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INTRODUCTION

Respondent Secretary of State Husted has told this Court that, “if a candidate truly desires to disaffiliate from a political party, then he or she will not continue to associate with that party *after* disaffiliation. Evidence of affiliation after declaring as an independent therefore belies this sincerity of disaffiliation.” Merit Br. of Respondent Secretary of State Jon Husted (“Husted Br.”) 9. Similarly, he told the Sixth Circuit that, under *Morrison*, “objective, post-disaffiliation evidence that the candidate had not severed his partisan ties” makes a “declaration of disaffiliation ... objectively false.”¹ Here, he abandons these accurate statements of the law, crediting Thomas M. Bernabei, the alleged independent candidate who is the subject of this application for a writ, with disaffiliation because “[h]e took various steps” to disaffiliate, (Husted Br. 25),² even if not all the steps were taken to actually disaffiliate himself from the Democratic Party. Recognizing that Bernabei’s actions were incomplete, Husted suggests that affirmative steps are unnecessary by skewing this Court’s precedents and ignoring its central holdings.

Husted applies similar excuses to Bernabei’s attempt to claim residency within Canton, essentially finding that an intent to move permanently into the city after filing his petition sufficient. (Husted Br. 22). Additionally, Husted ignores all contrary evidence, particularly Bernabei’s own testimony, to establish intentions he credits Bernabei with having.

If Husted’s view of the law prevails, carpetbagging and the fielding of sham independent candidates designed to bleed off votes from an adversary will become the order of the day. The integrity of the ballot will be compromised, and the primary process will lose meaning. Voter confusion, particularly in low-information municipal elections, will be rampant, as opportunistic candidacies with frequently changing alliances become commonplace. In the end, voters will suffer if Husted’s decision

¹ Defendant-Appellee Ohio Secretary of State’s Memorandum in Opposition to Petition for En Banc Consideration, p. 5 (Sept. 21, 2012), *Jolivette v. Husted*, 6th Cir. Case No. 12-3998, <https://ecf.ca6.uscourts.gov/docs1/006011442525> (last accessed Aug. 22, 2015).

² Bernabei himself tells this Court that he “did quite a bit” to disaffiliate, implicitly recognizing its incompleteness. Merit Brief of Intervenor Respondent Thomas M. Bernabei (“Bernabei Br.”) 25.

stands, and Bernabei's candidacy proceeds. Relators respectfully request that this Court issue the requested Writ.

A. Given the Undisputed Factual Record, the “Abuse of Direction” Standard Does Not Prevent this Court’s Correction of Respondent Husted’s Erroneous Application of Law.

As this Court’s review of the parties’ pleadings and briefing undoubtedly confirms, the facts in this case are not in dispute. Respondents have overstated the standard of review in this matter. When reviewing decisions of the Secretary of State in election matters, “[t]he abuse-of-discretion standard is not toothless. It does not insulate every ruling.”³ This Court has consistently held it “need not defer to Secretary of State’s unreasonable interpretation of election law.” *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 2008-Ohio-6333, 900 N.E.2d 982, ¶ 57.⁴ Indeed, if the decision concerns only an interpretation and application of law, the abuse of discretion standard has limited relevance.⁵ This is particularly true where, as here, the facts are undisputed and the Secretary’s approach disregards the applicable law.

B. The Election Laws at Issue Do Not Allow for Bernabei’s Substantial Compliance.

Respondents contend that the Ohio Election law at issue in this case is satisfied by “substantial compliance.” (*See*, Bernabei Br. 23). While ballot access is often liberally granted, that is only so for “those who are in fact and in law qualified.” *State ex rel. Schenck v. Shattuck*, 1 Ohio St.3d 272, 274, 439 N.E.2d 891 (1982) [citation omitted].⁶ Thus, “strict compliance is the default for election laws and that

³ *State ex rel. Ernst v. Brunner*, 145 Ohio Misc. 2d 73, 2007-Ohio-7265, 882 N.E.2d 990, ¶¶ 12, 26 (granting writ and rejecting the Secretary of State’s interpretation based upon “purely a conclusion of law.”).

⁴ *See also*, *State ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17, 2011-Ohio-35, 941 N.E.2d 782, ¶ 30; *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 8; *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, 899 N.E.2d 120, ¶ 26; *State ex rel. Stokes v. Brunner*, 120 Ohio St. 3d 250, 2008-Ohio-5392, 898 N.E.2d 23, ¶ 29; *State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205, ¶ 30; *State ex rel. Melvin v. Sweeney*, 154 Ohio St. 223, 226, 94 N.E.2d 785(1950).

⁵ *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237 (“When a court’s judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate.”).

⁶ Bernabei calls liberal interpretation the “Shattuck rule,” Bernabei Br. 23, but ignores the “rule’s” requirement of actual qualification and therefore gives it a weight it cannot bear because its liberality

standard is lowered only when the statutory provision at issue expressly states that it is.” *State ex rel. Linnabary v. Husted*, 138 Ohio St. 3d 535, 8 N.E.3d 940, 2014-Ohio-1417, ¶¶ 40-42. The independent disaffiliation requirement embodied by R.C. §§ 3501.01(I) and 3513.257 do not provide for “substantial compliance.” Likewise, this Court’s precedents make clear that a candidate is not excused of the requirement to accurately disclose their voting address on their nominating petition through “substantial compliance.” *State ex rel. Higgins v. Brown*, 170 Ohio St. 511, 166 N.E.2d 759 (1960). “Therefore, strict compliance is required.” *Linnabary*, 138 Ohio St. 3d 535, at ¶¶ 40-42.

