elected, he "will support and abide by the principles enunciated" by that party "in its national and state platform."

Under the definition given above, how can it be claimed that the same individual can, at the same time, abide by the principles of a party and still be uncontrolled thereby? How can it be logically maintained that a party candidate who, as a legal prerequisite to his candidacy, is required to declare that he intends "to vote for a majority of the candidates of such party at the forthcoming election," and swears to that statement, can be independent and exercise "a free choice in voting with either or any party"? Any party candidate maintaining such an attitude would violate his statutory declaration, would stultify himself, and would pursue a course which would have a tendency to perpetrate a fraud upon the electorate.

State ex rel. Patterson v. Schirmer, 129 Ohio St. 143, 147-48, 194 N.E. 13 (1934) (Jones, J., concurring) (citations omitted).

The irreconcilability of Bernabei's oath "to support and abide by the principles" of the Democratic Party with Bernabei's newly claimed "independence" of or "unaffiliation with" the

Democratic Party becomes even more discordant when consideration is given to the nature of the public office itself. This is because, as mentioned above, if Bernabei were to resign from his position of Commissioner, the Stark County Democratic Party will appoint his replacement.⁶ The legal “affiliation” with the Democratic Party is thus confirmed by operation of law.

Having received the benefit of this bargain through his election as a Democratic County Commissioner, it is inconceivable that Bernabei could refuse to uphold his corresponding obligation to the voters that elected him. Attempting to disaffiliate from the Democratic Party in order to bypass the primary process to enable Bernabei to challenge another Democratic office holder in the general election as an independent – all while retaining the benefit he received from Democratic Party voters – certainly fails to honor the oath that Bernabei swore to uphold. If the General Assembly’s aim is to “prevent candidates from altering their political party affiliations for opportunistic reasons” in furtherance of “short-range political goals,” and to “prevent splintered parties” and “political fragmentation,” it is difficult to conceive a situation that would implicate such concerns more directly. *See Bible*, 22 Ohio St. 2d at 60; *Purdy*, 77 Ohio St. 3d at 344; R.C. § 3513.257. To hold otherwise would “perpetrate a fraud upon the electorate” that relied upon Bernabei’s oath “to support and abide by the principles of the Democratic Party” when electing him. *Patterson*, 129 Ohio St. at 147-48.

Second, Bernabei’s ongoing membership in two separate Democratic clubs, and the circumstances surrounding his membership, implicate separate policy considerations that are uniquely threatened by Bernabei’s so-called independent candidacy. (Ver. Compl., ¶¶51-60; Tr.,

⁶ Because Bernabei was not elected to this position as an independent, “the county central committee of the political party with which the last occupant of the office *was affiliated* shall” select Bernabei’s successor. R.C. § 305.02(B), (C). To determine the political party with which Bernabei “was affiliated” in this context, the “voting record for the two years preceding” is determinative. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585-86, 651 N.E.2d 995 (1995). Bernabei has only voted as a Democrat. (Ver. Compl., ¶ 39; Tr., p. 77, Prts.’ Exh. 22). The Stark County Democratic Central Committee would therefore appoint Bernabei’s successor.

pp. 112-13, 119-20, Prts.' Exhs. 90, 112, 113). The record confirms that Bernabei did not take any steps to run for the office as an independent candidate for Canton Mayor, nor take any steps needed to disaffiliate from the Democratic Party to make this possible, until April 27, 2015, which is seven days before his nominating petitions were due. (Ver. Comp., ¶ 19; Tr., p. 234). Even then, he did not make the final decision to run for Canton Mayor, and therefore disaffiliate, until May 2, 2015, which was two days before his petitions were due. (Ver. Compl., ¶ 55; Tr., pp. 233, 255, 305). Bernabei was aware that he was an active member of several Democratic clubs and also aware of the need to sever these relationships in the event he decided to run for Canton Mayor. (Ver. Compl., ¶ 55; Tr., pp. 70, 245-49). Instead, he equivocated. On April 30, 2015, he signed letters resigning from these clubs, "conditioned" upon his final decision to run for Mayor. (Ver. Compl., ¶ 55; Tr., pp. 245-254). However, he never actually mailed or otherwise delivered his "conditional" letters of resignation to the actual Democratic clubs from which he now claims to have resigned. (Ver. Compl., ¶ 55; Tr., pp. 66-67).

