[Cite as *State ex rel. Wilcoxson v. Harsman*, 2010-Ohio-4048.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO, ex rel., C. RALPH WILCOXSON, II

Relator

v.

STEVEN P. HARSMAN, DIRECTOR
MONTGOMERY COUNTY BOARD OF ELECTIONS, et al.

Respondents

Appellate Case No. 24095

DECISION AND FINAL JUDGMENT ENTRY
August 26, 2010

PER CURIAM:

{¶ 1} On June 11, 2010, C. Ralph Wilcoxson, II, filed a complaint for a writ of mandamus. Wilcoxson seeks a writ of mandamus compelling Respondents, Steven P. Harsman, Director of the Montgomery County Board of Elections, et al., to certify Wilcoxson as an independent candidate for Juvenile Judge in the Montgomery County Common Pleas Court and place his name on the general election ballot for the November 2, 2010 election. Wilcoxson further seeks an order declaring R.C. 3513.257 unconstitutional for the "extra-conditional qualifications" imposed on independent political candidates.

{¶ 2} On June 21, 2010, Respondents filed a “Motion for Partial Dismissal of

Relator's Claims." There, Respondents argued that this Court lacked subject matter jurisdiction to consider the constitutional challenge posited by Wilcoxson, where the underlying complaint is in the nature of a request for declaratory relief. As a result, Respondents claimed that this Court was prohibited from reviewing the constitutional question without the complaint being served upon the attorney general, and the attorney general being provided an opportunity to be heard on the matter. See *State ex rel. Reese v. Cuyahoga Cty. Bd. of Elections,* 115 Ohio St.3d 126, 2006-Ohio-4588; *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St.3d 131, 2007-Ohio-5699; *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439.

{¶ 3} Wilcoxson filed a response to Respondents' motion for partial dismissal on June 30, 2010, arguing that the constitutionality of a statute may be challenged by mandamus in circumstances like the present one because he is seeking to compel official action rather than prevent it, and the alternative remedy–seeking declaratory judgment in the trial court–would be inadequate. See *State ex rel. Brown v. Summit Cty. Bd. of Elections* (1989), 46 Ohio St.3d 166; *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 133. On July 12, 2010, Respondents filed a reply brief.

{¶ 4} Finding Wilcoxson's argument well-taken, this Court overruled Respondents' motion for partial dismissal on July 23, 2010.

{¶ 5} Evidentiary hearings were held before the court on July 28, 2010 and August 3, 2010 on the issue of whether Respondents abused their discretion in refusing to certify Wilcoxson's candidacy due to invalid signatures on his nominating petitions. On August 16, 2010, arguments were made by the parties on the issue of whether R.C. 3513.257 should be declared unconstitutional for the burden it imposes on independent political

candidates seeking to appear on the general election ballot.

{¶ 6} Upon due consideration of the foregoing, we find that Respondents did not abuse their discretion in refusing to certify Wilcoxson's candidacy based upon an insufficient number of valid signatures on his nominating petitions. We further find that R.C. 3513.257 imposes reasonable, nondiscriminatory qualifying conditions on independent candidates consistent with the State's interest in regulating the election process and, therefore, is not unconstitutional.

I. *Nominating petitions*

{¶ 7} To be entitled to the requested writ of mandamus, Wilcoxson must establish a clear legal right to the relief requested, i.e., a clear legal right to the placement of his name on the November 2, 2010 general election ballot; a clear legal duty on the part of Respondents to perform the acts, i.e., a corresponding duty of the board of elections and its members to place Wilcoxson's name on the ballot; and the lack of a plain and adequate remedy in the ordinary course of law. *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008-Ohio-566, at ¶10, citing *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 115 Ohio St.3d 405, 2007-Ohio-5346, at ¶8. As the election at issue is less than three months away, the court is inclined to find that Wilcoxson lacks an adequate remedy in the ordinary course of law. Id., citing *State ex rel. Columbia Res. Ltd. v. Lorain Cty. Bd. of Elections*, 111 Ohio St.3d 167, 2006-Ohio-5019, at ¶28.

{¶ 8} In order to establish the clear legal right and legal duty, as provided above, Wilcoxson must further " 'prove that the board of elections engaged in fraud, corruption, abuse of discretion, or clear disregard of statutes or other pertinent law.' " *State ex rel.*

Greene v. Montgomery Cty. Bd. of Elections, 121 Ohio St.3d 631, 2009-Ohio-1716, at ¶11, quoting *Rust v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 139, 2005-Ohio-5795, at ¶8. Wilcoxson does not raise claims of fraud or corruption, so the dispositive issue is whether Respondents abused their discretion or clearly disregarded the applicable law when determining that Wilcoxson's nominating petitions lacked the number of valid signatures necessary to place his name on the November 2, 2010 general election ballot.