C. Respondents’ Interpretation of Ohio’s Residency Requirement is Squarely at Odds with Established Ohio Law.

Ohio statutes, and this Court’s interpretation of those statutes, make clear that a person’s voting residence must be that person’s “fixed and 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. Respondents, however, now ask this Court to set aside decades of precedent and the intent of the legislature in order to accommodate a last-minute candidate who did not live in the city he seeks to lead. In order to do so, Respondents misread relevant cases and cite inapposite cases in a desperate effort to make it seem as though they have a modicum of legal support for their arguments. Should Respondents’ interpretation be adopted, the candidate and voter residency standards will change, and hotel rooms, vacation spots, and campgrounds will all be valid residencies for election purposes. This Court should decline.

1. Acknowledging That Bernabei Was Not a Valid Elector at the Precinct for the Address Listed on his Nominating Petitions, Respondents Asks this Court to Overturn Decades of Settled Precedent to Accommodate His Hasty, Last-Minute Candidacy.

The facts relating to Bernabei’s residence are not in dispute. Bernabei moved out of Canton and into a suburban township ten years before the events in this case took place. (Ver. Compl., ¶ 107; Tr., p. 237, Prts.’ Exhs. 25, 26). After becoming possessed by a burning desire to be mayor of the city he abandoned, Bernabei realized that he faced significant problems: not only was he a Democrat who missed

referred to the amount of time before the primary one must file an independent candidacy, not the requirements of disaffiliation or residency.

the primary filing deadline, Bernabei lacked Canton residency. (Ver. Comp., ¶¶ 108, Tr., pp. 237-43). As such, Bernabei could not run for Canton Mayor unless he established a new, valid, Canton voting residency. (*Id.*). However, because Bernabei’s mayoral epiphany occurred only six days before Bernabei’s independent nominating petitions were due, he had to act quickly. (Ver. Comp., ¶¶ 108, Tr., pp. 237-43).

Bernabei’s intended permanent Canton home was unavailable by the petition-filing deadline. (Ver. Compl., ¶¶ 109, Tr. 237-43). It was occupied by tenants of Bernabei, and they were not interested in leaving early or renting him a room simply because Bernabei had last-minute mayoral aspirations. (*Id.*). Bernabei found a friend who owned another Canton home, empty and listed for sale. (Ver. Comp., ¶ 126; Tr., p. 97). Bernabei utilized the address of his friend’s empty house on his nominating petition – notwithstanding that it was located in a different ward and school district from his permanent home. (Ver. Compl., ¶¶ 110, 113; Tr., p. 256-57; Prts.’ Exh. 1). Bernabei never intended the temporary address be a substitute for his intended permanent home. (*Id.*; see also, Ver. Compl., ¶¶ 122-123, Tr., pp. 94-96, Prts.’ Exh. 49, pp. 3-4; Exh. 50, p. 11). Rather, Bernabei used this temporary address solely to establish the residency requirements to run for Canton Mayor. (Ver. Compl., ¶¶ 107-110; Tr., pp. 237-245).

Bernabei now argues that, because he intended to live in Canton, there was “no harm, no foul” in registering to vote at a temporary address, so long as that address was somewhere inside the Canton city limits. (Bernabei Br. 16). Husted advances a similar argument, that because Bernabei’s intended residence on Lakecrest Street was unavailable when Bernabei decided to run for office, the temporary address listed in his nominating petition was good enough. (Husted Br. 20).⁷ Neither this Court, nor the Ohio General Assembly, has ever adopted such an interpretation of the residency requirements. In fact, this Court has reached the opposite conclusion: 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.*” *Higgins*, 170 Ohio St. 511 (emphasis added). Neither Respondent claims that Bernabei was

⁷ Husted also ignores Bernabei’s testimony that he had “two residences.”

actually a resident of the precinct where he was registered when he signed his nominating petition. In fact, the undisputed evidence was that he was not. To embrace Respondents’ “no harm, no foul argument” would not only undermine *Higgins* and its progeny, but effectively legalize election falsification as it pertains to a fraudulent voting addresses. *See*, R.C. § 3599.36.

2. Despite Respondents’ Claims to the Contrary, this Court Has Never Held that Candidates – Or Any Ohioan – Can Change their Voting Addresses At Will.

Respondents read *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215 to stand for the proposition that Ohioans who own multiple homes can choose to change their registration between those homes at their leisure, and that elections officials are required to give deference to that choice. (*See*, Bernabei Br. 17; Husted Br. 20). Respondents misread *Brunner*. In *Brunner*, the Court was asked to decide whether Husted – then a member of the Ohio General Assembly – lost his Montgomery County residency, when, due to the time-consuming nature of his official duties, Husted chose to temporarily relocate his family to Columbus to spend more time with them. The Court decided that, since Husted was absent from his district on government business, he did not lose his residency.⁸ *Id.* at ¶29. Respondents’ citation of this case is problematic, in that *Brunner* deals with whether Husted lost his *existing* residency by being absent from Montgomery County on government business. Bernabei, however, is seeking to *acquire* residency in Canton to run for office. This is a key distinction, in that Bernabei would still need to follow the same steps as any other would-be voter: he must register at his “fixed or permanent” address. *See, Duncan*, 115 Ohio St.3d 405.

There is no question that the address listed on Bernabei’s nominating petition was neither fixed nor permanent. When Bernabei signed his independent nominating petitions on the day before he filed them, Bernabei had not moved any of his belongings into the address stated in his nominating petitions. (Ver. Compl., ¶ 117; Tr., pp. 257-58). He had never slept there. Afterward, the only belongings Bernabei

⁸ It is somewhat ironic that Bernabei would rely on *Brunner* in support of his case. While Husted wished to remain a resident of Montgomery County while being absent from Montgomery County on official business, Bernabei sought to avoid becoming a Canton resident while on official business *in* Canton. (*See*, Ptrs. Exh. 127).

did move into this residency were a single bed, a card table, a computer, toiletries, and clothes for a few days. (Ver. Compl., ¶¶ 125, Tr., pp. 96, 258-59; Prts.' Exh. 50, p. 10). The rest of his belonging remained in his home outside of Canton, which is where Bernabei and his wife lived when he decided to run for Mayor. (Ver. Compl., ¶¶ 107, 125, Tr., pp. 258-59; Prts.' Exhs. 25, 26). Bernabei did not place any utilities in his name at the address stated in his nominating petition, nor did he update his Attorney Registry with the Office of Attorney Services to reflect this address. (Ver. Comp., ¶¶ 127-28; Tr., p. 103-04, Prts.' Exh. 123).

