

**IN THE SUPREME COURT OF OHIO**

STATE EX REL. MARK H. CURTIS, ) Supreme Court Case No. 2015-1426  
10472 Woodchuck Ct. )  
Twinsburg, OH 44087 )  
 )  
Relator, ) **ORIGINAL ACTION IN**  
 ) **MANDAMUS – Expedited Election**  
v. ) **Case Under S.Ct. Prac. R. 12.08**  
 )  
SUMMIT COUNTY BOARD OF )  
ELECTIONS, )  
470 Grant Street )  
Akron, OH 44311 )  
 )  
Respondent.

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**RELATOR MARK H. CURTIS' REPLY BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. <u>PROPOSITION OF LAW NO. 1</u> : .....	1
RESPONDENT ABUSED ITS DISCRETION AND CLEARLY DISREGARDED APPLICABLE LAW WHEN IT REFUSED TO CONSIDER RELATOR’S PART PETITION 1.	
CONCLUSION.....	5
CERTIFICATE OF SERVICE.....	6

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Blakemore v. Blakemore</i> , 5 Ohio St.3d 217, 450 N.E. 2d 1140 (1983) .....	3
<i>State ex rel. Applegate v. Franklin Cty. Bd. of Elections</i> , No. C2-08-092, 2008 WL 341300, (S.D. Ohio Feb. 6, 2008).....	4
<i>State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections</i> , 108 Ohio St.3d 129, 841 N.E.2d 757 (2005).....	4
<i>State ex rel. Schulman v. Stark Cty. Bd. of Elections</i> , Stark C.P. No. 2015CV1545, 2015 WL 4778351 (July 24, 2015).....	2
<i>State ex rel. Schwarz v. Hamilton Cty. Bd. of Elections</i> , 173 Ohio St. 321, 181 N.E. 2d 888 (1962).....	2, 3
<i>See State ex rel. Stern v. Bd. of Elections</i> , 14 Ohio St.2d 175, 237 N.E.2d 313 (1968).....	5
 <b><u>Statutes</u></b>	
R.C. § 3501.38.....	4, 5

## ARGUMENT

### **I. PROPOSITION OF LAW NO. 1: RESPONDENT ABUSED ITS DISCRETION AND CLEARLY DISREGARDED APPLICABLE LAW WHEN IT REFUSED TO CONSIDER RELATOR'S PART PETITION 1.**

Despite clear and convincing evidence that Earl Shaffer's signature was stricken prior to submission of Petition 1, Respondent argues that it was within its discretion to reject all of the undisputed evidence and determine that there was not a cross-out of Shaffer's signature. In doing so the Board used a standard for "cross-outs" that is nowhere within the law and ignores Supreme Court precedent on how it must make such determinations when unrefuted testimony is submitted. As such, Respondent's refusal to consider Curtis' Petition 1 is both an abuse of discretion and contrary to law.

The Board of Elections had the following undisputed facts before it at its August 28, 2015 meeting:

- (1) Part Petition 1, which shows the full signature of Jacqueline Lawson in box 7 and the stricken signature of Earl Shaffer above it. The lines for the "City", "County" and "Date of Signing" next to Shaffer's signature were left blank.
- (2) The undisputed testimony of the candidate and circulator, Mark Curtis. Curtis testified that: "[Shaffer's] information is incomplete and I witnessed him drawing a line through their name acknowledging their intent to strike their name from the petition." (Transcript at p. 4, line 6-9).
- (3) The undisputed testimony of Earl Shaffer, the individual who began signing the nominating petition and then struck through it: "I struck through my name in an effort to remove it for consideration on the petition. Mr. Curtis and I had a mutual

understanding that my signature would not be counted on the petition and that I should contact him if my voting status changes.” (Exh. 2 at ¶ 4).

Respondent concedes that this information was received and considered by the Board of Elections (Respondent’s Merit Brief at 7). Despite this evidence, the Board of Elections refused to reconsider its decision to invalidate the entire Petition 1. (Transcript at p. 22, line 20 through p. 23, line 4). Instead, the Board ignored the undisputed testimony and created its own arbitrary standard for “cross-outs,” which is contrary to law. At the August 28 Board meeting, members Gorbach and Arshinkoff debated whether there appeared to be a cross-out on the Petitions. Arshinkoff ignored the Affidavit of Shaffer and the testimony of Curtis and stated that the standard is “the cross-out would go all the way across.” (Transcript at p. 15, lines 24-25). R.C. § 3501.38(G) simply states: “The circulator of a petition may, before filing it in a public office, strike from it any signature the circulator does not wish to present as part of the petition.” Other courts have noted there is nothing in Ohio law that defines how one complies with the procedure of “striking” or “omitting” a signature pursuant to R.C. 3501.38(G). *State ex rel. Schulman v. Stark County Bd. of Elections*, Stark C.P. No. 2015CV1545, 2015 WL 4778351 (July 24, 2015) at \*3 (attached at Appx. p. 9).