{¶ 9} R.C. 3501.38 sets forth the rules governing nominating petitions filed with a board of elections for the purpose of becoming a candidate for office. In relevant part, this statute provides the following:

{¶ 10} "All declarations of candidacy, nominating petitions, or other petitions presented to or filed with the secretary of state or a board of elections or with any other public office for the purpose of becoming a candidate for any nomination or office or for the holding of an election on any issue shall, in addition to meeting the other specific requirements prescribed in the sections of the Revised Code relating to them, be governed by the following rules:

{¶ 11} "(A) Only electors qualified to vote on the candidacy or issue which is the subject of the petition shall sign a petition. Each signer shall be a registered elector pursuant to section 3503.11 of the Revised Code. The facts of qualification shall be determined as of the date when the petition is filed.

{¶ 12} "(B) Signatures shall be affixed in ink. Each signer may also print the signer's name, so as to clearly identify the signer's signature.

{¶ 13} "(C) Each signer shall place on the petition after the signer's name the date of signing and the location of the signer's voting residence, including the street and

number if in a municipal corporation or the rural route number, post office address, or township if outside a municipal corporation. The voting address given on the petition shall be the address appearing in the registration records at the board of elections.

{¶ 14} "(D) Except as otherwise provided in section 3501.382 of the Revised Code, no person shall write any name other than the person's own on any petition. Except as otherwise provided in section 3501.382 of the Revised Code, no person may authorize another to sign for the person. If a petition contains the signature of an elector two or more times, only the first signature shall be counted.

{¶ 15} "(E)(1) On each petition paper, the circulator shall indicate the number of signatures contained on it, and shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code. On the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition, the circulator shall identify the circulator's name, the address of the circulator's permanent residence, and the name and address of the person employing the circulator to circulate the petition, if any.

{¶ 16} "(2) As used in division (E) of this section, 'statewide candidate' means the joint candidates for the offices of governor and lieutenant governor or a candidate for the office of secretary of state, auditor of state, treasurer of state, or attorney general.

{¶ 17} "(F) Except as otherwise provided in section 3501.382 of the Revised Code,

if a circulator knowingly permits an unqualified person to sign a petition paper or permits a person to write a name other than the person's own on a petition paper, that petition paper is invalid; otherwise, the signature of a person not qualified to sign shall be rejected but shall not invalidate the other valid signatures on the paper."

{¶ 18} Here, Wilcoxson's complaint alleges the following with respect to Respondents' invalidation of signatures on his nominating petitions:

{¶ 19} "15. On May 20, 2010, Relator received written notice from the Board of Elections that they had voted not to certify the petitions 'due to insufficient Valid Signatures.' The notice was signed by Steven P. Harshman, Director and Betty J. Smith, Deputy Director.

{¶ 20} "16. Relator contacted the Montgomery County Board of Elections and received a report detailing the signatures that were stricken as invalid.

{¶ 21} "17. Relator's review of the report revealed several errors made by the Montgomery County Board of Elections.

{¶ 22} "18. Respondent, Montgomery County Board of Elections failed to count valid signatures of registered voters in Montgomery County, Ohio.

{¶ 23} "19. Respondent failed to diligently search its database and verify signatures as required by O.R.C. §3513.263.

{¶ 24} "20. Respondent improperly and incorrectly invalidated signatures based on petition dates.

{¶ 25} "21. Respondent improperly invalidated signatures and failed to properly check voter addresses.

{¶ 26} "22. Respondent improperly invalidated signatures and failed to check elector status.

{¶ 27} "23. The Montgomery County Board of Elections has engaged in an abuse of discretion in failing to certify the Relator's petitions."

{¶ 28} During the hearing before this Court on July 28, 2010 and August 3, 2010, Wilcoxson submitted a number of exhibits, including 154 nominating petitions reviewed by Respondents. At the same time, both parties submitted joint exhibits, also including Wilcoxson's 154 nominating petitions. The petitions submitted as joint exhibits, however, also included printouts of board records that included registration cards, address searches and/or name searches for each signature that was invalidated.

{¶ 29} Upon review of the 154 nominating petitions entered into evidence as joint exhibits, we do not find that Respondents abused their discretion in determining that Wilcoxson's nominating petitions did not contain the required number of valid signatures to place his name on the general election ballot.