On these undisputed facts, it is plain that Bernabei failed to satisfy the residency requirement of R.C. § 3513.261. *See, State ex rel. Markulin v. Ashtabula Cty. Bd. of Elections*, 65 Ohio St.3d 180, 184, 602 N.E.2d 626 (1992). Husted's conclusion to the contrary was a clear abuse of discretion.

3. Respondent Bernabei's Failure to Maintain a Canton Residence Distinguishes this Case.

While Husted relies largely on the *Brunner* decision, Bernabei cites other cases to claim that intent to live in a jurisdiction is enough to establish voting residency, and that the language of R.C. § 3503.02 does not mean what it says – notwithstanding the cases that have held the exact opposite. *See*, 1991 Ohio Op. Att'y Gen. No. 045 (“Simply renting a post office box or an apartment within a district, without actually dwelling or establishing a home there, does not make one a resident of that district.”)⁹ In fact, the cases Respondents rely upon undermine Bernabei's claims.

For instance, Bernabei cites *State ex rel. Klink v. Eyrich*, 157 Ohio St. 338, 105 N.E.2d 399 (1952), in which this Court found that a person who maintained a residence in Hamilton County, received mail at that residence, and intended to return to that residence after temporarily residing in Franklin County, did not lose his Hamilton County voting residency. *Id.* at 342. It is unclear why Bernabei chose to cite this case, given that it merely confirms the statutory language of R.C. 3503.02 – that a person's

⁹ *See also, Kyser v. Bd. of Elections of Cuyahoga Cnty.*, 36 Ohio St. 2d 17, 22, 303 N.E.2d 77 (1973) (“two elements which are determinative of residency – (1) fixed habitation *and* (2) the intention of returning to that habitation.” [emphasis added]; 2002 Ohio Op. Att'y Gen. 2-165 (2002) (“residence for voting purposes requires *both* a fixed habitation and the intention to make that place one's residence.” [emphasis added]); *Jolly v. Deeds*, 135 Ohio St. 369, 372, 21 N.E.2d 108 (1939).

residence is their permanent or fixed address, “to which, whenever the person is absent, the person has the intention of returning.” R.C. § 3503.02(A). Bernabei did not maintain a house in Canton; he maintained a house in a suburban township, outside of Canton. Until Bernabei’s sudden revelation that he needed to be mayor of Canton, Bernabei had no intention of residing in Canton. The two cases are not comparable.

Similarly, Bernabei cites *Spangler v. Cuyahoga Cty. Bd. of Elections*, 7 Ohio St.3d 20, 455 N.E.2d 1009 (1983) and *Cox v. Village of Union City*, 84 Ohio App. 279, 87 N.E.2d 374 (2nd Dist. 1948) to stand for the proposition that the location of a person’s family is not dispositive in determining residency. (Bernabei Br. 18-19). Relators do not dispute this fact. (Rel. Br. 6). However, Relators note a few problems with Bernabei’s reliance on *Cox*, a rarely cited district court decision, dealing with a prior version of the residency statute, in which the court defined marital separation so broadly as to render R.C. § 3503.02(D) meaningless. *Cox* held that “when the spouses have separated and live apart” no showing of marital discord or disagreement was required, just that the spouses were residing in separate locations. 84 Ohio App. at 282. Bernabei is not separated. If applied here, such a broad interpretation of R.C. § 3503.02(D) would effectively amend it to read: “The place where the family of a married person resides shall be considered to be the person’s place of residence; except when the person lives at a different address.” The Court should reject this nonsensical interpretation.

Despite Respondents’ contention, the residence of Bernabei’s wife is unquestionably relevant to the analysis of the facts of this case. *Bell v. Marinko*, 367 F.3d 588 (6th Cir.2004); *State ex rel. Eaton v. Erie Cty. Bd. of Elections*, 6th Dist. No. E-05-065, 2006-Ohio-966. And the facts in this case are clear: Bernabei’s wife did not join Bernabei at new address. (Ver. Compl., ¶ 130; Tr., pp. 263-64, 292-93). Instead, she remained at their home in the adjoining suburban township and voted in-person at the precinct for their township home the day after Bernabei filed his petitions. (Id. See also, Prts.’ Exh. 127). This fact was altogether ignored by Husted when he made his tie-breaking decision.

Bernabei’s explanation that his wife insisted on remaining in the township home to fix it up for sale “before she moved” (rather than move into the largely empty, temporary abode), (Bernabei Br. 15),

provides no more justification than if Bernabei himself chose to remain in the township until his home was ready for sale. When the undisputed residency of Bernabei's wife is considered in conjunction with the other undisputed facts of this case, there can be only one conclusion – Bernabei failed to satisfy the residency requirement of R.C. § 3513.261.

4. Bernabei was not a Resident of 2118 University Heights Avenue when he Filed His Voter Registration Form and Declaration of Candidacy; Respondents Disregarded Clearly Applicable Law and Abused their Discretion in Accommodating His Candidacy.

It is *undisputed* that at the time Bernabei filed his change of voter address registration form, and at the time he signed his nominating petition – both on May 3, 2015 – Bernabei had yet to move *anything* to the address listed on his petition. (Ver. Compl., ¶¶ 111, 117; Tr., pp. 251-54, 257-58, Prts.' Exh. 44). The following day, when Bernabei filed his petitions, he moved little more than a single bed into this property. (Ver. Compl., ¶¶ 125, Tr., pp. 96, 258-59; Prts.' Exh. 50, p. 10). Bernabei never intended to stay at the address for more than a few nights. (Ver. Compl., ¶¶ 110, 113, 122-123; Tr., pp. 94-96, 256-57; Prts.' Exh. 1, Prts.' Exh. 49, pp. 3-4; Exh. 50, p. 11). It was never Bernabei's "fixed or permanent" place of habitation. Rather, it was the desperate and pretextual attempt to meet legal requirements because he did not live in the city he wished to serve as mayor. This Court should not ratify such political shenanigans.