When there is ambiguity about whether a circulator has fully complied with the law, this Court has instructed that the Board of Elections is to consider all of the evidence before it. The facts of this case are nearly identical to the facts of *State ex rel. Schwarz v. Hamilton County Bd. of Elections*, 173 Ohio St. 321, 181 N.E. 2d 888 (1962). In *Schwarz*, the relator submitted a part petition with 28 signatures, but indicated that there were 27 signatures in the circulator’s statement. *Id.* at 322. The part petition was rejected by the Board of Elections, based upon the Secretary of State’s guidance. *Id.* at 323. The relator later submitted “an uncontradicted and

plausible explanation under oath” as to why the number in the circulator’s statement did not match the number of signatures. This Court held:

[W]e think **the determination made by the board against the validity of the petition was too technical, unreasonable and arbitrary - in short, an abuse of discretion** - and that upon the facts which respondent had in its possession it was under a clear legal duty to approve and accept the petition and place relator’s name on the primary ballot as a candidate to the office he seeks.

*Id.* at 323 (emphasis added).

It has long been held that an abuse of discretion occurs when there is action that is “unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E. 2d 1140 (1983). Here, the facts supporting reversal of the Board’s decision are even stronger than in *Schwarz*. At the August 28 meeting, the Board had in its possession the affidavit of Shaffer and the testimony of Curtis in which both attest that Shaffer’s signature was stricken. Even if there was some good faith doubt by the Board members about whether they could see a cross-out, their failure to accept the undisputed testimony constitutes an abuse of discretion.

The Board of Elections attempts to distinguish *Schwarz* on the basis that Curtis had the duty “to ensure the signature that he did not want the Board to verify was struck.” (Respondent’s Merit Brief at 7). This in no way distinguishes the *Schwarz* case from this matter. In *Schwarz*, the Court’s opinion does not explain what the “plausible explanation” was that convinced the Court the respondent had abused its discretion. However, it is clear that the Board has a duty to accept the *uncontradicted* explanation offered by the prospective candidate where that explanation provides a plausible alternative to denying access to the ballot. Respondent’s argument that under the facts of this particular case it was incumbent upon Curtis to ensure the signature was struck creates an unreachable, and circular, standard for any candidate. As the undisputed testimony of

the circulator and the signer establish, both believed the signature was struck. How does one ensure that the signature is struck when they believe it has already been struck?

Despite the fact that Realtor's Merit Brief concedes that all of this evidence was properly before the Board at its August 28 meeting, it cites *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 131-132, 841 N.E.2d 757 (2005), in an attempt to argue that an affidavit cannot cure a defect in the nominating petition. *Canales-Flores* is completely inapplicable to this situation. There, the circulator's attestation was not completed on several of the part petitions submitted. The prospective candidate attempted to amend her petitions by submitting an affidavit attesting to the number of signatures on the petitions. This attempt was rejected by the Court because candidates cannot in any way alter or amend their petition after filing. R.C. § 3508.38(I)(1). Obviously, there has been no attempt by Curtis to alter or amend his petitions. The affidavit of Shaffer was submitted to explain the cross-out as expressly permitted in *Schwarz*. It was not an amendment or alteration of the petition as in *Canales-Flores*.

Finally, the Board of Elections claims the unpublished decision in *State ex rel. Applegate v. Franklin Cty. Bd. of Elections*, No. C2-08-092, 2008 WL 341300, at \*4 (S.D. Ohio Feb. 6, 2008) is "almost identical" to Curtis' argument herein. (Respondent's Merit Brief at 5). In fact, the *Applegate* court dealt with a set of facts that are far different than what is argued here. As stated by the Court:

Plaintiff did not "strike" the signatures he subjectively believed to be invalid, as required by Ohio Revised Code § 3501.38(G). Instead, he calculated the number of signatures he considered valid, and inserted that number in his circulator's declaration. A review of the part-petition reveals that, as to most of the signatures Plaintiff believed to be invalid, he inserted the word "no" at the end of the line containing the signature, without striking it, so as to indicate that he did not wish to present it as part of the petition, as required by Ohio Revised Code § 3501.38(G).

Here, the undisputed testimony from the both the circulator and the signer is that the signature was stricken.

As Chairman Gorbach acknowledged at the conclusion of the August 28 hearing, the public policy of the State of Ohio favors free and competitive elections, in which the electorate has the opportunity to make a choice between the candidates. (Transcript at p. 23). *See State ex rel. Stern v. Bd. of Elections*, 14 Ohio St.2d 175, 237 N.E.2d 313 (1968). The Board of Elections abused its discretion and acted contrary to law when it ignored the undisputed testimony that there was a cross-out and substituted its own arbitrary standard for a cross-out. The voters of the Twinsburg City School District should not be deprived of a free and competitive election<sup>1</sup> where Curtis has provided the Board of Elections with undisputed evidence of the “plausible explanation” required by *Schwarz*.

### CONCLUSION

Realtor Mark Curtis respectfully requests that this Court order a Writ of Mandamus to compel the Summit County Board of Elections to consider his Petition 1 and, upon their finding of a total of seventy-five (75) valid signatures on all petitions, to place Curtis’ name on the November 3, 2015 general election ballot as a candidate for the Office of Member of the Twinsburg City School District Board of Education.

Respectfully submitted,  
/s David T. Andrews  
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<sup>1</sup> Without Curtis, there would be only two certified candidates for the two open seats on the Twinsburg Board of Education.

**CERTIFICATE OF SERVICE**

A copy of Relator Mark. H. Curtis' Reply Brief has been served by operation of this Court's electronic filing system and by electronic mail to counsel for Respondent at [simsc@prosecutor.summitoh.net](mailto:simsc@prosecutor.summitoh.net) on this 12<sup>th</sup> day of September, 2015.

/s David T. Andrews

Counsel for Relator