In explaining why he failed to mail the resignation letters, Bernabei explained:

Q. You could have done that but you choose not to?

A. ...It was not an issue of choice. It was an issue of omission.

Q. An issue of omission?

A. Omission on my part to fail to mail them. Yes, I wish I had mailed them obviously. I wish I had run in the Democratic primary. We wouldn't be here today. Neither of those things happened. I omitted to mail them. I did not intentionally choose not to mail them.

(Ver. Compl., ¶ 58; Tr., p. 296). He further explained:

They were not sent in the actual mail to the people because of the crush of the extraordinary number of events that was occurring on April 30th and on every day that happened thereafter.

(Tr., p. 71). Yet, disaffiliation does not occur because of an intention to resign that never took place, even if explained by the crush of other business. It requires an affirmative act, which

Bernabei never took. As a consequence, Bernabei failed to resign from these Democratic clubs prior to filing his independent nominating petitions on May 4, 2015, and the officers of these clubs testified that Bernabei remained a member even through the Hearing on July 6, 2015. (Ver. Compl., ¶¶ 51-54; Tr., pp. 112-13, 119-21. *See also* Prts.’ Exhs. 90, 112, 113).

By itself, Bernabei’s failure to sever his membership in the Democratic clubs by the time he filed his independent petitions is sufficient to objectively demonstrate Bernabei’s continued affiliation with the Democratic Party so as to warrant his disqualification. *See Jolivette*, 694 F.3d at 768 (affirming disqualification of independent candidacy because “there is evidence in the record indicating that Jolivette did not completely undo his affiliation with the Republican Party in advance of filing his petition to run as an independent.”). There is no “accidental oversight” exception to Ohio’s independent disaffiliation law. *Id. See also Morrison*, 467 F.3d 503.

Yet pressing further, Bernabei’s justification for his omission is one of the *exact* reasons why the disaffiliation law was enacted in the first place – “to refus[e] to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot.” *Curry*, 394 F. App’x at 442. Dr. Brooks of the Bliss Institute explained:

The most troublesome switches, and difficult to discern intent, are switches that take place at the last minute, usually just before a filing deadline. The short time does not give the candidate the ability to demonstrate his or her sincerity of motives.

Brooks, *A Political Science Examination of Candidate Qualifications and Ballot Access*, *supra*, pp. 7-8. In this respect, Bernabei is like the plaintiffs the U.S. Supreme Court found unsympathetic in *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245, 1250, 36 L. Ed. 2d 1 (1973), where the plaintiffs complained about an enrollment deadline for participating in a party primary. The Court held their lack of explanation and “own failure to take timely steps to effect their enrollment” doomed their complaint. *Id.* at 758, 93 S. Ct. at 1250. Bernabei’s failure to

unequivocally disaffiliate and then assert he never had time to mail his letters of disaffiliation must ring hollow, if not viewed as entirely disingenuous.

Similarly, Bernabei's statement that he wished he "had run in the Democratic primary," because then "[w]e wouldn't be here today," (Ver. Compl., ¶ 58; Tr., p. 296), establishes that he has not disaffiliated from the Democratic Party, but is running as an independent only because he had procrastinated in seeking his party's nomination. One cannot continue to entertain designs on a party nomination while also claiming to be unaffiliated and independent. *Cf. Jolivette*, 694 F.3d 767-68.

Finally, Bernabei's active campaigning on behalf of Democratic candidates up to and through the filing date, and the public displays conveying Bernabei's affiliation with the Democratic Party on websites and at the Stark County Democratic Headquarters which remained displayed long after Bernabei filed, certainly prove Bernabei's objective failure to "disaffiliate." (Ver. Comp., ¶¶ 43-50, 61-63; Tr., pp. 46-60, Prts.' Exhs. 52, 90, 93, 94-98, 103). Indeed, to allow Bernabei's candidacy in the face of this evidence would be completely ignore the type of voter confusion this evidence causes, and to disregard the General Assembly's intention to prevent it. R.C.. § 3513.257; *Purdy*, 77 Ohio St. 3d at 344.

By way of merely one example, as part of his campaign efforts on behalf Kristen Donahue Guardado, a Democrat seeking nomination as candidate for the Canton Municipal Court in a contested Democratic primary, Bernabei taped a radio commercial on April 29, 2015 – five days before Bernabei filed his independent nominating petitions. (Ver. Compl., ¶¶ 43-46, Tr., p. 46-57, Prts.' Exhs. 21, 52, 116). This radio ad stated:

MR. BERNABEI: This is Stark County Commissioner Tom Bernabei. In my former job as Canton Law Director, 19 years ago I hired Kristen Donohue Guardado as a young lawyer. Today, she is an experienced prosecutor and an active community leader in Canton and Stark County.