A decision condoning Bernabei's actions will have consequences that extend beyond this case. If Bernabei's temporary "camp-out" at the address in his nominating petition was sufficient to constitute a valid "voting residence," then a temporary stay at a hotel, vacation spot, or campground will have the same legal effect. This has never been the law in Ohio, and for good reason. *See, In re Protest of Brooks*, 3rd Dist. No. 17-03-17, 2003-Ohio-6990, ¶¶ 23-27 (holding "Red Roof Inn where person stayed for five nights" was not a permanent "voting residence" for purposes of Ohio Election law); *In re Protest of Brooks*, 155 Ohio App. 3d 370, 2003-Ohio-6348, 801 N.E.2d 503, ¶¶ 42-49 (3rd Dist.) (accord); 1993 Op. Att'y Gen. No. 93-055 ("If an individual lives in the resort area for temporary purposes only – vacation, for example – then, pursuant to R.C. § 3503.02(D), such an individual does not gain a residence in the resort area.") This Court not should change this conclusion here.

D. Respondents Misstate the Law Applicable to Ohio’s Independent Disaffiliation Requirement.

The parties to this case are in agreement: Bernabei attempted to disaffiliate from the Democratic Party for the sole purpose of running for Canton Mayor. (Ver. Compl., ¶¶ 83-86; Tr., pp. 205-06, 229-233). This is because the only way to gain ballot access at the late date Bernabei made this decision was via the independent route. (Verf. Compl., ¶ 83, 86; Tr., pp. 233-234, 298-99). However, Bernabei did not begin any effort to disaffiliate from the Democratic Party until six days prior to filing his petitions. (Ver. Compl., ¶ 70; Tr., pp. 232-254, Resp. Exh. D). After filing his nominating petitions, Bernabei testified, “I wish I had run in the Democratic primary.” (Ver. Compl., ¶ 58; Tr., p. 296; see also Ver. Compl., ¶ 90; Tr., p. 228). Indeed, Bernabei’s actions were far too little, far too late.

As detailed previously, 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 (“Advisory”); *Morrison v. Colley*, 467 F.3d 503 (6th Cir. 2006). These requirements must be satisfied when the candidate files a nominating petition. *Id.*

Applying Ohio’s independent disaffiliation law to the facts of this case, it is clear that Bernabei’s last-minute effort to secure ballot access cannot be condoned. In an effort to avoid its inevitable conclusion, both Husted and Bernabei have misstated the law pertaining to the application of this test in very important ways. These misconstructions should not be embraced

1. If a Candidate has Continuing Objective Ties with a Political Party, the Candidate Must Take Action to Sever Those Ties Prior to Running as an Independent.

Respondents have glossed over the first element of the test set forth in the Advisory, namely, that the candidate must be “actually be unaffiliated, or disaffiliated” when the petitions are filed. In doing so,

Respondents have attempted to conflate the analysis into *solely* whether the candidate acted in “good faith.” Husted wrote:

Indeed, no court has ever required complete separation from a political party before the filing of an independent’s statement of candidacy and nominating petitions.

* * *

Ohio law does not require a candidate to make a complete and total break with a political party prior to declaring as an independent candidate; It requires only that the break be made in good faith.

(Husted Br. 10, 15). Indeed, Husted contends that once the candidate files his or her independent nominating petition, the candidate has taken “the objective steps necessary to disaffiliate[.]” (*Id.* at p. 11, 17). To him, nothing else is required, and “the question then turns to good faith.” (*Id.* at p. 11). (See also Bernabei Br. 17-18, 24-25) (“The Law Requires No Action Besides the Declaration Itself”).

Respondents are mistaken. Ohio’s independent disaffiliation law requires the candidate actually be unaffiliated or disaffiliated, which requires severing existing ties with a political party if the candidate wants to be an independent. In some instances, simply filing a form is not enough. The Advisory states:

Longstanding practice in Ohio and the interpretations of R.C. 3513.257 made by former Ohio Secretaries of State required only that the *candidacy* of an independent candidate be independent of political party affiliation, but not that the *individual* himself or herself be entirely unaffiliated. The *Morrison* case now requires that independent candidates actually be unaffiliated and that when an unaffiliation is claimed, it must be claimed in good faith.”

Id. at 1. Common sense teaches that a candidate is not “actually disaffiliated” if they are still affiliated.

Respondents’ exact proposition was rejected by the Sixth Circuit. In *Jolivette*, like Respondents here, the candidate claimed that all was required to qualify as an independent was that the candidate file his independent nominating petitions, and then not actively engage in partisan activities after he filed. 694 F.3d at 768. The Sixth Circuit disagreed:

As of the time his independent petition was submitted, Jolivette had on file a Designation of Treasurer indicating that he was affiliated with the Republican Party. This Designation of Treasurer was not amended until May 5, 2012. In addition, at the time Jolivette’s independent petition was filed, his campaign committee maintained a website which stated that Jolivette would be a “Vote for Strong Republican Leadership.” Further, after he filed as an independent, Jolivette continued to maintain a Facebook page that indicated he was affiliated with various Republican organizations, including the Ohio–Republican Party and Positively Republican!, among others. These objective factors are “inconsistent with

[Jolivette's] claim that he is unaffiliated with a political party." *Although Jolivette argues that he has not actively participated in partisan activities or promoted himself as a partisan candidate since his disaffiliation, 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.*

Id. at 767-68 [emphasis added].