{¶ 30} Relator's Exhibit 1/Page 1 of Joint Exhibit A, a detailed report of Wilcoxson's petitions and the signatures contained therein, provides that 154 part petitions were verified containing a total of 2157 signatures. Four part petitions containing a total of 47 signatures were invalidated because (1) the circulator failed to list her address; (2) the circulator's name could not be verified with the signature on file at the board of elections; (3) the number of signatures on the petition was more than the number of signatures indicated in the Circulator's Statement; and (4) a number of signatures on the petition appeared to be fraudulent. See Joint Exhibit E. Under the authority of R.C. 3501.38(E)(1) & (F), we do not find Respondents abused their discretion in invalidating

these four part petitions.

{¶ 31} The report provides that 63 signatures were invalidated for miscellaneous reasons: lined out; erasable–not indelible; address missing; date missing; date precedes collection; date follows collection; illegible; signer has signed before; or signer is the circulator. We find that Respondents did not abuse their discretion as to 45 of the signatures, with 18 being questionable, an abuse of discretion, conceded or excluded from review due to insufficient evidence. See R.C. 3501.38(A), (B), (C), & (D).

{¶ 32} The report provides that 299 signatures were invalidated because the signer was not a registered elector. We find that Respondents did not abuse their discretion as to 248 of the signatures, with 51 being questionable, an abuse of discretion, conceded or excluded from review due to insufficient evidence. See R.C. 3501.38(A).

{¶ 33} The report provides that 158 signatures were invalidated because the signature on the petition did not match the signature on record at the board of elections. We find that Respondents did not abuse their discretion as to 129 of the signatures, with 29 being questionable, an abuse of discretion, conceded or excluded for review due to insufficient evidence. See R.C. 3501.38(B). See, also, *State ex rel. Rogers v. Taft* (1992), 64 Ohio St.3d 193, 196 (finding no abuse of discretion where printed "signatures" on petitions were invalidated because they did not match the signature on file at the board of elections).

{¶ 34} Finally, the report provides that 185 signatures were invalidated because the address on the petition did not match the address on file at the board of elections. We find that Respondents did not abuse their discretion as to 154 of the signatures, with 31

being questionable, an abuse of discretion, conceded or excluded from review due to insufficient evidence. See R.C. 3501.38(C).

{¶ 35} Of the 705 signatures invalidated by Respondents in total, the court ultimately finds that 576 of these invalidations are clearly not an abuse of discretion. When these 576 invalidations are subtracted from the total number of signatures submitted by Wilcoxson, this leaves him with no more than 1581 valid signatures, which is well short of the 1893 signatures required under R.C. 3513.257. In other words, even if all of the remaining 129 signatures invalidated by Respondents should have been allowed, instead, his total – 1581 – would be well short of the required number. Thus, there is no need for this Court to determine whether any of these 129 invalidations constituted an abuse of discretion.

{¶ 36} Having found that Respondents neither abused their discretion nor clearly disregarded applicable law when invalidating 576 signatures on Wilcoxson's nominating petitions, we conclude, on this issue, that Wilcoxson has failed to show he has a clear legal right to an order compelling Respondents to certify his candidacy and place his name on the November 2, 2010 general election ballot as an independent candidate for Juvenile Judge in the Montgomery County Common Pleas Court.

II. R.C. 3513.05 and 3513.257

{¶ 37} Before turning to the issue of whether R.C. 3513.257 should be declared unconstitutional for the alleged heightened qualifying conditions imposed upon independent political candidates, we address Respondents' claims that (1) Wilcoxson lacks standing to assert a constitutional challenge to the signature requirement in R.C.

3513.257 because he, in fact, collected more than the statutory required number, and (2) this Court lacks jurisdiction to consider a constitutional challenge where the Ohio Attorney General was not served a copy of the complaint and joined as a party.

{¶ 38} With respect to the former claim, simply because Wilcoxson turned in a number of signatures beyond the statutory requirement does not prove that he was not injured and, therefore, has no standing to challenge R.C. 3501.257. We find that standing must be based on the number of valid signatures the candidate submits. Thus, standing is demonstrated in the present matter by the fact that Wilcoxson ended up with less than the statutory required number of signatures after Respondents reviewed his nominating petitions.

{¶ 39} Insofar as Respondents have reasserted their claim that the Ohio Attorney General must have been made a party to this action, the court has addressed this issue in overruling Respondents' motion for partial dismissal. Nevertheless, such argument shall be deemed moot for the reasons that follow.

