

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO, ex rel.** :  
**ROBERT RICHARDS, et al.,** :  
 :  
*Relators,* : Case No. 2015-1297  
 :  
v. : **Original Action in Prohibition**  
 :  
**STARK COUNTY BOARD OF** :  
**ELECTIONS, et al.,** :  
 :  
*Respondents.* :

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**MERIT BRIEF OF RESPONDENT OHIO SECRETARY OF STATE JON HUSTED**

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## I. INTRODUCTION

Relators seek *extraordinary* relief in this case: disqualifying a candidate for public office against the certification decision of the Board of Elections and Secretary of State. This request requires caution, for many reasons. Although Relators essentially request such an inquiry, this Court should be reluctant to peer into the subjective intentions of candidates in order to disqualify them. It should be reluctant to take a certification decision out of the hands of the Board and the Secretary where Ohio law firmly places these ballot decisions.

This case decides whether Francis H. Cicchinelli, Jr. gets to run as an independent candidate for Mayor of Massillon. In this fact-specific case, Relators claim that Mr. Cicchinelli did not declare his lack of affiliation in good faith and is, therefore, not qualified to appear on the ballot. However, viewing the record as a whole, the evidence supports the Board's and Secretary's conclusions—Relators failed to present clear and convincing evidence that Mr. Cicchinelli was not qualified to appear on the ballot.

The record reflects that Mr. Cicchinelli's declaration of lack of affiliation was made under penalty of election falsification and in good faith. Relators' claim to the contrary is founded, at best, on shaky ground. To "prove" Mr. Cicchinelli was not independent when he filed his Petition and Statement, Relators' solely rely on the testimony of Mr. and Mrs. Cicchinelli (both non-lawyers) that Mr. Cicchinelli "technically" became an independent when he voted a non-partisan ballot in the May primary (the day after he submitted his Petition and Statement of Candidacy). *Technically* speaking, Mr. Cicchinelli is correct. Under R.C. 3513.05, as a voter, Mr. Cicchinelli is considered a member of the Democratic Party (for purposes of signing or circulating petitions) because he voted in the party's primary election within the preceding two calendar years, and that party designation does not change until he votes on non-partisan ballot. This technical view alone does not mean that, *legally* speaking, he

was not an independent, for purposes of running, at the time he filed his Petition, declaring under penalty of election falsification that he was an independent candidate.

Relators' request for this extraordinary writ comes with heavy standards. The question is *not* whether this Court agrees with Relators and would have granted their protest. Rather, within the writ of prohibition context, the question is whether the Board's and Secretary's decision was so poor that it should be considered *unauthorized by law*. The decision at issue comes nowhere close to that standard. The Board's and Secretary's decision was well within the range of acceptable decisions that Ohio law affords them. For this reason, the writ should be denied.

## **II. BACKGROUND**

This action involves Francis H. Cicchinelli, Jr.'s candidacy for Massillon Mayor in the November 2015 election. On May 4, 2015, Mr. Cicchinelli filed a statement of candidacy and nominating petitions (signed under penalty of election falsification) seeking to run for Massillon Mayor as an independent candidate. Compl. at ¶ 11; Tr. at p. 27 and Ex. 2. On June 16, 2015, Relators filed a protest against Mr. Cicchinelli's candidacy with the Stark County Board of Elections ("the Board") alleging that Mr. Cicchinelli's "claim of being independent was not made in good faith." Compl. at ¶ 13.

The Board held a hearing on July 13, 2015. *Id.* at ¶ 14. Several witnesses testified including Mr. Cicchinelli. *Id.* At the close of the proceedings, the Board voted on whether to allow Mr. Cicchinelli's candidacy. The four Board members split two to two. *Id.* at ¶ 18. Pursuant to R.C. 3501.11(X), the Board submitted the tie vote to the Secretary for decision. *Id.* at ¶ 19.

