

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.	:	Case No. 2015-1297
ROBERT L. RICHARDS, ET AL.,	:	
	:	
Relators,	:	<u>ORIGINAL ACTION IN PROHIBITION</u>
	:	
v.	:	
	:	
STARK COUNTY BOARD OF ELECTIONS,	:	
ET AL.,	:	
	:	
Respondents.	:	

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**REPLY BRIEF OF RELATORS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	4
ARGUMENT	5
<u>Proposition of Law No. I:</u>	5
<b>A protestor who challenges the independence of a candidate under R.C. 3513.262 must prove that the candidate’s declaration of lack of affiliation was not in good faith. The protestor is not required to prove that the candidate failed to disaffiliate in good faith from a political party.</b>	
<u>Proposition of Law No. II:</u>	7
<b>Under R.C. 3513.257, candidates who seek to appear on the ballot as an independent must make a good-faith claim that they are not affiliated with a political party at the time they submit their petitions for independent candidacy, and no later than the day before the primary.</b>	
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>State ex rel. Davis v. Summit Cty. Bd. of Elections</i> , 137 Ohio St.3d 222, 2013-Ohio-4616, 998 N.E.2d 1093.	5, 6
<i>State ex rel. Husted v. Brunner</i> , 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215.	8
<i>Stutzman v. Madison Cty. Bd. of Elections</i> , 93 Ohio St.3d 511, 2001-Ohio-1624, 757 N.E.2d 297.	8
<i>Teamsters Local Union No. 2000 v. Hoffa</i> , 284 F. Supp.2d 684, (E.D. Mich. 2003).	6
<u>STATUTES:</u>	
R.C. 3501.01(I)	6
R.C. 3501.39(A)	9
R.C. 3513.257	7-9
R.C. 3513.261	9
R.C. 3513.262	5

## ARGUMENT

### **Proposition of Law No. I:**

**A protestor who challenges the independence of a candidate under R.C. 3513.262 must prove that the candidate's declaration of lack of affiliation was not in good faith. The protestor is not required to prove that the candidate failed to disaffiliate in good faith from a political party.**

Respondent Husted stated in his decision of July 30, 2015: “Without clear and convincing evidence that his disaffiliation from the Democratic Party was not in good faith, I also break this tie in favor of certifying Mr. Cicchinelli, Jr.’s independent candidacy \*\*\*.”

In an attempt to justify his erroneous standard, Respondent Husted contends that “disaffiliation” is synonymous with “lack of affiliation.” At page 10 of his brief, Respondent even states that the two are “one in the same.”

If Respondent was correct, then this Court in *Davis* would have had no reason to so clearly draw the distinction between “lack of affiliation” and “disaffiliation.” As this Court held: “In addition, the board abused its discretion because it fundamentally misconstrued the relevant inquiry. Based on her past voting record, the board informs the court, ‘the Board determined that Relator did not make a good faith attempt to disaffiliate from the Democratic Party.’ But the requirement imposed by R.C. 3513.257 and *Morrison v. Colley* is that a candidate must declare her lack of affiliation in good faith, not that she take affirmative action to disaffiliate in order to prove her good faith.” *State ex rel. Davis v. Summit Cty. Bd. of Elections*, 137 Ohio St.3d 222, 227, 2013-Ohio-4616, ¶28, 998 N.E.2d 1093, 1098.

Although there can be some factual overlap between lack of affiliation and disaffiliation, the two are not the same. Lack of affiliation is a characteristic of a candidate, while disaffiliation is a process. When considering whether a candidate's claim of lack of affiliation is in good faith,

there is no presumption of any affiliation to a political party. Rather, we look at the candidate's subjective intent and the current and recent connections the candidate has to a political party.

Disaffiliation, on the other hand, involves a very different inquiry that begins with the presumption that an affiliation already existed. "Disaffiliation *by definition* presumes a history of support for or membership in a political party." *Davis*, 137 Ohio St.3d at 225, 2013-Ohio-4616 at ¶19, 998 N.E.2d at 1097. (Emphasis original.) From this starting point, disaffiliation then involves the process of severing the pre-existing affiliation, e.g., cutting ties and support, terminating partisan memberships, and other acts of withdrawal.<sup>1</sup>

Respondent Husted's contention that lack of affiliation and disaffiliation are the same also flies in the face of the clear language of R.C. 3501.01(I). The statute defines an "independent candidate" as one "who claims not to be affiliated with a political party." The General Assembly expressly defined an independent candidate solely in terms of a lack of affiliation. Had the legislature intended the definition to include the completely different process of disaffiliation, it would have been a simple matter to draft R.C. 3501.01(I) accordingly, but the legislature did not do so. As it stands, the statute is completely silent about "disaffiliation." Yet, disaffiliation – found nowhere in the statute – is the sole standard applied by Respondent Husted in this case.

Relators were not required to somehow prove a failure to disaffiliate in good faith, which is the erroneous standard applied by Respondent Husted. When Respondent Husted applied the wrong standard, the clear and convincing evidence presented by Relators became so irrelevant that Respondent never bothered to even mention it in his decision. As in *Davis*, Respondent abused his discretion because he fundamentally misconstrued the relevant inquiry.

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<sup>1</sup> "Disaffiliation' is defined as withdrawal \*\*\*." *Teamsters Local Union No. 2000 v. Hoffa*, 284 F. Supp.2d 684, 694, fn. 5. (E.D. Mich. 2003).