Thus, contrary to Respondents' contention, a candidate *is* required to establish a "complete separation from a political party before the filing of an independent's statement of candidacy and nominating petitions" – they must "completely undo [their] affiliation... in advance of filing [their] petition to run as an independent." *Id.* In arguing against *en banc* consideration in *Jolivette*, Husted explained the correctness of this conclusion:

Morrison held that it was constitutional to bar an independent candidate from the ballot where there was objective, post-disaffiliation evidence that the candidate had not severed his partisan ties. Consistent with *Morrison*, the district court and the Appellate panel found post-disaffiliation evidence that Mr. Jolivette did not sever his ties to the Republican Party, such that Mr. Jolivette's declaration of disaffiliation was objectively false.¹⁰

There is no basis in law or fact for Husted disavow in this case the same proposition that Respondent previously embraced.¹¹

Respondents misinterpret *State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St. 3d 222, 2013-Ohio-4616, 223, 998 N.E.2d 1093, for support. Specifically, *Davis* said the independent disaffiliation law requires that the candidate "declare her lack of affiliation in good faith, not that she take

¹⁰ Defendant-Appellee Ohio Secretary Of State's Memorandum in Opposition to Petition for En Banc Consideration, p. 5 (Sept. 21, 2012), *Jolivette v. Husted*, 6th Cir. Case No. 12-3998, <https://ecf.ca6.uscourts.gov/docs1/006011442525> (last accessed Aug. 22, 2015).

¹¹ Husted has attempted to distinguish his preemptive opinion disqualifying the threatened 2016 independent presidential candidacy of Donald Trump from his decision allowing the candidacy in this case on the basis that Trump has submitted a Statement of Candidacy with the FEC. (Bernabei Br. 39-42; Husted's Br., p. 20 n. 3). However, under Husted's interpretation of the disaffiliation requirement advanced in this case, the legality of an independent Trump candidacy would be guaranteed. (Husted Br. 10-11, 15-17). Trump can easily withdraw his Statement of Candidacy with the FEC, and would have until Feb. 4, 2016 to withdraw his Declarations of Candidacy from the Ohio Republican Primary. R.C. § 3513.30. Thereafter, Trump would have until Aug. 10, 2016 to file his independent nominating petitions. R.C. § 3513.257. Thereupon, according to Husted in this case, Trump would have taken all of "the objective steps necessary to disaffiliate." (*Id.* at pp. 11, 17). Not only is this interpretation contrary to Ohio law, but it would be dangerous to Ohio's ballot access framework.

affirmative action to disaffiliate in order to prove her good faith.” *Id.* at ¶ 28. In that case no objective ties remained between the candidate and the political party that the candidate had failed to sever in disaffiliating. *Id.* The Court therefore continued, “the declaration of disaffiliation can, *in some circumstances*, be sufficient affirmative action.” *Id.* (emphasis added). However, this Court did *not* hold that a candidate *with* objective ties of continued affiliation need not take action in order to completely disaffiliate, as Respondents contend. When such objective evidence is present, as it was in *Jolivette* and is in this case, the candidate must take action to “completely undo” their affiliation. *Id.* at 767-68. Filing the petition, in and of itself, is not enough. *Davis* does not support a different conclusion.

As detailed extensively, the undisputed evidence confirms Bernabei failed to “completely undo [his] affiliation... in advance of filing [his] petition to run as an independent.” *See, Jolivette*, 694 F.3d at 768. This was evidenced by his failure to disentangle himself with a campaign of a Democratic candidate resulting in a radio ad airing after he filed his petitions where he personally asked voters to “join him” in voting for a Democratic candidate in a Democratic primary. (Ver. Compl., ¶¶ 43-46, Tr., p. 46-57, Prts.’ Exhs. 21, 52, 116). It was evidenced by his failure to effectively resign from two democratic clubs. (Ver. Compl., ¶¶ 51-54; Tr., pp. 112-13, 119-21. *See also* Prts.’ Exhs. 90, 112, 113). It was also evidenced by his failure to seek removal of his image from websites and other public displays showing his affiliation with the Democratic Party. (Ver. Comp., ¶¶ 43-50, 61-63; Tr., pp. 46-60, Prts.’ Exhs. 52, 90, 93, 94-98, 103). Finally, perhaps most importantly, Bernabei is currently a Democratic-elected Stark County Commissioner, and he did not resign this position prior to filing his independent nominating petitions. (Ver. Compl., ¶¶ 34-42; Tr. pp. 38-39; Prts.’ Exhs. 16, 110).

Husted credits Bernabei’s intention to resign from Democratic clubs, (Husted Br. 3, 12), 17 (crediting letters written but never mailed or delivered), but Bernabei wrote the letters without an intent to resign from the clubs. Instead, he wrote them in case he decided to run for office and needed to resign. (Ver. Comp., ¶ 70; Tr., pp. 233, 245-254, Resp. Exh. D). That is not proof of intent, only anticipation of a possible need. Husted asserts Bernabei “made efforts to resign,” (Husted Br. 17), but Bernabei only

drafted letters, gave them to an election official he calls a “trusted intermediary” for safekeeping, (Bernabei Br. 30), asked her to hold onto them until he decided whether to run for office and thus really had to resign, but then never followed through to have them delivered once he decided to run. Yet, he tells this Court that he is “not responsible for a breakdowns [sic] in intraparty communication” when the Democratic clubs received no notice of his intent to resign. *Id.* However, just as a lawyer’s failure to act for a client is imputable to the client and no excuse because the client voluntarily chose the attorney as his representative, see *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 152, 1 O.O.3d 86, 351 N.E.2d 113 (1976), Bernabei cannot escape responsibility for his own obligation, regardless of who he trusted to deliver them.

Bernabei’s failures are quintessential evidence of objective post-petition affiliation that disqualifies his candidacy. Despite Respondents’ contention, the fact that the ties that Bernabei failed to sever were established prior to Bernabei filing as an independent does not change this result.¹² (*See* Husted Br. 15-18; Bernabei Br. 29-30). Indeed, the same could be said of the objective evidence that served to disqualify the candidate in *Jolivette* – the Designation of Treasurer was filed and the passive websites were created well before the candidate filed to run as an independent. Yet, the candidate’s failure to sever these ties “indicat[ed] that Jolivette did not completely undo his affiliation” so as to warrant his disqualification. *Id.* at 768. On undisputed facts, the same conclusion is inescapable here.