Kristen Donohue Guardado is running for Canton Municipal Court Judge. She has deservedly earned the endorsements of the Repository and Canton Police Patrolmen's Association.

Please join me in voting for Kristen Donohue Guardado for Judge.

Paid for by the Kristen Donohue Guardado for Judge Committee.

(Ver. Compl., ¶ 46; Tr., p. 51, Prts.' Exh. 52 (emphasis added)). Bernabei understood, and the evidence established, that this radio ad began airing on April 30, 2015 and continued through and after the date that Bernabei filed his independent nominating petitions, until May 5, 2015. (Ver. Compl., ¶ 48; Tr., p. 54. See also, Tr., pp. 107-08, 272, Prts.' Exh. 93). Bernabei acknowledged that his request for voters to "join him" in voting for Guardado in the Democratic primary implied that he too was a Democrat that would be voting in this primary. (Ver. Compl., ¶ 47; Tr., pp. 51-52). Indeed, Bernabei helped edit this ad prior to its recording and airing. (Ver. Compl., ¶ 47; Tr., pp. 272-73).

Bernabei took no action to prevent the airing of this radio commercial or otherwise change its message. (Ver. Compl, ¶ 49, Tr., p. 57). Even if he had made a bona fide decision to run as an independent, the ad contributes to voter confusion because it conveys to voters that he is really a Democrat. Nor did he make any efforts to sever his involvement with any other Democratic campaign activities nor the public displays reinforcing his affiliation with the Democratic Party. (Ver. Compl, ¶¶ 49, 62, Tr., pp. 57, 59-60).

The voter confusion that this post-petition affiliation with the Democratic Party is likely to cause is undeniable. When consideration is given to the fact that Bernabei is currently a public official elected as a Democrat seeking to run as an independent against another Democrat in a low turnout, low information municipal general election, voter confusion is guaranteed, which is exactly why the disaffiliation requirements exist. *Storer*, 415 U.S. at 729, 736; R.C. § 3513.257; *Purdy*, 77 Ohio St. 3d at 344.

2. The Pre-Petition Evidence Reinforces the Risk of Damage that Bernabei’s Independency Poses to Ohio’s Ballot Access Framework.

Relators’ Verified Action in Prohibition summarizes the extensive pre-petition evidence presented at the Hearing confirming the veracity of Bernabei’s affiliation with the Democratic Party. (Ver. Compl., ¶¶ 64-76). Indeed, this Court has never before considered a case such as this with such a significant amount of pre-petition evidence.⁷ While, by itself, Relators submit such evidence would be sufficient to make this the rare case where an independent candidate is disqualified based upon pre-petition evidence alone, *see Davis*, 137 Ohio St. 3d 222 at ¶ 27, when considered in conjunction with the post-petition evidence discussed above, the implications to the policy goals of the disaffiliation requirement become readily apparent.

Bernabei has been a household name in Stark County Democratic politics for more than thirty years. Set forth in detail in the Verified Complaint for Mandamus, the stipulated evidence that confirmed this conclusion includes:

YEARS IN OFFICE AS AN ELECTED DEMOCRAT		
Democrat Canton Law Director	11	(1989 - 2000)
Democrat Canton City Council	2	(2004 – 2005)
Democrat County Commissioner	4 +	(2011 – Present)
TOTAL YEARS AS ELECTED DEMOCRAT:	17 +	(Continuing to Present)

APPEARANCES ON BALLOT AS A DEMOCRAT		
	Primary Election	General Election
Democrat Canton Law Director	1991, 1995, 1999	1989, 1991, 1995, 1999
Democrat Canton City Council	2003	2003
Democrat County Commissioner	2010, 2012	2010, 2012
Democrat Central Committee	2014	
TOTAL BALLOT APPEARANCES AS DEMOCRAT:	14	

EMPLOYMENT WHEN HIRED BY OTHER ELECTED DEMOCRATS			
Massillon Law Department	<i>(Thomas V. Ferraro)</i>	2	(1976-1978)
Canton Law Department	<i>(Harry E. Klide / W. Scott Gwin)</i>	9	(1979 – 1988)
Mayor of City of Canton	<i>(William J. Healy II)</i>	1	(2008)
TOTAL YEARS HIRED BY DEMOCRATS:	12		

(Ver. Compl., ¶ 65; Tr., pp. 62-63, Prts.’ Exh. 119).