**Proposition of Law No. II:**

**Under R.C. 3513.257, candidates who seek to appear on the ballot as an independent must make a good faith claim that they are not affiliated with a political party at the time they submit their petitions for independent candidacy, and no later than the day before the primary.**

Ohio law clearly requires that a candidate seeking to be on the ballot as an independent must make a good faith claim of independence no later than the day before the primary. At the hearing before Respondent Board of Elections, the sworn, uncontroverted testimony of Intervenor Cicchinelli was that he did not claim to be independent until the day of the primary.

Respondent Husted and Intervenor Cicchinelli engage in an effort to distract from the significance of this uncontroverted testimony. First, Respondent Husted suggests that Relators' claim is founded on "shaky ground." If the candidate's own sworn and uncontroverted testimony is considered "shaky," then one reasonably wonders what source would be more insightful regarding the candidate's intent. Here, we have a candidate who candidly admits that he does not claim to be independent until the day of the primary. The only thing that is shaky is the effort by Respondent Husted and the Intervenor to write off this critical admission as meaningless.

Next, Respondent Husted and Intervenor place heavy emphasis on the candidate's use of the word "technically" when he testified. By elevating "technically" to a false level of importance, they ignore the substance of what the Intervenor actually said.

What Respondent and Intervenor are really suggesting is that strict compliance with election statutes is not required. Their argument is that although the candidate did first claim to be an independent on the day of the primary, that's just a technicality. In the curious words found on page 8 of Respondent Husted's brief, "Mr. Cicchinelli would indeed still be *considered* a Democrat without actually being one." (Emphasis original.)

The self-contradictory argument of Respondent leads only to confusion. This Court has held: “[T]he 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, ¶15, 915 N.E.2d 1215. “In general, election statutes in Ohio are mandatory and require strict compliance unless the statute specifically permits substantial compliance.” *Stutzman v. Madison Cty. Bd. of Elections*, 93 Ohio St.3d 511, 514, 2001-Ohio-1624, 757 N.E.2d 297, 300.

There is no substantial compliance provision that applies to the Revised Code’s time deadline to claim a lack of affiliation. Indeed, the statute is specific down to the precise minute. Under R.C. 3513.257, the claim of non-affiliation must be made no later than 4:00 p.m. the day before the primary. Despite the attempt by Respondent Husted and Intervenor to write off such issues as a mere “technicality,” this election statute is mandatory and must be strictly complied with. The fact remains that the Intervenor’s testimony is irreconcilable with any suggestion that he was an independent within the deadline required by law.

Finally, Respondent Husted places great emphasis on an alleged declaration by the Intervenor that he was independent:

- “The record reflects that Mr. Cicchinelli’s declaration of lack of affiliation was made under penalty of election falsification and in good faith.” Merit Brief of Respondent Husted, p. 4.
- “\*\*\* declaring under penalty of election falsification that he was an independent candidate.” Id. at 5.
- “\*\*\* Mr. Cicchinelli declared he was not affiliated with a political party. Tr. at p. 27 and Ex. 2.” Id. at 8.

- Cicchinelli’s “declaration (again, made under penalty of election falsification).” Id. at 9.

Apparently, Respondent believes that such a declaration actually exists and somehow refutes Intervenor’s testimony at the hearing. Respondent refers to Exhibit 2 from the hearing, which was Intervenor’s “Nominating Petition and Statement of Candidacy.” This is the form set forth in R.C. 3513.261.

If we actually read the form as found in the statute, however, a glaring omission becomes apparent: there is no “declaration of lack of affiliation.” The form contains no express declaration or claim of a lack of affiliation. Indeed, the form is silent as to the candidate being independent or lacking affiliation. The most a candidate could contend is that a claim of lack of affiliation is somehow assumed when the term “independent candidate” is used in R.C.

3513.257.<sup>2</sup> But a mere assumption by reference would not negate the express, uncontroverted testimony of the candidate that he was not independent until the day after the deadline. Further, the statute merely refers to a “person desiring to become an independent candidate.” The statute does not say that a person who files a petition shall become an independent candidate.

As a matter of law, a candidate’s status as an “independent” must be established no later than the day before the primary. By his own sworn, uncontroverted testimony, Intervenor Cicchinelli did not claim to be independent until the day after this deadline. Therefore, Cicchinelli’s attempted independent candidacy is in violation of law and cannot proceed under the grounds established by R.C. 3501.39(A). Respondents’ failure to uphold the protest and disqualify Cicchinelli’s name from being placed on the ballot is unauthorized by law, and was an abuse of discretion and in clear disregard of Ohio law.

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<sup>2</sup> “Each person desiring to become an independent candidate \*\*\* shall file no later than four p.m. of the day before the day of the primary election \*\*\* a statement of candidacy and nominating petition as provided in section 3513.261 of the Revised Code.”

## CONCLUSION

For the reasons stated above, Intervenor Cicchinelli's nominating petition is in violation of law and is invalid, thereby making Cicchinelli disqualified from running as an independent. Respondents' failure to uphold the protest and disqualify Cicchinelli's name from being placed on the ballot is unauthorized by law, and was an abuse of discretion and in clear disregard of Ohio law.

Relators respectfully submit that they are entitled to a writ of prohibition because (a) Respondents have exercised quasi-judicial power, (b) the exercise of that power is unauthorized by law, an abuse of discretion and in clear disregard of applicable law, and (c) given the approaching General Election on November 3, 2015, denying the writ of prohibition would result in injury to Relators for which no other adequate remedy exists in the ordinary course of law.

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Pursuant to S.Ct.Prac.R. 3.11 and 12.08(C), a copy of the preceding document was served  
by:

- Personal Service
- E-mail
- Facsimile Transmission

on August 27, 2015, to:

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