2. Pre-Petition Evidence is Entirely Relevant to the Independent Disaffiliation Analysis, and Respondents’ Position to the Contrary is Inconsistent with Ohio Law.

Respondents do not attempt to dispute the pre-petition evidence in this case. Instead, Respondents simply claim that the pre-petition evidence confirming the strength of Bernabei’s political affiliation is irrelevant to disaffiliation analysis. (*See* Husted Br. 11, 14-15; Bernabei Br. 27-31).

Arguing the exact opposite position in *Jolivette*, Husted articulately (and correctly) stated:

¹² Moreover, even if Bernabei could be said to lack control over websites touting his continued connection to the Democratic Party, he was fully aware of the websites, understood that his “independent” candidacy benefited from the connection, and undertook no steps to demonstrate his good faith by asking that they be taken down.

The principles of the *Morrison* case did not limit future analysis to considering only objective “post-disaffiliation” conduct. If the issue is whether a candidate is honestly and sincerely declaring himself an independent, looking at all evidence to analyze the candidate’s subjective motivations is appropriate. Accordingly, what a candidate says and does four days before his disaffiliation can be as relevant as what he says and does four days after. Moreover, as Judge Smith astutely observed, limiting the analysis to the type of post-disaffiliation evidence present in *Morrison* does nothing more than create a roadmap for candidates to follow when they attempt to fool the system.¹³

This Court’s decisions are consistent with Husted’s conclusion. While the previous cases before this Court did not present nearly the amount of pre-petition evidence as in this case,¹⁴ this Court acknowledged that pre-petition evidence is relevant to the disaffiliation analysis. *Davis*, 137 Ohio St. 3d 222 at ¶ 27.

Indeed, the undisputed pre-petition evidence in this case is remarkable. Bernabei’s own campaign Designation of Treasurer on file with the Board of Elections designated himself as a Democrat until the day he filed his independent petitions. (Ver. Compl., ¶ 68; Tr., p. 80, Prts.’ Exh. 18, 46). He was the Campaign Treasurer for three other Democrat candidates until the day he filed his petitions, and did not notify the candidates of his resignation until after he filed his petitions. (Ver. Compl., ¶¶ 68; Tr., pp. 80, 292, Prts.’ Exhs. 19, 20, 21, 45).

And the undisputed pre-petition evidence showed far more. For his entire life, Bernabei has always identified himself as a Democrat and never considered himself anything else. (Ver. Compl., ¶ 74; Tr., p. 219). He donated tens of thousands of dollars to Democratic candidates and organizations. (Ver. Compl., ¶ 66; Tr., p. 76, Prts.’ Exh. 118). This includes \$500 to the Stark County Democratic Party as a sponsor for a Party fundraiser four days before he submitted his independent nominating petitions. (Ver. Compl., ¶ 67; Tr., p. 83, Prts.’ Exh. 91). He held public office as an elected Democratic candidate for 17 years, which continues to this day. (Ver. Compl., ¶ 65; Tr., pp. 62-63, Prts.’ Exh. 119). He appeared on the

¹³ Merit Brief of Defendant-Appellee Ohio Secretary of State Jon Husted, p. 19, Aug. 29, 2012, *Jolivette v. Husted*, 6th Cir. Case No. 12-3998, <https://ecf.ca6.uscourts.gov/docs1/006011417469> (last accessed Aug. 22, 2015).

¹⁴ Cf., Ver. Compl., ¶¶ 64-76 with *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 137 Ohio St. 3d 62, 2013-Ohio-4490, 997 N.E.2d 524 and *State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St. 3d 222, 2013-Ohio-4616, 223, 998 N.E.2d 1093.

ballot as a Democratic candidate 14 times, as recently as May 2014. (Id.). He voted as a Democrat at least 17 times, has never cast a Republican ballot, and the first time he ever voted a “non-partisan” primary ballot was on the day after he filed his independent petitions, (Ver. Compl., ¶ 73; Tr. p., 77, Prts.’ Exh. 22), only because casting a Democratic ballot would automatically disqualify his independent petitions. (Ver. Compl., ¶ 73, Tr., pp. 234-35, Prts.’ Exh. 49, pp. 8-10, Prts.’ Exh. 50, pp. 7-8).

There was nothing like this in *Davis* or *Monroe*. When consideration is given to what the disaffiliation requirement is meant to prevent, *see*, R.C. § 3513.262, it is difficult to understand how this and all the other pre-petition evidence in this case could be discounted as irrelevant. This Court’s decisions certainly do not demand such a result. Rather, *Davis* suggests that this much pre-petition evidence, even without the post-petition evidence, can be sufficient to disqualify an independent candidacy standing alone. *See Davis*, 137 Ohio St. 3d 222 at ¶ 27.

The Advisory explicitly describes the types of pre-petition evidence that may serve as evidence of party affiliation to support a protest against an independent candidate’s candidacy. This evidence includes:

- Holding of public office for which the office holder was nominated through a political party’s primary election and elected on a partisan ticket.
- Information submitted on required election-related filings.
- Political advertisements.
- Participation as a political party officer or member.
- Past voting history. While voting history alone may be insufficient to disqualify an independent candidate, the Advisory states, “voting history, together with other facts tending to indicate party affiliation, may be sufficient grounds to disqualify an independent.”

Candidates have previously been disqualified in reliance upon on this type of pre-petition evidence,¹⁵ even in the absence of post-petition evidence.¹⁶ But no case has presented as much undisputed pre-petition evidence as exists here. The only way to overlook this evidence is to do exactly what Respondents ask:

¹⁵ *In re Greg Jolivette*, Ohio Sec. of State Letter (June 26, 2012) (Prts.’ Exh. 3), *aff’d*, 886 F. Supp. 2d 820, 694 F.3d 760.