⁷ *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 137 Ohio St. 3d 62, 2013-Ohio-4490, 997 N.E.2d 524; *State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St. 3d 222, 2013-Ohio-4616, 998 N.E.2d 1093.

By way of financial support of Democratic Party causes and candidates, Bernabei donated at least \$30,203.22 since 1998 (Tr., p. 76. *See also* Prts.’ Exhs. 26-42, 87-88, 90-91). Since 2014, Bernabei’s Democratic political contributions were as follows:

BERNABEI’S DEMOCRATIC POLITICAL CONTRIBUTIONS SINCE 2014		
Democratic Candidate or Entity	Amount	Date
Jefferson Jackson Democratic Club	\$200.00	4/24/2015
Stark County Democratic Party	\$500.00	4/22/2015
Greg Hawk for Canton Council	\$50.00	4/7/2015
Edmond Mack for Canton Council	\$50.00	3/26/2015
John Mariol for Canton Council	\$50.00	3/26/2015
James Babcock for Canton Council	\$50.00	3/26/2015
Kristen Guardado for Canton Municipal Judge	\$100.00	3/3/2015
Stark County Democratic Party	\$100.00	11/21/2014
George Maier for Sheriff	\$500.00	9/24/2014
Chryssa Hartnett for Common Pleas Judge	\$500.00	7/29/2014
Connie Rubin for Ohio Statehouse	\$50.00	6/11/2014
Stark County Democratic Party	\$100.00	5/19/2014
Jefferson Jackson Democratic Club	\$80.00	3/20/2014
Chryssa Hartnett for Common Pleas Judge	\$100.00	2/18/2014

(Ver. Compl., ¶ 66; Tr., p. 76, Prts.’ Exh. 118).

Unlike other cases, the pre-petition evidence demonstrating the strength of Bernabei’s affiliation with the Democratic Party is not only voluminous, but also recent. By way of example, with respect to Bernabei’s political donations in particular, the evidence reflected that Bernabei’s \$500 donation to the Stark County Democratic Party on April 22, 2015 was as a “Bar Sponsor” in connection with a Party fundraiser held on April 30, 2015 – four days before Bernabei submitted his independent nominating petitions. (Ver. Compl., ¶ 67; Tr., p. 83, Prts.’ Exh. 91). Other such evidence included:

- Bernabei’s own campaign Designation of Treasurer on file with the Stark County Board of Elections designated Bernabei as a Democrat until May 4, 2015, the day he submitted his independent nominating petitions. (Ver. Compl., ¶ 68; Tr., p. 80, Prts.’ Exh. 18, 46).
- Bernabei was the Campaign Treasurer for three other Democrat candidates until May 4, 2015. (Ver. Compl., ¶ 68, Tr., p. 80, Prts.’ Exhs. 19, 20, 21, 45). Bernabei did not inform one such candidate that he was resigning as her Treasurer, or that he was otherwise

attempting to disaffiliate with the Democratic Party, until *after* he filed his independent petitions. (Tr., p. 292). No evidence was presented as to when, or if, the other two candidates were notified.

- Bernabei was an elected member of the Stark County Democratic Central Committee until April 30, 2015, when he submitted his “conditional” resignation pending his final decision to run for Canton Mayor as an independent candidate. (Ver. Comp., ¶ 70; Tr., pp. 245-254, Resp. Exh. D). Bernabei made the final decision May 2, 2015, and he filed his resignation from the Central Committee with the Board of Elections on May 4, 2015 – *subsequent* to the filing of his independent petitions. (Ver. Comp., ¶ 70; Tr., p. 233, Prts.’ Exh. 1, Resp. Exh. D).

With respect to Bernabei’s Democratic-voting history, the stipulated evidence demonstrated:

BERNABEI’S DEMOCRATIC PRIMARY VOTING HISTORY	
2014	2001
2012	2000
2010	1999
2008	1997
2006	1994
2005	1993
2004	1992
2003	1991
2002	

(Ver. Compl., ¶ 73; Tr. p., 77, Prts.’ Exh. 22). Bernabei has never voted in a Republican primary, and the only instance in which Bernabei requested a “non-partisan” primary ballot was on May 5, 2015 – in recognition of the fact that that voting in the Democratic primary would automatically disqualify his independent candidacy. (Ver. Compl., ¶ 73, Tr., pp. 77, 234-35, Prts.’ Exh. 49, pp. 8-10, Prts.’ Exh. 50, pp. 7-8).