After review of the record, the Secretary voted in favor of certifying Mr. Cicchinelli's independent candidacy. The Secretary issued his decision through a July 31, 2015 letter to the parties. *Id.* at ¶ 20. The Secretary found that there was not enough evidence to prove—under a

clear and convincing evidence standard—that Mr. Cicchinelli’s disaffiliation with the Democratic Party was not made in good faith. *Id.* at ¶ 20; Exhibit 3. The Secretary further noted that unlike the circumstances in a past disaffiliation case, *Jolivette v. Husted*, 694 F.3d 760 (6th Cir. 2012), Mr. Cicchinelli had not attempted to run for office through a partisan primary election immediately prior to his disaffiliation. Compl. at ¶ 20; Exhibit 3.

Relators filed the current action against the Board and the Secretary on August 7, 2015. They seek to overturn the Board’s and Secretary’s decision through a writ of prohibition barring Mr. Cicchinelli from appearing on the November 2015 ballot. Respondent Jon Husted, Ohio Secretary of State, filed his Answer on August 14, 2015. Relators did not file their Brief until six days later on August 20, 2015.

### **III. STANDARDS OF REVIEW**

Relators face a steep uphill climb. To be entitled to the extraordinary writ they seek, Relators must overcome *multiple* unfavorable standards.

To begin, at the initial protest hearing, Relators were required to show by clear and convincing evidence that Mr. Cicchinelli should be disqualified. *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 137 Ohio St.3d 62, 2013-Ohio-4490, 997 N.E.2d 524, ¶ 25 (applying clear and convincing evidence standard in determining whether a “candidate’s claim to be an independent was false or not made in good faith”). Clear and convincing evidence is “more than a mere preponderance of the evidence” and requires enough proof to “produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Id.* at ¶ 18, quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). This elevated standard is consistent with the requirement “that election laws should be liberally construed in favor of candidates for public office.” *State ex rel. Livingston v. Miami Cty. Bd. of Elections*, 196 Ohio App.3d 263, 2011-Ohio-6126, 963 N.E.2d 187, ¶ 34 (2d Dist.).

In addition to providing clear and convincing evidence, Relators must now *also* demonstrate that they are entitled to a writ of prohibition. To justify this extraordinary relief, Relators must show that “(1) the board of elections is about to exercise or has exercised quasi-judicial power, (2) the exercise of that power is not authorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of the law.” *State ex rel. Monroe*, 137 Ohio St.3d at ¶ 19. More specifically, “[i]n an extraordinary action challenging the decision of a board of elections, the standard is whether the board engaged in fraud, corruption, or abuse of discretion or acted in clear disregard of applicable legal provisions.” *Id.* at ¶ 21. Because Relators do not allege fraud or corruption, “the question is whether the board clearly disregarded established law or abused its discretion.” *Id.* “An abuse 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, 686 N.E.2d 238 (1997).

Accordingly, Relators must overcome *both* an unfavorable evidentiary standard *and* an unfavorable standard of quasi-appellate review. They must show that the record weighs so strongly in their favor that *both* (1) clear and convincing evidence justifies Mr. Cicchinelli’s disqualification *and* (2) the Board’s and Secretary’s decision otherwise amounts to an abuse of discretion or a clear disregard of the law. This is no small task.

#### **IV. ARGUMENT**

**The Secretary did not abuse his discretion, or clearly disregard the law, in finding that Mr. Cicchinelli’s declaration of lack of affiliation was made in good faith.**

Under Ohio law, a person may run as an independent candidate by filing a statement of candidacy and nominating petitions no later than four p.m. on the day before the primary election. R.C. 3513.257. An independent candidate is defined broadly as “any candidate who claims not to be affiliated with a political party.” R.C. 3501.01(I); *State ex rel. Davis v. Summit*

*Cty. Bd. of Elections*, 137 Ohio St.3d 222, 2013-Ohio-4616, 998 N.E.2d 1093, ¶ 16. Notably, “one cannot register with the secretary of state’s office as an independent.” *State ex rel. Davis*, 137 Ohio St.3d at ¶ 16. Rather, a candidate must declare his lack of affiliation in good faith. *Id.* at ¶ 27, citing *Morrison v. Colley*, 467 F.3d 503 (6th Cir. 2006).