¹⁶ *In re Edna Boyle*, Ohio Sec. of State Letter (Oct. 5, 2007) (Prts.’ Exh. 6); *aff’d in dicta*, *State ex rel. Boyle v. Summit Cty. Bd. of Elections*, Ohio Ct. of Cmn. Pleas, Summit Cty. Case No. 2007-10-7107, 2007 WL 4462641 (Oct. 17, 2007).

overrule the prior cases and the Advisory upon which they were based and declare that pre-petition evidence is now irrelevant. Doing so, however, would certainly contravene the policy behind Ohio's independent disaffiliation law. R.C. § 3513.262. More pointedly, as stated by Husted, it would "create a roadmap for candidates to follow when they attempt to fool the system."

3. Attempting to Gain Ballot Access with "Good Intentions" Does Not Establish Disaffiliation with a Political Party in "Good Faith."

On undisputed evidence, the parties to this case are in agreement: Bernabei understood he had to disaffiliate from the Democratic Party so he could run for Canton Mayor and did not do so completely. (Ver. Compl., ¶¶ 83-86; Tr., pp. 205-06, 229-233. *See also* Husted Br. 13-14, 17; Bernabei Br. 1, 4-5, 24-25). Despite being a Commissioner of the County in which Canton is the county seat since 2011, Bernabei did not begin to arrive at his decision to run for Canton Mayor until April 22, 2015. (Ver. Compl., ¶ 85; Tr., pp. 229-230). By this time, the February 4, 2015 filing deadline for the Democratic Primary had long passed. (Ver. Compl., ¶ 86; Tr., pp. 298-99). Therefore, only way to gain ballot access at the late date Bernabei made this decision was via the independent route. (Ver. Compl., ¶¶ 83, 86; Tr., pp. 233-234, 298-99). This required him to disaffiliate from the Democratic Party. (*Id.*).

The evidence is undisputed: Bernabei's decision to disaffiliate was not motivated by a change of ideology or disagreement with the Democratic Party. (Ver. Compl., ¶ 82, Prts.' Exh. 49). His continued public service as a County Commissioner is "still guided by the same principles" on the oath of he signed on set forth on Declaration of Candidacy for election to that office, which confirmed that Bernabei would "support and abide by the principles enunciated by the Democratic Party" if "elected to office." (Tr. pp. 275-75, Plts.' Exh. 1). "[I]n his heart he intend[ed] to honor" this oath, he intended voters to rely upon this oath when electing him to the office he currently holds, and he agrees his oath has no expiration. (Ver. Compl., ¶ 35; Tr., pp. 37, 276, 280, 299-30). He described his connection with the Democratic Party as "heartfelt," confirmed "nothing happened" between him and the Party, and acknowledged that "the Party that had treated me well." (Ver. Compl., ¶ 82; Tr., pp. 221, 225). He still considers himself a

“liberal on social policy” and believes that “[w]e should pay higher income taxes in order to obtain the necessary services and infrastructure.” (Tr., p. 276).

Bernabei testified that his disaffiliation decision was difficult. Indeed, the intraparty splintering and fractioning of his Party he feared is happening and likely to get much worse. Bernabei was consistent in explaining that he believes his years in elected office will make an impact on Canton if elected Mayor, and he felt he would do a better job than the current candidates. All of this may be true. (Husted Br. 11, 13-14; Bernabei Br. 1, 4-5).¹⁷ However, this evidence only shows that Bernabei sincerely wants to be Canton Mayor. These reasons are no different than any other candidate would have for running for public office. It is nearly always a difficult decision, and the few seek such office always do so because they feel they can benefit the community. Bernabei’s strong desire to become Canton Mayor, which was the only explanation Bernabei for his disaffiliation, cannot establish that Bernabei disaffiliated from the Democratic Party in good faith as a matter of law.¹⁸ Otherwise, every candidate would establish “good faith disaffiliation” in every case, and the requirement would be meaningless.

¹⁷ In addition to this desire to run for Canton Mayor, Husted cites Bernabei’s failure to receive the endorsement of the AFL-CIO in his most recent election as a basis supporting Bernabei’s disaffiliation with the Democratic Party. (Husted Br. 13-14). This is problematic for three reasons. First, that election occurred in 2012. (Tr. p. 220; Ptf’s. Exh. 78). Bernabei took countless actions reaffirming his affiliation with the Democratic Party since this non-endorsement, the least of which was his election to the Democratic Central Committee of Stark County in May 2014. (Tr., pp. 63-64; Ptf’s. Exh. 17, 48). He held this position until his “conditional resignation” was effective on May 2, 2015, two days prior to the submission of his independent nominating petitions. (Ver. Comp., ¶ 70; Tr., pp. 233, 245-254, Resp. Exh. D). Second, the AFL-CIO is not a proxy for the Democratic Party. Finally, Bernabei never testified that this AFL-CIO non-endorsement motivated his decision to disaffiliate from the Democratic Party in any way. The same is true of Husted’s reference to Bernabei’s supposed disappointment in never being appointed to the Executive Committee of the Stark County Democratic Party. (Husted Br. 13-14). Bernabei never testified that this motivated his decision or that he even wanted such an appointment.

