

IN THE COURT OF COMMON PLEAS  
BROWN COUNTY, OHIO

FILED

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TINA BERANDA  
CLERK OF COURTS

State of Ohio, ex rel  
Dennis J. Varnau  
7661 White Swan Road  
Georgetown, OH 45121

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Case No.: CVH 2008-0566

Relator,

vs.

Brown County Board of Elections  
800 Mount Orab Pike  
Georgetown, OH 45121

**AMENDED RESPONSE TO  
AMENDED MOTION  
TO DISMISS  
MANDAMUS PETITION**

Respondent.

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Now comes Relator with his Amended Response to Respondent's Amended Motion to Dismiss. Relator respectfully requests that the Court deny Respondent's Motion to Dismiss for the reasons set forth in the attached Memorandum.

Respectfully Submitted,

  
DENNIS J. VARNAU (0041267)  
Relator  
7661 White Swan Road  
Georgetown, OH 45121  
Tel.: 937-378-2057

## **MEMORANDUM**

### **FACTS**

Relator does not dispute the facts as stated by the Respondent in its Memorandum In Support.

### **ARGUMENT**

Relator seeks a writ of mandamus from this Court, directing the Brown County Board of Elections (BCBOE) to follow a constitutional course in accepting Relator's protest of the candidacy of Mr. Dwayne Wenninger, the Republican candidate for sheriff in the 2008 general election. Relator contends that the candidate protest provisions of R.C. 3513.05; 3513.262 violated his right to equal protection, as guaranteed in Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the U.S. Constitution.

The BCBOE held that, under the guidelines and regulations set forth in the 2008 Ohio Candidate Requirement Guide (OCRG), published by Jennifer Brunner, Ohio Secretary of State [Exhibit #3], Relator had no right to protest the candidacy of Dwayne Wenninger because he is an independent and not a member of the Republican party.

Relator contends that the candidate protest provisions of R.C. 3513.05; 3513.262 are unconstitutional, insofar as they deny an independent the right to protest a partisan candidate's candidacy for elected office, while allowing any qualified elector the right to protest an independent candidate's candidacy.

As an independent candidate, Relator's candidacy could have been protested by any partisan [Democrat or Republican] elector up to May 30, 2008, in accordance with R.C. 3513.262. Relator's protest was filed on April 11, 2008. Under R.C. 3513.05, Relator, an independent, was

denied the right to challenge any partisan candidate's candidacy at any time. Relator argues that there is no rational relationship to a legitimate state goal or interest in the unequal treatment of independent candidates versus partisan candidates under the protest provisions.

In *State, ex rel. Zupancic et al. v. Limbach* (1991), 58 Ohio St.3d 130, 133, the Court stated:

This court has previously held that a mandamus action may test the constitutionality of a statute. *State, ex rel. Michaels, v. Morse* (1956), 165 Ohio St. 599, 608 ("[t]he right of relator to question, by mandamus, the constitutionality of the statute is recognized in Ohio"); *State, ex rel. Brown, v. Summit Cty. Bd. of Elections* (1989), 46 Ohio St.3d 166, 167. Moreover, where this court has found a statute unconstitutional it may direct the public bodies or officials to follow a constitutional course in completing their duties. See *State, ex rel. Park Invest. Co., v. Bd. of Tax Appeals* (1971), 26 Ohio St.2d 161 (where this court in a mandamus proceeding directed the Board of Tax Appeals to comply with this court's earlier decision in the same case after finding two tax statutes unconstitutional).

The BCBOE agreed that independent voters have been disenfranchised "from challenging the qualifications of a party candidate," [Exhibit #2], but were bound to follow the OCRG.

In *State, ex rel. Brown v. Summit Cty. Bd. of Elections* (1989), 46 Ohio St.3d 166, 168, the court stated, citing *State, ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141:

[A] mandamus action will lie where a public officer or agency is under a clear legal duty to perform an official act and there is no adequate remedy in the ordinary course of the law. The board of elections in this case was merely following the residency requirement of the Stow Charter and, at the time of its ruling, had no clear duty to place the name of the relator on the ballot because it could not declare a city charter section unconstitutional. However, if we determine that the charter section in question is unconstitutional, *then the duty of the board of elections to place the name of the relator on the ballot will relate back to the time relator filed his nominating petition and a writ of mandamus will properly issue.*" (emphasis added)

If the court finds that the protest provisions in R.C. 3513.05; 3513.262 are unconstitutional, as applied to protests of candidacy, then the court has the power and authority to issue a writ of mandamus and order the BCBOE to accept Relator's protest of April 11, 2008 as valid and timely filed.

### CONCLUSION

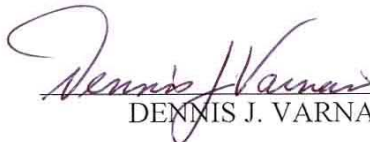
The protest provisions in R.C. 3513.05; 3513.262 are unconstitutional insofar as they denied Relator, an independent, the right to protest a partisan candidate's candidacy for elected office, while allowing any qualified elector the right to protest an independent or nonpartisan candidate's candidacy. Those statutes, as applied, violated Relator's equal protection rights as guaranteed in Section 2, Article I of the Ohio Constitution and 14th Amendment to the U.S. Constitution. Therefore, Relator is entitled to a writ of mandamus directing the BCBOE to accept his April 11, 2008 protest of Dwayne Wennigner's candidacy.

Respectfully submitted,

  
DENNIS J. VARNAU (0041267)  
Relator  
7661 White Swan Road  
Georgetown, OH 45121  
Tel.: 937-378-2057

### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Amended Response to Respondent's Amended Motion To Dismiss was hand-delivered to Thomas F. Grennan, Attorney for Respondent, 200 E. Cherry Street, Georgetown, OH 45121 on the 18th day of August, 2008.

  
DENNIS J. VARNAU