{¶ 40} Wilcoxson contends that he is entitled to extraordinary relief in mandamus because R.C. 3513.257 imposes an onerous and disparate signature requirement for independent candidates to appear on the general election ballot when compared to the signature requirement for major party candidates and minor party candidates under R.C. 2513.05 to appear on their party's primary ballot. In considering this claim, we must keep in mind that " '[s]tatutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision.' " *State ex rel. Watson v. Hamilton Cty. Bd. of Elections* (2000), 88 Ohio St.3d 239, 242, quoting *State ex rel. Huntington Ins.*

Agency, Inc. v. Duryee (1995), 73 Ohio St.3d 530, 535; *Fabrey v. McDonald Village Police Dept*. (1994), 70 Ohio St.3d 351, 352. Thus, doubts concerning the constitutionality of R.C. 3513.257 must be resolved in the statute's favor. Id., citing *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 538.

{¶ 41} Under R.C. 3513.257, Wilcoxson was required to submit nominating petitions containing valid signatures of "at least one percent of qualified electors voting in the last gubernatorial election who reside within the district, political subdivision or portion thereof where the election is to be held." *Miller v. Lorain Cty. Bd. of Elections* (C.A.6, 1998), 141 F.3d 252, 254. In other words, R.C. 3513.257 requires that Wilcoxson obtain at least 1893 valid signatures to appear on the general election ballot. By comparison, major party candidates, *in seeking party nomination to be voted for at a primary election*, are required under R.C. 3513.05 to submit nominating petitions "signed by not less than fifty qualified electors who are members of the same political party as the political party of which the candidate is a member." Under the statute, minor party candidates must obtain a minimum number of signatures equal to "one-half the minimum number provided in this section," i.e., twenty-five. Wilcoxson's argument, therefore, is that it is inherently more burdensome for an independent candidate to gather signatures of one percent of the total electorate voting in the last gubernatorial election than it is for a major or minor party candidate to win the votes of a plurality in his or her party's primary. See *Jenness v. Fortson* (1971), 403 U.S. 431, 440, 91 S.Ct. 1970, 29 L.Ed.2d 554.

{¶ 42} In order to determine the constitutionality of R.C. 3513.257, this Court must apply the modified balancing test adopted by the United States Supreme Court in voting and ballot access cases. See *Burdick v. Takushi* (1992), 504 U.S. 428, 433-34, 112 S.Ct.

2059, 119 L.Ed.2d 245; see, also, *Watson*, 88 Ohio St.3d at 243; *State ex rel. Purdy v. Clermont Cty. Bd. of Elections* (1997), 77 Ohio St.3d 338, 343-44. "Under this test, in deciding whether a state election law violates First and Fourteenth Amendment constitutional rights, [this Court] must first weigh the character and magnitude of the burden the law imposes on those rights against the interests the state contends justify that burden, and consider the extent to which the state's interests necessitate the burden. *Anderson v. Celebrezze* (1983), 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547, 558. Regulations imposing severe burdens on voters' and candidates' rights must be narrowly tailored to serve a compelling state interest, while lesser burdens require less exacting review, and a state's important regulatory interests usually justify reasonable, nondiscriminatory restrictions. See *Timmons v. Twin Cities Area New Party* (1997), 520 U.S. 351, 358-359, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589, 598." *Watson*, at 243.

{¶ 43} In accordance with the modified balancing, our first inquiry is whether R.C. 3513.257 severely burdens First and Fourteenth Amendment constitutional rights. "[A] law severely burdens voting rights if it discriminates based on political content instead of neutral factors or if there are few alternative means of access to the ballot." Id., citing *Citizens for Legislative Choice v. Miller* (C.A.6, 1998), 144 F.3d 916, 921. The burden imposed on independent candidates by R.C. 3513.257 is based on political affiliation by the simple fact that it is associated with party affiliation. However, it is ill-founded to say that the statute "*discriminates* based on political content" by a comparison of its signature requirements for candidates to appear on the general election ballot to the requirements of R.C. 3513.05 for candidates to appear on a party's primary election ballot. Independent candidates are guaranteed a place on the general election ballot upon satisfying R.C.

3513.257. Major and minor party candidates, however, are only guaranteed a place on their party's primary election ballot, a first step in the process of securing a place on the general election ballot. Once on the primary election ballot, said candidates must rally the support of a plurality of their party to win the primary. Only upon winning the primary do said candidates begin the process of garnering support from the entire population for the race on the general election ballot.