¹⁸ The suggestion in Bernabei’s brief that he now blames the Democratic Party for his dissatisfaction with the Canton mayoral candidates, thereby impliedly providing a post hoc basis for Bernabei’s disaffiliation, must be dismissed out of hand. (Bernabei Br. 6). First, it is entirely inconsistent with Bernabei’s testimony. He testified that his decision to disaffiliate was exclusively conditioned upon his decision to run for Canton Mayor. (Ver. Comp., ¶ 70; Tr., pp. 233, 245-254, Resp. Exh. D). Had he decided not to run, he would still be a member of the Democratic Party, notwithstanding his dissatisfaction with the Mayoral candidates. (Id.). Second, such a contention is undermined by the fact that, after Bernabei fully realized his discontent with the Canton Democratic mayoral candidates on April 26, 2015, he continued reinforce his

Merely wanting to gain ballot access as an independent candidate is insufficient to support a claim of “good faith” disaffiliation from a political party. 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; *see also Jolivette*, 694 F.3d at 768-69. Indeed, this was the precise holding in *Jolivette*. The reason is because this is the exact ballot access “opportunism” and “short range goals” that the disaffiliation requirement is meant to prohibit. R.C. § 3513.257; *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274 (1974); *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St. 3d 338, 344, 1997-Ohio-278, 673 N.E.2d 1351. Otherwise, party splintering and intraparty factionalism inevitably follow, which is exactly what is happening in Stark County as a consequence of Bernabei’s candidacy. (Rels.’ Br. 39).

In advocating for the conclusion that the Sixth Circuit ultimately reached in *Jolivette*, Husted concisely stated:

[T]here was absolutely no evidence that Mr. Jollivette’s “disaffiliation” was motivated by changes in ideology or policy. Nor did the Court find persuasive the claim that his disaffiliation was the product of a long-simmering feud with the Butler County Republican Party[.]

* * *

The trial court properly made a factual determination that Mr. Jolivette did not disaffiliate from the Republican Party in good faith; rather, he merely claimed to disaffiliate as political gamesmanship in order to appear on a ballot for which he would otherwise not have qualified.

* * *

The district court left no doubt that Mr. Jolivette’s maneuvering “undermines the integrity of the electoral process.” Disaffiliation resulting from intra-party feuding, tactical maneuvering, or political convenience, “potentially disrupt[s] the integrity of the election process by causing voter confusion and other problems.”¹⁹

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).

¹⁹ Merit Brief of Defendant-Appellee Ohio Secretary of State Jon Husted, pp. 11, 15, 18, Aug. 29, 2012, *Jolivette v. Husted*, 6th Cir. Case No. 12-3998, <https://ecf.ca6.uscourts.gov/docs1/006011417469> (last accessed Aug. 22, 2015).

Husted's conclusions in *Jolivette* were as true then as they are today, and they apply with equal force in this case. Bernabei experienced no ideological shift or split from the Democratic Party. (Ver. Compl., ¶ 82; Tr., pp. 221, 225, 275-74; Prts.' Exh. 49). His disaffiliation decision is driven purely by the fact that Bernabei wants ballot access, the Democratic primary filing deadline has passed, and the only way he can appear on the ballot is therefore as an independent. (Ver. Compl., ¶¶ 83-86; Tr., pp. 205-06, 229-33, 298-99). But unlike the candidate in *Jolivette*, Bernabei is a current Democratic-elected office holder that engaged in an unprecedented amount of consistent activity confirming his affiliation until immediately before he filed his petitions, a significant amount of which continued through the date of Bernabei's filing – none of which is disputed. (Ver. Comp., ¶¶ 32-73). And unlike the candidate in *Jolivette*, Bernabei even acknowledged that he “probably should have chosen to run in the primary” and “wished [he] had run in the Democratic primary.” (Ver. Compl., ¶¶ 58, 90; Tr., p. 228-96). If the candidate in *Jolivette* was disqualified the same conclusion obtains here.

As repeated by Respondents, it is true this Court recognized that a candidate's claim of disaffiliation is not automatically “in bad faith” simply because the candidate considered the strategic implications of the disaffiliation decision. *Monroe*, 137 Ohio St. 3d 62 at ¶ 27. However, in that case, the candidate *did* articulate a shift in ideology to explain his disaffiliation. *Id.* at ¶ 13 (“Kitchen expressed his belief that voters were frustrated with ‘the constant accusations and things’ that arise with the two-party system. He went on to say that ‘the fact that I’m running as an independent is a reflection of my ideology[.] [M]y decision to run as an independent[was truly because I feel that I am an independent as it relates to my world view.’”). In *Jolivette*, as the case here, there was no evidence to demonstrate a shift in ideology or an internal conflict to explain the disaffiliation. Rather, the testimony was the opposite. This is far different from a mere remark, coupled with a change in ideology, that it is “more strategic” to run as an independent, as was the evidence in *Monroe*. 137 Ohio St. 3d 62 at ¶ 27. Indeed, the candidate in *Monroe* engaged in conduct disaffiliating from the Democratic Party, such as resigning the Executive Committee,

two years before he filed his independent petitions – not *the day before* he filed his petitions, as is the case here. *Id.* at ¶ 10.

E. Respondent Bernabei’s Defense Proves, by Clear and Convincing Evidence, His Own Ineligibility for the Ballot.

Bernabei’s defense actually demonstrates his own ineligibility. His decades-long affection for the Democratic Party came to a “sharp[]” end in April 2015 because he found neither Democratic primary candidate for mayor “up to the job.” (Bernabei Br. 1). He then spent two weeks “systematically sever[ing] his ties with the party,” so he could run himself, *id.*, even if he did so incompletely and selectively. He also sought during that period “to reestablish residency in Canton.” *Id.* He admits that he relocated to a “permanent” Canton residence “after his petitions were filed,” but asserts that that should not matter because he intended to live in Canton. (Bernabei Br. 2). Of course, intention to move is not the requisite form of residency.

This proves that Bernabei failed to establish the legal prerequisites to run for Canton Mayor. As to evidence, Bernabei argues that there is conflicting evidence, which Husted is entitled to settle in favor of Bernabei’s candidacy. But there is no conflicting evidence. This is the exact type of last minute opportunism that is the target of both the independent disaffiliation and residency requirements. Any other conclusion is a clear abuse of discretion, warranting the issuance of Relators’ requested Writ.

CONCLUSION

For the foregoing reasons and the reasons articulated in the Complaint for a Writ of Prohibition and Relators’ Merit Brief, 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.

DATED: August 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing has been served by email this 24th day of August, 2015

upon:

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