Bernabei himself confirmed the obvious conclusion required from the accumulation of this evidence. He has been a self-identified Democrat, without exception, the entirety of his adult

life. (Ver. Compl., ¶ 74; Tr., p. 219). He has even referred to himself “a dyed-in-the-wool Democrat” in the local media. (Ver. Compl., ¶ 74; Tr., p. 58, Prts.’ Exhs. 80, 84). This only began to change in late April 2015, when Bernabei began his efforts to “disaffiliate” so he could run as an independent candidate for Canton Mayor.

The Advisory explains that there are two circumstances that will automatically disqualify an independent candidate namely, (1) voting in a party primary election after filing, or (2) serving on a political party’s central or executive committee after filing; Bernabei qualifies for the latter automatic disqualification for resigning two days after filing, his procrastination providing no excuse. Nevertheless, the Advisory also makes clear that, if sufficient evidence is presented, an independent candidacy must still be disqualified in the absence of these automatic disqualifiers. *See also, Jolivette*, 694 F.3d 760. In this context, there has yet to be such a case that has presented the volume of evidence that has been presented in this case. This is true of the cases that have refrained from disqualifying the independent candidate.⁸ It is equally true of the cases that have disqualified the independent candidate.⁹

To allow Bernabei’s independent candidacy in the face of the undisputed evidence confirming Bernabei’s failure to effectively and completely sever his strong, ongoing affiliation with the Democratic Party would be tantamount to concluding that an independent candidate can never be disqualified if the Advisory’s automatic disqualifiers are not deemed applicable. Such a conclusion would both overturn *Jolivette* and nullify the standards set forth in the Advisory. The policy goals of “preventing candidates from altering their political party affiliations for opportunistic reasons” in furtherance of “short-range political goals,” “prevent[ing] splintered

⁸ *Monroe*, 137 Ohio St. 3d 62; *Davis*, 137 Ohio St. 3d 222; *State ex rel. Livingston v. Miami Cty. Bd. of Elections*, 196 Ohio App. 3d 263, 963 N.E.2d 187, 2011-Ohio-6126.

⁹ *In re Greg Jolivette*, Ohio Sec. of State Letter (June 26, 2012) (Sup. Apx. D), *aff’d*, 886 F. Supp. 2d 820, 694 F.3d 760; *In re Edna Boyle*, Ohio Sec. of State Letter (Oct. 5, 2007) (Sup. Apx. E); *aff’d in dicta, State ex rel. Boyle v. Summit Cty. Bd. of Elections*, Ohio Ct. of Cm. Pleas, Summit Cty. Case No. 2007-10-7107, 2007 WL 4462641 (Oct. 17, 2007).

parties” and “political fragmentation” – and most importantly, preventing voter confusion, would be thwarted. R.C.. § 3513.257; *Purdy*, 77 Ohio St. 3d at 344; *Storer*, 415 U.S. at 729, 736. In short, the General Assembly’s effort to preserve the integrity of the ballot access system through the independent disaffiliation law would be fundamentally damaged.

Respondent Husted abused his discretion in clear disregard of applicable law in concluding otherwise. Relators respectfully submit that the requested Writ should be issued by this Honorable Court.

3. A Conclusion that Bernabei’s Attempted Disaffiliation Was Made in “Good Faith” Would Fundamentally Alter the Established Routes to the Ballot.

As Bernabei cannot satisfy the first requirement of the independent disaffiliation law as set forth in the Advisory due to his failure to completely disaffiliate with the Democratic Party, the analysis need go no further. But for purposes of completeness, the evidence similarly confirms that Bernabei cannot satisfy the second requirement, namely, that Bernabei’s attempted effort to disaffiliate was made in good faith. Such a conclusion would have the same damaged effect on the General Assembly’s clear policy goals, and for interrelated reasons.

Relators’ Verified Action in Prohibition describes Bernabei’s motivation for attempting to disaffiliate from the Democratic Party in detail. (Verf. Compl, ¶¶ 81-96). And this undisputed evidence establishes that Bernabei’s effort to disaffiliate was driven by one singular goal – Bernabei wanted to run for Canton Mayor because he was dissatisfied with the Democratic candidates that were already in the race. (Verf. Compl., ¶¶ 83-86; Tr., pp. 205-06, 229-233). Because Bernabei arrived at this conclusion well after the Democratic primary filing deadline had passed, though he lamented his failure, the only way Bernabei could enter the race was as an independent candidate. (Verf. Compl., ¶ 83, 86; Tr., pp. 233-234, 298-99). This required Bernabei to disaffiliate. (Verf. Compl., ¶ 83, 86; Tr., pp. 233-234, 298-99). Bernabei confirmed this singular objective by his own testimony:

Q. So when did it occur to you at last that you were going to really do this? ***When did you firmly in your min[d] decide to disaffiliate from the party and seek the mayoral?***

A. I ultimately firmly made the decision in, when I was in Clearwater Beach on probably Saturday, May 2nd, 2015.

(Verf. Compl., ¶ 83; Tr., p. 233 [emphasis added]).