Whether a candidate has acted in good faith is a case-by-case, fact-specific inquiry. *See* Ohio Sec. of State Adv. Op. No. 2007-05 (providing guidelines to boards of elections in assessing independent candidates and party affiliation). Here, it is undisputed that, at the time of filing his Petition and Statement, Mr. Cicchinelli declared he was not affiliated with a political party. Tr. at p. 27 and Ex. 2. Relators’ sweeping characterization of Mr. and Mrs. Cicchinelli’s post-petition testimony is not sufficient to rebut that declaration.

Relators rely exclusively on testimony from Mr. Cicchinelli in which he indicates the date that he was first an independent—“[t]echnically, it would be the May primary, when I voted non-issues—or no partisan ballot.” Tr. at p. 14. Relators cling to this statement as proof that Mr. Cicchinelli was not an independent on May 4, 2015, when he filed his Petition and Statement. Rel. Br. at p. 14. In doing so, Relators entirely overlook the reality that, in some circumstances under Ohio law, Mr. Cicchinelli would indeed still be *considered* a Democrat without actually being one.

R.C. 3513.05 requires candidates seeking nomination or election to certain offices to obtain petition signatures from members of the same political party. “For purposes of signing or circulating a petition of candidacy for party nomination or election, an elector is considered to be a member of a political party if the elector voted in that party’s primary election within the preceding two calendar years, or if the elector did not vote in any other party’s primary election within the preceding two calendar years.” R.C. 3513.05; *State ex rel. Davis*, 137 Ohio St.3d at

¶ 20. However, while signers or circulators of a candidate petition in Ohio may be considered members of a party by “looking back” to see if they voted in a partisan primary election within the past two years, there is no such “look back” requirement to determine a candidate’s affiliation. *State ex rel. Davis*, 137 Ohio St.3d at ¶¶ 20-22.

Based on this statute and considering Mr. Cicchinelli conditioned his response with the term “technically,” such testimony is hardly conclusive of an intent on Mr. Cicchinelli’s part to invalidate his previous declaration (again, made under penalty of election falsification). It is entirely reasonable for the Secretary to conclude that Mr. Cicchinelli simply intended to answer counsel’s question as accurately as possible. Without any further evidence of post-petition conduct suggesting Mr. Cicchinelli did not intend to disaffiliate with the Democratic Party in good faith, Respondents were well within their discretion to certify Mr. Cicchinelli as an independent candidate.

Relators claim that Respondents misapplied the test from *Morrison*, arguing that Respondents’ inquiry should have been whether Mr. Cicchinelli declared his lack of affiliation in good faith, not whether he disaffiliated in good faith. However, Relators distort this analysis because Mr. Cicchinelli’s declaration was, by nature, a disaffiliation. Relators mention that Mr. Cicchinelli had a history of affiliation with the Democratic Party. *See* Relators’ Merit Br. at 14. Thus, in order to declare a lack of affiliation, Mr. Cicchinelli must necessarily *disaffiliate*.

A disaffiliating candidate presumes a history of *affiliation*. As this Court has noted, a prior history of partisan voting and support for party candidates does not prove that a candidate lacked good faith on the day he declared that he is not affiliated with a political party. *See State ex rel. Davis*, 137 Ohio St.3d at ¶19 (noting that “[d]isaffiliation *by definition* presumes a history

of support for or membership in a political party”). For Mr. Cicchinelli, declaring a lack of affiliation and disaffiliating were one in the same.

Ultimately, upon examination of the record, Relators cannot point to any clear and convincing evidence to support their contentions regarding lack of good faith. The Secretary neither abused his discretion nor clearly disregarded the law in concluding that Mr. Cicchinelli was qualified to appear on the ballot as an independent candidate.

## V. CONCLUSION

For all the foregoing reasons, this Court should deny Relators’ extraordinary request for a peremptory writ of prohibition. Based upon the evidence submitted, Respondents reasonably concluded within their sound discretion that Mr. Cicchinelli’s declaration of a lack of affiliation was made in good faith, and he is, therefore, qualified to appear on the ballot as an independent candidate. This Court should not disrupt that finding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Merit Brief of Respondent Ohio Secretary of State Jon Husted* was served by electronic mail or by facsimile transmission on August 24, 2015, upon the following:

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