{¶ 44} Furthermore, alternative routes are available to an independent candidate seeking to get his or her name on the general election ballot. A candidate may enter the primary of a political party despite the apparently ideological differences he or she may have to the party's current views. See *Jenness v. Fortson* (1971), 403 U.S. 431, 440, 91 S.Ct. 1970, 29 L.Ed.2d 554, fn. 25 (finding that American political history is filled with examples of parties changing their "ideological direction because of the influence and leadership of those with unorthodox or 'radical' views"). Also, a candidate may organize a new political party, as defined by R.C. 3517.01. Such new party comes into legal existence on the date it files its declaration to organize with the secretary of state. At that time, the party is entitled to hold a primary election. R.C. 3517.012. We note that the signature requirement necessary to organize a new party is equivalent to the signature requirement an independent candidate must meet to obtain a place on the general election ballot, i.e., at least one percent of the total vote for governor or nominees for presidential electors at the most recent election. R.C. 3517.01.

{¶ 45} Accordingly, we find that R.C. 3513.257 does not impose a severe burden on voters' and candidates' constitutional rights. Consequently, we now must turn to the alternative inquiry under *Burdick* and determine whether the nominating qualifications in

R.C. 3513.257 are reasonable to justify the State's interest in regulating its election process.

{¶ 46} In *Burdick*, the Supreme Court advanced that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." 504 U.S. at 433-34, quoting *Anderson*, 460 U.S. at 788. Under the rational basis standard, "a party challenging the constitutionality of legislation cannot prevail where the rationality of that legislation is at least debatable." *Cook v. Wineberry Deli, Inc*. (July 17, 1991), Summit App. No. 14841, 1991 WL 131485, at *7, citing *Minnesota v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659. In other words, this Court must defer to the legislature on the issue of constitutionality. *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 692.

{¶ 47} On a large scale, the State certainly has a legitimate interest in creating an election process that avoids voter confusion, ballot overcrowding, or frivolous candidacies. *Purdy,* 77 Ohio St.3d at 344. Specific to this purpose is its interest "in requiring some preliminary showing of a significant modicum of support" before printing the name of a political candidate on the ballot. *Jenness*, 403 U.S. at 442; see, also, *Anderson*, 460 U.S. at 788, fn. 9 (providing that "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates"); *Williams v. Rhodes* (1968), 393 U.S. 23, 33, fn. 9 (stating that a signature requirement of one percent of the electorate equates to a "relatively lenient" requirement for obtaining ballot position).

{¶ 48} Here, this winnowing process to eliminate overcrowded ballots begins for an independent candidate at the time he declares his candidacy. The legislature has concluded that requiring said candidate to demonstrate support from the electorate can be achieved by obtaining valid signatures from a mere one percent of the qualified electors within the district, political subdivision, or portion thereof where the election is to be held who voted for the office of governor at the most recent election for that office. We find that Wilcoxson has not demonstrated this to be an unreasonable requirement. The fact that major and minor party candidates have a lesser burden to gain access to their party's primary does not reflect a less onerous winnowing process. In the end, campaigning, etc., in an effort to draw support for one's candidacy, does not guarantee a major or minor party candidate's position on the general election ballot.

{¶ 49} Moreover, the one percent signature requirement has been considered and adopted by the legislature in other ballot access contexts. As stated above, a person wishing to organize a new party must submit a petition to the secretary of state "signed by qualified electors equal in number to at least one percent of the total vote for governor or nominees for presidential electors at the most recent election." R.C. 3517.01. Candidates for office from the newly formed party are then entitled to hold a primary election, regulated by the candidacy requirements outlined in R.C. 3513.05. We find Wilcoxson's candidacy as an independent analogous to one of a newly formed party. In a reasonable, nondiscriminatory fashion, the legislature has set forth like signature requirements to obtain access to the ballot.

{¶ 50} Based on the foregoing, this Court finds that Wilcoxson has failed to overcome the strong presumption of constitutionality afforded R.C. 3513.257. The

State's interest in avoiding overcrowded ballots and voter confusion, in conjunction with a candidate's duty to show support for his or her candidacy, justifies the reasonable signature requirement for independent candidates under R.C. 3513.257 to appear on the general election ballot.

{¶ 51} Accordingly, Wilcoxson is not entitled to the requested extraordinary relief in mandamus. The June 11, 2010 complaint for a writ of mandamus is hereby DENIED, and this matter is DISMISSED.

SO ORDERED.

JAMES A. BROGAN, Judge

MIKE FAIN, Judge

JEFFREY E. FROELICH, Judge

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