Bernabei did not testify that his motivation for disaffiliating with the Democratic Party was due to any disagreement with the Democratic Party. (Ver. Compl., ¶ 82). Rather, Bernabei's testimony was the exact opposite. He described his connection with the Democratic Party as "heartfelt" and acknowledged "the party that had treated me well." (Ver. Compl., ¶ 82; Tr., pp. 221, 225). Bernabei explained, "I am not leaving the Democratic Party, ah, ya know, on, on bad terms in any way, shape or form. Ya know, nothing occurred." (Ver. Compl., ¶ 82, Prts.' Exh. 49).

Nor did Bernabei testify that his disaffiliation was due to any shift in ideology. (Ver. Compl., ¶ 82). Rather, the only ideology Bernabei expressed was consistent with the Democratic Party. He described himself as "a liberal on social policy." (Tr., p. 276). He further testified, "I am conservative probably on fiscal matters; although, I believe that people should pay taxes. We should pay higher income taxes in order to obtain the necessary services and infrastructure that we need." (Tr., p. 276). No change in this ideology was ever claimed, whether in late April 2015, when he began to his effort to disaffiliate from the Democratic Party, or at any other time.

Further, the consistent reason Bernabei offered to justify his decision to run for Canton Mayor, and therefore his effort to disaffiliate, was due to his dissatisfaction with the current Democratic candidates in the race. (Ver. Compl., ¶ 93; Tr., pp. 229-230. See also, Tr., pp. 205-06; Prts.' Exhs.130, 131). By implication, if he was satisfied with the individuals running, he would not have sought to run and would have remained a Democrat. Bernabei cannot now claim he somehow blames the Democratic Party for his dissatisfaction, thereby providing a post hoc

reason for his disaffiliation effort. Such a claim is undermined by Bernabei's own actions – after Bernabei fully realized his discontent with the Canton Democratic mayoral candidates on April 26, 2015, he continued reinforce his affiliation with the Democratic Party through political donations and campaign efforts. Ver. Compl, ¶ 93-94; Tr., pp. 51, 54, 83, 106-08, 119-20, 205-06, 229-230, 272; Prts.' Exhs. 52, 90,91, 93, 103, 130, 131).

In light of the facts of this case, Bernabei himself agreed that, if he desired to run for Mayor of Canton, he should have simply run in the Democratic primary. Bernabei testified:

Q. Why didn't you run in the primary?

A. That's a great question. Why didn't Bernabei run in the primary?

Q. Yes, sir.

A. You know, again hindsight says that Bernabei probably should have chosen to run in the primary.

(Ver. Compl., ¶ 90; Tr., p. 228). Later in his testimony, Bernabei made this sentiment clearer when he testified, "I wish I had run in the Democratic primary." (Tr., p. 296).

However, Bernabei cannot now bypass the primary process that he admittedly should have pursued and gain ballot access via the independent route simply because Bernabei now wants to be a candidate for Canton Mayor. This is not good faith disaffiliation within the meaning of Ohio election law. As *Jolivette* recognized, "good faith" is lacking when a candidate disaffiliated from a party solely because the candidate "wanted access to the ballot" as an independent candidate. 886 F. Supp. 2d at 832-33; 694 F.3d at 768-69. Without more supporting the claim of disaffiliation, such as an expression of "a change in ideology or policy to explain [the] disaffiliation," good faith cannot be based upon a desire for to access the ballot via the independent route alone. *Jolivette*, 886 F. Supp. 2d at 832-33; 694 F.3d at 768-69. In other words, merely having "good intentions" in seeking to run for office is not the same as disaffiliating from a political party "in good faith." If a member of a political party could

establish their “good faith” political disaffiliation merely by expressing their sincere desire to appear on the ballot as an independent, it would automatically be established in every case.

Dr. Brooks summarized the policies that are implicated by a candidacy such as that contemplated by Bernabei:

The practice of candidates switching to Independent status poses three challenges to the electoral system, especially if it increases the number of Independent candidates with previous, recent party ties. First, the number of candidates participating in general elections will increase, creating more confusion for voters. More candidates will likely lower winning margins, reducing the legitimacy of the successful candidate. Second, with fewer participants in the primaries, the value of this long-standing component of the electoral system will be reduced. With or without spoiler laws, newly converted Independents can take advantage of forgoing a primary that they calculate they will likely lose. The increasing use of political analytics, even in local campaigns, makes such calculations easier. Third, with a ballot filled with “true” Republicans, “true” Democrats, Independent-Democrats and Independent-Republicans, the meaning of “Democrat,” “Republican” and “Independent” lose meaning. Without a clear distinction among candidate partisan identities, participating in local, low-information elections become even more confusing and frustrating for voters.

* * *

For these issues, strict regulation and enforcement ensures only qualified candidate appear on the ballot. Also, by controlling the number of candidates, they increase voters’ ability to easily distinguish between candidates.

Brooks, *supra*, at 8-9.

To allow Bernabei’s candidacy to proceed would embrace the exact evils the disaffiliation law is meant to prevent. More specifically, Bernabei’s attempt to run as an independent for Canton Mayor is a quintessential last-minute effort. Bernabei’s effort is admittedly premised upon opportunism and short-range political goals, as he is disaffiliating with the Democratic Party for the singular reason of becoming a candidate for Canton Mayor. As explained above, Bernabei did not even have a residence in Canton when he made his last minute decision. If these are indeed valid policy objectives, it is inconceivable that such a candidacy could ever be condoned.

The factionalism and splitting that his candidacy is already causing within the Democratic Party is very real. Bernabei is himself a Democratic-elected official that has been involved in Democratic Party for 30 years, still a member of Democratic clubs, and endeavoring to run squarely against another incumbent-Democratic elected official. There are no other candidates in the race. Indeed, one need look no further than Bernabei's own independent nominating petitions to see this intraparty fractioning. In addition to the petitions Bernabei circulated himself, two other Democratic-elected office holders circulated Bernabei's petitions on his behalf. (Prts. Exhs. 1, 28, 40). And at the Hearing, Bernabei subpoenaed four other Democratic-elected office holders and the Democratic Deputy Director of the Stark County Board of Elections who testified on Bernabei's behalf. (Tr., pp. 186, 202, 219, 302, 328). With the Relators' prosecuting this Action against Bernabei's candidacy consisting of seven other Democratic-elected office holders, the splintering that Bernabei's candidacy is causing is more than theoretical. It is real.

If Bernabei's candidacy proceeds, voter confusion will inevitably follow. Instead of "presenting the people with understandable choices between candidates who have not previously competed against one another in a primary," the voters will be presented with the exact opposite. They will be forced between two local sitting Democratic-elected office holders competing against one another in a low information general election during the midst of an intraparty feud. Our system is designed to resolve these contests by the primary ballot. If the independent disaffiliation requirement is intended to preserve the integrity of the ballot access system, then Bernabei's independent candidacy is the exact type of candidacy that this law should prevent.

Respondent Husted abused his discretion in clear disregard of applicable law in concluding otherwise. Relators respectfully submit that the requested Writ should be issued by this Honorable Court.

B. The Implications of Allowing Bernabei's Independent Candidacy Will Extend

Beyond this Case.

Finally, it is important to mention another policy objective of Ohio's independent disaffiliation law that is implicated by this case, albeit indirectly. More specifically, another important policy behind Ohio's independent disaffiliation law is to prevent the fielding of "spoiler candidates," who "are independent candidates intended to capture and bleed off votes in the general election that might well go to another party." *Purdy*, 77 Ohio St.3d at 344. This interest is particularly acute when the "spoiler candidate" has the effect of "preventing the winner from representing a majority of the community." R.C. § 3513.257. There is little doubt that political parties engage in this conduct, as was uncovered by the Milwaukee Journal Sentinel during the 2011 Wisconsin recall elections.¹⁰

There are many instances where an independent candidate's participation in an election had a potential "spoiler" affect, thereby preventing the party preferred by the median voter from prevailing in the general election. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 Colum. L. Rev. 283, 334 (2014). For instance, in the 2012 U.S. House general elections, there were approximately twelve races where the votes received by third parties exceeded the major party's margin of victory. *Id.* While proving a "spoiler" effect requires significant analysis, this analysis has been performed with respect to the 2000 presidential election. Specifically, ballot-level data compilation confirmed that approximately 60% of Florida voters that cast ballots for Ralph Nader preferred Al Gore to George W. Bush. Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil Al Gore's Presidential Bid? A Ballot-Level Study of Green and Reform Party*

¹⁰ Bice, D., *Wisconsin GOP leaders encouraging colleagues to place fake Democrats on recall ballots*, The Milwaukee Journal Sentinel, June 5, 2011, <http://www.jsonline.com/watchdog/noquarter/123202643.html> (last accessed Aug. 16, 2015). This would likely be illegal in Ohio. R.C. §§ 3513.19; 3513.191; *Lippitt v. Cipollone*, 337 F. Supp. 1405, 1406 (N.D. Ohio 1971), *aff'd*, 404 U.S. 1032 (1972) ("These Ohio statutes seek to prevent 'raiding' of one party by members of another party and to preclude candidates from altering their political party affiliations for opportunistic reasons.")

Voters in the 2000 Presidential Election, 2 Q.J. Pol. Sci. 205, 206 (2007). Therefore, had Nader not been in the race as a third-party candidate, Gore would have won Florida, and consequently the presidency. *Id.*

Ohio is the familiar epicenter of presidential elections, and 2016 will be no different. Should Donald Trump run as an independent candidate for in this presidential race, the presence of a spoiler effect, particularly in Ohio, could be very real. Former Republican National Committee Chairman Haley Barbour recently opined that a Trump independent candidacy could bleed “3 to 4 percent” of the vote from the Republican nominee, and would “give the White House to the Democrats.”¹¹ Barbour is certainly not alone in this assessment.¹²

In light of the openly, and legitimately, feared consequences of a Trump independent candidacy, Respondent Husted expressed the following:

Ohio Secretary of State Jon Husted, a Republican, has concluded that since Trump has filed with the Federal Election Commission to pursue the Republican nomination and “voluntarily participated” in the Republican presidential debate in the state of Ohio, he has “chosen a party for this election cycle” and declared himself “as a Republican in the state of Ohio,” said Husted spokesman Joshua Eck.

Singer, P., *A Trump independent run got harder Thursday night*, USA Today, Aug. 7, 2015, <http://www.usatoday.com/story/news/politics/elections/2015/08/07/trump-independent-bid-ohio-debate/31283537/> (last accessed Aug. 16, 2015). While it may be somewhat unusual for an Ohio Secretary of State to publicly and preemptively opine on the ballot eligibility of a prospective candidate, given the stakes, few would consider it unwarranted.

¹¹ Hardball with Chris Matthews, *Haley Barbour plays Hardball*, MSNBC, Aug. 4, 2015, <http://www.msnbc.com/hardball/watch/haley-barbour-plays-hardball-498547779659> (last accessed Aug. 16, 2015).

¹² Shribman, D., *The Real Trump Threat: 3rd Party Spoiler*, Real Clear Politics, Aug. 2, 2015, http://www.realclearpolitics.com/articles/2015/08/02/the_real_trump_threat_3rd_party_spoiler_127628.html (last accessed Aug. 16, 2015); Gibson, C., *Donald's Trump Card*, U.S. News, July 24, 2015, <http://www.usnews.com/opinion/blogs/opinion-blog/2015/07/24/donald-trump-independent-bid-would-be-a-gop-disaster> (last accessed Aug. 16, 2015).

Husted's indication concerning Trump is plainly at odds with his ruling here. If the independent disaffiliation law in Ohio does not plainly disqualify Bernabei's candidacy in this case, Respondent Husted's conclusion with respect to a potential Trump independent candidacy is incorrect.¹³ While Trump's electoral agenda is far from predictable, allowing Bernabei on the ballot will at least make Trump's potential independent candidacy legally possible in Ohio – and all of the vote bleeding, opportunism, and party splintering that such a circus candidacy would entail.

CONCLUSION

For the foregoing reasons and the reasons articulated in the Complaint for a Writ of Prohibition, Relators Frank Morris, Chris Smith, Thomas E. West, Kevin Fisher, David R. Dougherty, John Mariol II, Edmond J. Mack, and the Ohio Democratic Party 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 Secretary of State Jon Husted, prohibiting the placement of Thomas M. Bernabei on the November 3, 2015 ballot as an independent candidate for the Office of Mayor of Canton, Ohio.

¹³ Because Trump has not yet lost the Ohio Republican primary, Trump's potential independent candidacy does not presently implicate the sore loser law. *State ex rel. Knowlton v. Noble Cty. Bd. of Elections*, 126 Ohio St. 3d 483, 2010-Ohio-445, 935 N.E.2d 395, ¶¶ 46-55.

DATED: August 17, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing has been served by email this 17th day of

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